THE INVIOLABILITY OF MEDICAL CONFIDENTIALITY: AN ANALYSIS OF THE RULES AND EXCEPTIONS

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Abstract:

The duty of medical confidentiality has been one of the core duties of medical practice as information created, disclosed, acquired directly or indirectly during the doctor-patient relationship is considered confidential and requires legitimate protection. Further, preserving confidentiality on the premise that the relationship between doctor and patient has been built on trust and confidence renders the duty to be seen as sacrosanct. The source for this duty can be found not only in the Hippocratic Oath, codes of ethics, religious tenets but also in the common law, principles of equity and statutory provisions. Nevertheless, technological advancements and the growth of social networks have contributed to the difficulties in preserving confidentiality as the information gathered tends to become vulnerable in unsecure environments. However, the duty of medical confidentiality is by no means absolute as it can be breached in situations in which there are stronger conflicting duties. This paper seeks to discuss the rules governing the duty of medical confidentiality and the exceptions in which infringements to this duty become justified. The scope and limitations of this duty under the Islamic law will also be discussed as infringements on confidentiality make up a significant portion of Islamic rulings that should be thoroughly explored and investigated to understand the demands of this duty on Muslim medical practitioners. The inviolability of this duty may be without doubt but circumstances warranting its disclosure are crucial to serve the interests of justice.

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1. Introduction

The duty of confidentiality in a doctor-patient relationship is built on trust and confidence. The trusting environment created encourages patients to share sensitive information and communicate their symptoms, experience, beliefs, concerns and expectations about their illness without fear that the information would be made known to others. The duty has also been held to be sacrosanct due to its long standing tradition in many codes of ethics for many centuries. The undertaking by the medical profession to preserve confidentiality is to safeguard patient’s dignity, privacy and autonomy and this obligation extend even after the death of the patient (De Cruz, P. 2000). Nevertheless, the patient’s interest in his privacy must be balanced with other potentially conflicting interests. This makes the duty of confidentiality not to be an absolute concept. Pragmatism requires any countervailing moral or legal considerations to override the duty of confidentiality. In other words, the inviolability of the duty requires violation when circumstances demand for the disclosure of such information.

The duty of confidentiality refers to the legal or ethical duty to keep private the information gathered during the course of a professional relationship (BMA, 1999). Literally speaking, confidentiality means to keep secret that is not to be divulged (Puteri Nemie, J.K., 2012). All identifiable patient information, whether written, computerised, visually or audio recorded or held in the memory of medical professionals, is subject to the duty of confidentiality. These include (i) any clinical information about an individual’s diagnosis or treatment; (ii) a picture, photograph, video, audiotape or other; (iii) images of the patient; (iv) the identity of the patient’s doctor and the information about the clinics the patients had attended; (v) anything else that may be used to identify patients directly or indirectly so that any of the information above, combined with the patient’s name or address or full postcode or the patient’s date of birth, can identify be made to them (BMA, n.d).

The duty of confidentiality serves various purposes in medicine. Firstly, confidentiality gives recognition to patient autonomy. It acknowledges respect for the patient’s sense of individuality and privacy (Puteri Nemie, J.K., 2012). Patient’s personal, physical, and psychological secrets are kept confidential in order to decrease the sense of shame and vulnerability that would surface if the information would be revealed, particularly, for conditions that may be stigmatizing such as sexual and reproductive health as well as
psychiatric health concerns (De Bord, 2013). Secondly, confidentiality protects doctor’s integrity, which is important in improving the patient’s health. Confidentiality permits individuals to trust that information given to their doctors will not be dispersed further. In doing so, communication will become honest and straightforward. If patients did not believe that doctors would keep their secrets then either they would not divulge embarrassing but potentially medically important information, thus, reducing their chances in getting the best medical care (Gillon, R. 1986). In many psychiatric cases, confidentiality is essential to psychiatric treatment. Without the assurance of complete secrecy, patients would be less inclined to enter treatment and those already in therapy would be unwilling to disclose important material. Therefore, violating confidentiality would seriously affect the care of the mentally ill, to the detriment of patients and society as a whole.

2. The Ethical Obligations of the Duty of Medical Confidentiality

Medical ethics has regarded the duty of medical confidentiality as one on the core and non-negotiable tenets of medical practice. The ethical duty of medical confidentiality was first articulated in the Hippocratic Oath which takes the form of a covenant comprising of a code of medical ethics and professional etiquette (White, B. et. Al., 2014). The Oath imposed a strict duty of confidentiality for doctors by stating that “What I see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about” (Edelstein, 1987). Thus, doctors should not divulge information gathered during the course of their professional relationship with their patients or even those gathered outside of the medical activities (White, B. et. Al., 2014). Thus, the ethical obligation of the duty stems from the special relationship of trust and confidence created between the doctor and the patient. Patients disclose personal information about themselves while seeking seeing advice, care and treatment from the medical professionals believing and trusting that they are able to help them. Without the element of trust, the patient would be inhibited from disclosing important information about their medical condition which may be private, embarrassing and stigmatising if they are made known to the public (Stephens v Avery [1988] 2 All ER 477). Thus, it would only be fair that for the doctor to hold such special information in confidence and to use it exclusively for the benefit for the patient.
The ethical obligation of medical confidentiality laid out by the Hippocratic Oath has been accepted globally in substance and embedded in a variety of modernised versions of codes of medical ethics. For instance, the International Code of Medical Ethics mentions that “a doctor shall preserve absolute secrecy on all he knows about his patients because of the confidence entrusted in him” while the Declaration of Geneva, which is the basis of the modern version of the International Code of Medical Ethics (Hau, 2003), requires doctors to promise to respect the secrets that have been confided in them even after the patient has died (De Cruz, P. 2000). Similarly, under the Malaysian Medical Council Code of Professional Conduct 1986, the ethical duty of can be found in Part II of Infamous Conduct which states under Abuse of Confidence that “a practitioner may not improperly disclose information which he obtains in confidence from or about a patient” (at Provision 2.22). Further, the Code of Professional Conduct for Nurses 1998 by the Nursing Board Malaysia specifically provides that “the nurse must not disclose information which she obtained in confidence from or about a patient unless it is to other professionals concerned directly with the patient’s care” (at Provision 3.5). Nevertheless, the duty of medical confidentiality, like other ethical duties, is not absolute. It has to be overridden to protect individuals or the public when the law requires it. Before disclosing patient’s information, the doctor should make every effort to discuss the issues with the patient. If breaching confidentiality is necessary, it should be done in a way that minimizes harm to the patient and heeds the governing legal conditions allowing disclosure of such information.

3. The Rules of Confidentiality under Medical Law

The source of the obligation of confidentiality can further be found in the common law, principles of equity and various statutory provisions. While the ethical duty of confidentiality is universal, the legal concept of confidentiality may not be uniformly recognized or applied in all jurisdictions. Generally, the medical professional has a duty in law not to voluntarily disclose, without the consent of the information which he has gained in his professional capacity (Hunter v Mann [1974] QB 767). Thus, any improper release of personal information by the doctor may trigger a legal action by the patient.
Under the common law, the duty of confidentiality is well established and can be found in both contract law and in tort law. Every contract between a patient and a doctor gives rise to an implicit agreement that the professional will preserve the patient’s confidences, and breach of this obligation could give rise to an action for breach of contract. In circumstances where the patient pays for the treatment, the relationship between the doctor and the patient is contractual and the patient has a right to sue for breach of contract as long as the damage was not to remote (White, B. et. al., 2014). There is thus, an implied term in the contract between the doctor and the patient that the patient’s affairs are confidential and the information about the patient will not be disclosed without just cause (Breen v Williams (1996) 186 CLR 71, at paragraph 9.210).

A patient may also have a remedy in the tort of negligence against a doctor, if negligent disclosure of confidential information gives rise to some foreseeable injury to the patient. In AG v Guardian Newspapers (No 2) [1990] AC 109, Lord Goff stated that “…a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others…” (at p. 281). His Lordship however, added several limitations to this duty. The first limitation is that “the principle of confidentiality only applies to information to the extent that it is confidential.” Thus, once the information has entered the public domain, it can no longer be regarded as confidential. The second limitation is that “the duty of confidence applies neither to useless information, nor to trivia…” The third limitation is of far greater importance and is basically the subject-matter of this paper. Although the duty of confidentiality protects public interest but the duty can be overridden by some other countervailing public interest, which favours disclosure (at p. 282).
The duty of medical confidentiality can also be found under the principles of equity relating to elements of morality governing all interpersonal relationships (Stephens v Avery [1988] 2 All ER 477, at 482). As patients invariably confide intimate personal details about themselves, the provision of such confidential information may make the relationship between the patient and the doctor fiduciary in nature (Breen v Williams (1996) 186 CLR 71, at 107-108). However, the relationship may not be fiduciary for all purposes as a person may stand in a fiduciary relationship to another for one purpose but not for others (Hospital Products Ltd v United States Surgical Corporation (1984) CLR 41, at 98). Classes of information that can be protected includes (a) information about health and medical treatment; (b) information about sexual life; (c) information about appearance; (d) information about identity; (e) information about private acts; (f) information about knowledge of or involvement in crime; (g) financial and business information; (h) the contents of personal communications and conversations (Cooray, M., 2011). Further, equity will also intervene where confidential information has been obtained by mistake, inadvertently, surreptitiously, improperly (White, B. et. Al., 2014) or “where the person to whom the confidential information has been disclosed seeks to use it in breach of the terms on which it was disclosed and to the detriment of the party who communicated the confidential information” (Trevorrow v South Australia (No. 4) (2006) 94 SASR at paragraph [14]).

4. The Exceptions provided by the Law

Although the basis of the law’s protection of confidence is that there is a public interest that confidences should be preserved and protected by law, nevertheless, as has been stated earlier, this public interest may be outweighed by some other countervailing public interest which favours disclosure (AG v Guardian Newspapers (No 2) [1990] AC 109 at. 282, per Lord Goff). The Malaysian Medical Council Revised Guidelines 2011 on Confidentiality stated that a practitioner may “disclose personal information if (a) it is required by law (b) the patient consent either implicitly for the sake of their own care or expressly for other purposes; or (c) it is justified in the public interest” (at Provision 3). Therefore, the duty of confidentiality is not absolute and the law recognises several exceptions for breaching the duty of confidentiality. The exceptions include:
(i) Disclosure with patient’s consent

Confidential information regarding the patient may be disclosed if the patient agrees for its disclosure through an express or implied consent. Explicit or express consent is achieved when a patient actively agrees, either orally or in writing, to a particular use or disclosure of information which has been discussed with the patient (BMA, n.d). In procuring an express or explicit consent, the patient needs give a legally valid consent. This means patient must have the mental competence (reached the age of majority and of sound mind), sufficient understanding of the treatment proposed (the consent must be informed in nature) and by with their own free will (Puteri Nemie, J.K. 2007). In other words, there must not exist any duress or undue influence (Re T (Adult: Refusal of Medical Treatment) [1992] 4 All ER 649). Patient agreement can also be implied, signaled by the behaviour of an informed patient. (BMA, n.d). In certain situations, the release of patient information may be implied, particularly, to individuals within a health facility who have legitimate therapeutic interest for accessing the information in order to be able to provide the appropriate care and treatment (MMC Guidelines 2011, at provisions 22-24).

However, the issue of implied consent may be contentious, particularly, when there is lack of understanding of the implications of the disclosure by the patient or it violates the patient’s right of privacy. Even if the information has been procured within a clinical environment for the best interest of the patient, the patient still needs to be informed explicitly in all aspects of the medical procedure. This can be seen in the case of Lee Ewe Poh v Dr Lim Teik Man & Anor [2011] 1 MLJ 835, in which the patient brought an action against a colorectal surgeon, that the photographs he had taken of her private parts without her consent during a procedure constitute an invasion of her privacy rights under the common law. The photographs were taken while the patient was unconscious and under anaesthesia. The patient later learned from the nurse that photographs showing her anus were taken without her prior knowledge and consent. The surgeon claimed that “infringement, invasion or violation of privacy” was not a recognised tort or a cause of action in Malaysia. It was acceptable medical practice for photographs to be taken in the course of surgical procedure in a clinical environment and intended for the patient’s medical record. It was further submitted that the patient’s identity was not known in these photographs. However, the court held that consent was an absolute requirement especially since the photographs involved images of her
intimate parts. Invasion of privacy of a female in relation to her modesty, decency and dignity is a cause of action and thus, actionable (Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826). As a doctor, the surgeon ought to be aware of the need to obtain the patient’s prior consent for such photographs to be taken, particularly, when it involves the private parts of the patient. Further, there was publication of the photographs as the photographs were seen by the nurse. This case depicts that the right of privacy of the patient needs to be fully respected in modern health care setting and prior consent of the patient is essential and cannot be taken for granted. Implied consent is not a lesser form of consent but in order for it to be valid, it is important that patients are made aware that information about them will be shared, with whom it will be shared, and that they have the right to refuse. Even when the practitioner have contractual obligations with the third parties such as insurance companies or managed care organisations, the practitioner shall obtain the patient’s consent before undertaking any examination or writing a report for a third party and ensure that the patient’s consent is obtained prior to the submission of the report (MMC Guidelines 2011, at Provision 29).

(ii) Disclosure allowed by statutes

A number of statutory provisions provide for the disclosure of information by doctors. For instance, there are several legislations in Malaysia that requires medical practitioners to disclose patient information to the relevant authorities, for example, the Prevention and Control of Infection Diseases Act 1988 (Act 342), the Poisons Act 1952 (Act 366) (sections 21(2), 23(2) and 24; Regulations 19 and 20 of the Poisons (Psychotropic Substances) Regulations 1989) and the Criminal Procedure Code (FMS Chapter 6). For instance, section 10(2) of the Prevention and Control of Infection Diseases Act 1988 requires medical practitioners to provide information of infectious diseases to the nearest Medical Officer of Health in the prescribed form. Similarly, section 27 of the Child Act 2001 states that “if a medical officer …believes on reasonable grounds that a child he is examining or treating is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall immediately inform the Protector” (at subsection 1) and failing to comply with this, the medical officer “commits an offence and shall on conviction be liable to a fine not exceeding two years or to both” (at subsection 2).
Disclosure in the public interest to prevent harm to others

The influence of principles based on public interest is predominant in the action for breach of confidence (Gurry, F., 1984). Public interest includes matters which affects the life and even the liberty of members of the society (De Bate, 1987). If it can be shown that the public has serious and legitimate interest in the disclosure then it may be demonstrated that there is a just cause or excuse in breaking confidence. The importance of secrecy is weighed against the public interest in disclosure. However, “before considering whether a disclosure of personal information in the public interest would be justified, the practitioner must be satisfied that identifiable data are necessary for the purpose, or that it is not practicable to anonymise the data. In such cases the practitioner shall still try to seek patient’s consent, unless it is not practicable to do so, for example because (a) the patients are not competent to give consent; or (b) the records are of such age and/or number that reasonable efforts to trace patients are unlikely to be successful; or (c) the patient has been, or may be violent; or obtaining consent would undermine the purpose of the disclosure (e.g. disclosures in relation to crime); or (d) action must be taken quickly (for example in the detection or control of outbreaks of some communicable diseases) and there is insufficient time to contact patients (MMC Guidelines 2011, provision 35). Nevertheless, “ultimately, the ‘public interest’ can only be determined by the courts” (MMC Guidelines 2011, at Provision 38).

Public interest was raised as a defence in the case of X v Y [1988] 2 All ER 648, which concerned doctors who were believed to be continuing in practice despite having developed Acquired Immune Deficiency Syndrome (AIDS). The court held that the public interest in preserving the confidentiality of hospital records identifying actual or potential AIDS sufferers outweighed the public interest in the freedom of the press to publish such information because victims of the disease ought not to be deterred by fear or discovery from going to the hospital for treatment. Furthermore, free and informed public debate about AIDS could take place without publication of the confidential information. Amongst other examples of public interests, which may outweigh the competing public interest in maintaining confidences are disclosure in the interests of national security, disclosure to prevent harm to third party and disclosure to prevent crime.
Medical professionals including psychiatrists may, at times, find it necessary to reveal confidential information disclosed by the patient in order to protect the patient or third parties from imminent danger. In these cases, the harm sustained by the third party may outweigh the duty of confidentiality owed by the doctor to the patient. The case of *Tarasoff v Regents of the University of California* (1976) 551 P 2d 334, illustrates that the duty of confidentiality can be overridden in the interests of the public. In this case, the patient confided to his therapist, an employee of the University of California, of his intentions to harm a fellow colleague, Tatiana Tarasoff, who had constantly rejected his advances. The therapist informed the police but did not inform Tarasoff herself. Tarasoff was later found dead, stabbed to death by the patient. Mr Justice Tobriner, holding the majority opinion in the Supreme Court of California held that there was a duty by the therapist to disclose threats made by the patient to Tarasoff. If the patient presents a serious danger of violence to another, the therapist incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case, which may include warning the intended victim or others likely to appraise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances (at p. 340).

Disclosure may be justified on the basis of the need to protect those at risk of death or serious harm. The protection of public from crime was considered in *W v Egdell* [1990] 1 All ER 835, which provides an interesting insight into the dilemma faced by the court in such situation. In this case, W, a paranoid schizophrenic, was detained as a patient in a secure hospital indefinitely following a conviction of manslaughter on the grounds of diminished responsibility and could only be released by the order of the Home Secretary if he was found to be no longer a danger to public safety. Ten years after his detention, W made an application to a mental health tribunal to review his condition and hope that this will lead to an early discharge. Dr Egdell, a consultant psychiatrist, was asked by W’s solicitors to prepare a psychiatric report on W. After examining W, Dr Egdell’s opined that W is still highly dangerous and showed persistent interest in explosives. Upon receiving the report, W’s solicitors withdrew his application to the mental health review tribunal. However, Dr Egdell believed that the contents of his report should be made available both to the medical director of the hospital that was caring for W and the Home Office. This is to
warn those who are involve in caring for W at the hospital and to ensure that the public was in no way endangered by his early release. W applied to the court for an injunction preventing the disclosure of the report by Dr Egdell. The Court of Appeal refused to prevent disclosure of the report and held that public interest justified disclosure to the medical director and the Home Office. The report contained the dangerousness of W that is not known to many. To suppress it would have prevented material relevant to public safety from reaching the authorities responsible for protecting it. It was in the public interest to ensure that they took decisions on the need for such protection on the basis of the best available information. Bingham LJ. remarked that balance should be struck between the public interest in maintaining professional confidences and the public interest in protecting the public against possible violence. He aptly said that “the breach of such a duty [of confidentiality] is…dependent on circumstances…the law recognizes an important public interest in maintaining professional duties of confidence but the law treats no such duties as absolute…. [it can] be overridden where there is held to be a stronger public interest in disclosure…. Dr Egdell did act in accordance with the law and his conduct was necessary in the interest of public safety and the prevention of crime” (at pp. 851-852). W v Egdell has been applied in Public Prosecutor v Dato’ Seri Anwar bin Ibrahim & Anor [2001] 3 MLJ 193, where the court held that there is no privilege under the law for a doctor to refrain from disclosing what transpired between him and his patient (PP v Haji Kassim [1971] 2 MLJ 115). In this case, the court held that Dr Fadzil did not commit a breach of his duty of confidentiality when he disclosed what transpired between him and his patient, Sukma. He concluded that Sukma was suffering from a mental depression due to biological factors and family background. He further disclosed that Sukma told him that he had homosexual relationship with his adopted brother and his business partner although he did not disclose the identity of these two persons. The implication of these cases depicts that, in exceptional circumstances, the duty of confidentiality could be breached. However, for disclosure to be lawful, there must be an overwhelming public interest in disclosure. A real and serious risk of danger to the public must be shown before the public interest exception is made out and the public interest exception can only justify disclosure so long as the threat persists.
(iv) Disclosure of HIV/AIDS status

As discussed above, even where public interest requires disclosure, it is necessary to confine it to the extent strictly necessary. The fact that it is in the public interest to reveal some aspects of a patient’s situation does not justify disclosing all the details (Montgomery, J. 2003). However, this does not prevent revealing information that helps to explain the situation. Disclosure of patient’s HIV status has been a concern particularly, to those caring for them and to their sexual partners. Under the common law, disclosure of a patient’s HIV status is allowed provided that two conditions are satisfied: first, that there is a real risk to the people to be informed; secondly, that disclosure is the only practical way to protect them. The General Medical Council in England advises doctors to explain to patients the nature and implications of their disease, how they can protect others from infection and the importance of giving professional carers information about their condition. However, if patients still refuse to allow others to be informed of their status, disclosure is accepted as ethical provided that the doctor judges that there is a serious risk of death or serious harm and that patients are told that the information will be disclosed (GMC, 1997, at paragraphs 18-23). Stigma and discrimination are usually inherent in society’s perception towards HIV patients. A study which was conducted in 2012 by Positive Malaysian Treatment Access & Advocacy Group revealed that 15.6% of the people living with HIV respondents had suffered discrimination in relation to job or income, with 12.4% being refused employment and 6.4% having been refused promotion or having the nature of their job changed (Gurusamy, 2014). Thus, it is of paramount importance that the medical profession is careful and discreet in releasing information about HIV patients, even to companies, insurance companies and managed care organisations without patient’s prior consent (MMC Guidelines, 2011). The Malaysian HIV/AIDS Charter for Doctors states that “doctors should, without prejudice and discrimination, when carrying out blood or other tests, ensure that adequate pre and post-test counselling is conducted to ensure consent to testing.” The Charter further reads that patients who are HIV positive “shall be encouraged to inform the attending doctor/s of their HIV status and information about a patient’s HIV status shall be restricted to medical professionals and other authorised personnel on a need-to-know basis” (MMA HIV/AIDS Charter for Doctors, n.d.).
5. Breaching the Duty of Confidentiality through Social Networks

The obligation of confidentiality is not limited to the undertaking of not divulging confidential information but also it includes a responsibility to make sure that all records containing patient information are kept securely. Confidential records should not be left where other people may have casual access to them and information about patients should be sent under private and confidential cover, with appropriate measures to ensure that it does not go astray. The use of social networks has been beneficial for the medical profession to interact with patients, market their practices, attract participants for research studies and share information with colleagues and community (Dill, K.J. 2009). Nevertheless, the discussions on patients’ information over social networks may trigger a myriad of legal issues particularly, on the law relating to privacy and defamation. Thus, it has become increasingly vital for medical professionals to be aware of the related legal risks (Cooray, M. 2011) and extremely cautious in deciding what information to share on their social networking sites.

The same legal rules on confidentiality apply to the information disseminated through social networks. In view of the vulnerabilities of such information, healthcare providers as employers, should enact policies with guidelines and requirements for their employees’ online interactions to ensure that their employees are aware of the risks of posting confidential or proprietary information and set standards for appropriate and professional communications (Dill, K.J. 2009). The British Medical Association has developed specific guidelines for medical practitioner for their practical and ethical guidance in disclosing information through social network (BMA, 2011). The 2011 BMA Guidelines stated that disclosing identifiable information about patients without consent on blogs, medical forums or social networking sites would constitute a breach of General Medical Council (GMC) standards and could give rise to legal complaints from patients (BMA, 2011). Unintentional disclosure is considered improper as medical professionals should not share identifiable information about patients where it may be overheard, including in internet forums (GMC, 2009). The BMA further recommends that medical professionals should consider adopting conservative privacy settings where available, for instance, social media sites such as Twitter and Facebook, have privacy settings that allow users to control and put restrictions on who has access to their personal information (BMA, 2011). However, the medical professional should also be aware that not all content on the web can be protected in this way and thus,
they need to be conscious at all times of those having access to their personal material online and how widely will the content be shared (BMA, 2011). Malaysia does not have specific guidelines and rules for the medical profession’s disclosure of confidential information through social network. However, some provisions under the Malaysian Medical Council (MMC) Guidelines 2011 on Confidentiality can be used as guidance for disclosing information through social network. Under the MMC 2011 Guidelines, the practitioner shall take steps to ensure that the patient’s confidentiality is maintained regardless of the technology used to communicate health information (at Provision 7) and shall not discuss patient’s information in an area where the practitioner can be overheard or leave patient’s records, either on paper or on screen, where they can be seen by other patients, unauthorized health care staff or the public (at Provision 8). The practitioner has a responsibility, as a custodian of patient’s medical records, to ensure the integrity, confidentiality and availability of the medical records (Provision 11) and follow the MMC’s guidelines on raising concerns about patient safety, including concerns about confidentiality and information governance (at Provision 9).

6. **The Rule of Confidentiality under Islamic Law**

Islam holds the right of privacy of human beings in high esteem and this right is given paramount and important consideration under the *Shari’ah*. There are numerous *Qur’anic* verses and hadiths explaining the significance of privacy in Islam. *Surah an-Nur*, verse 27 stresses on physical privacy in which Allah s.w.t states to the effect: “O you who believe! Enter not houses other than your own, until you have asked permission and saluted those in them, that is the best for you, in order that you may heed (what is seemly)” (The Holy Qur’an, 4: 27). Further, in *Surah al-Hujurat* verse 12, Allah s.w.t. states to the effect that: “O you who believe! Avoid suspicion as much as possible, for suspicion in some cases is a sin. And spy not on each other, nor speak ill of each other behind their backs” (The Holy Qur’an, 49:12). The rule to respect one’s privacy is not an obligation imposed on adults only but applies to children as well. In *Surah an-Nur*, verse 59, Allah s.w.t states to the effect: “But when children among you come of age, let them (also) ask for permission as do those before them, does Allah s.w.t. make His signs to you, for Allah s.w.t is full of knowledge and wisdom” (The Holy Qur’an, 4:59). Thus, Muslims are strictly advised not to indulge in activities that will bring another Muslim’s name, reputation and business in contempt. The
Prophet Muhammad p.b.u.h has also stated that “The believer is not one who defames, slanders, nor is obscene” (Sahih al-Tirmidhi, Vol. 28, Hadith No.1977). Guided by the respected principle of privacy in Islam, medical professionals are forbidden to disclose information they obtain from their patient to others. The Islamic Charter of Health Ethics provides that: “A doctor may not disclose a personal secret that has come to his knowledge through the performance of his profession, whether the patient confides the secret to him, or the doctor comes to know it in the course of his work” (at Article 29).

Further, when the doctor receives information from his patient, it is considered part of his amanah (trust) not to disclose the information to others without the patient’s permission. Amanah literally means trust, reliability, trustworthiness, loyalty, faithfulness, integrity, and honesty. The concept of amanah binds individuals with society as it defines man’s rights and responsibilities in relation to all the other humans, his environment and God’s creation. The term amanah is used in the Qur’an and the Sunnah to indicate a very broad and deep meaning. Everything given to us by Allah s.w.t is a kind of amanah (trust) which should be managed appropriately according to the laws and rules revealed by Allah s.w.t (Sheikh Munawar Haque, 2014). Every tasks or responsibility assigned to us is considered an amanah. Our bodies, our souls, our eyes, our ears, our intellect, our provisions, our clothing, our homes, and all other blessings and bounties of Allah s.w.t. have been given to us as amanah (trust) and has to be either returned back to Allah s.w.t. or used according to His instructions (Sheikh Munawar Haque, 2014). Thus, we have to ensure that we used these gifts from Allah s.w.t properly as we will be made accountable about them. In Surah al-Takathur, verse 2, Allah s.w.t states to the effect: “Then on that day you shall most certainly be questioned about the bounties” (The Holy Qur’an: 102:8). Similarly, in Surah al-Isra’, verse 36, Allah s.w.t. states to the effect: “The hearing, sight and hearts will all be questioned (The Holy Qur’an, 17:36).

The Holy Qur’an also contains many verses reminding mankind not to be disloyal to Allah s.w.t, His Prophet p.b.u.h., and also not to be dishonest to the amanah (trust) delegated unto them. In Surah al-Anfal, verse 27, Allah s.w.t states to the effect: “O you, who believe, do not betray God and His Messenger, and do not knowingly violate your trusts (The Holy Qur’an, 8:27). Amanah is considered by the Prophet p.b.u.h. as a sign of faith and breaching
it is a sign of hypocrisy. Abu Hurairah r.a. narrated that the Prophet p.b.u.h said: “The signs of a hypocrite are three (a) whenever he/she speaks, he/she tells a lie; (b) whenever he/she promises, he/she always breaks it; (c) whenever he/she is trusted, he/she always proves to be dishonest” (Sahih Bukhari, Hadith No. 33). The Prophet p.b.u.h. further stressed on the responsibility of amanah by stating that: “It has been narrated on the authority of Ibn Umar that the Holy Prophet p.b.u.h. said: Beware, everyone of you is a shepherd and everyone is answerable with regard to his flock. The Caliph is a shepherd over the people and shall be questioned about his subjects (as to how he conducted their affairs). A man is a guardian over the members of his family and shall be questioned about them (as to how he looked after their physical and moral well-being). A woman is a guardian over the household of her husband and his children and shall be questioned about them (as to how she managed the household and brought up the children). A slave is a guardian over the property of his master and shall be questioned about it (as to how he safeguarded his trust). Beware, everyone of you is a guardian and everyone of you shall be questioned with regard to his trust” (Sahih Muslim, Book 20: Hadith No. 4496). Consequently, true believers are, according to Surah al-Mu”minun, verse 8, in which Allah s.w.t states to the effect: “those who honor their trusts and their contracts” (The Holy Qur’an, 23:8). Therefore, when a person received confidential information during the tenure of his profession, maintaining secrecy of that information is his responsibility. For instance, an employee is the custodian of the property of his employer which he will be answerable for and what is required to be confidential is considered in as a trust (Sheikh Munawar Haque, 2014).

However, a doctor is allowed to disclose information about his patient according to the following exceptions:

i. If disclosure of a person’s secret is done at his own request, which should be in writing or if disclosure of a secret is in the interest of the patient or society;

ii. If the laws in operation require disclosure of the secret, or an order to disclose it is made by a judicial authority;

iii. If the purpose of disclosing the secret is to prevent crime, in which case the disclosure should be strictly to the official authority concerned and to no other party;
iv. If the disclosure of a person’s secret is in the interest of the patient’s spouse, provided that it is made to the couple, and not to one without the other;

v. If the doctor makes the disclosure in defending himself before a judicial authority at its request and in as much as the defence requires and

vi. If the purpose of disclosing the secret is to prevent the spread of an infectious disease that would be harmful to society members provided that the disclosure is made only to the concerned health authority (Islamic Charter of Health Ethics, Article 29).

7. Conclusion

Striking a balance between the legitimate interests of the community and the rights of individuals is always problematic. No set of rules could completely address many complex issues facing the medical profession. The law must strike the difficult balance of protecting the rights and interests of the individual person while also maintaining the safety and interests of the public at large or any others who may be affected by the actions of individuals. The greater the potential harm to the public, the greater the pressure to curb the actions of an individual. It is a matter of fine balancing, but at the end of the day, the law must ensure that any “protective privilege should end where public peril begins.”

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THE ROLE OF APOLOGIES IN THE RESOLUTION OF MEDICAL DISPUTES

Jahn Kassim, P.N. & Saleh, M.R.

Abstract

In the wake of medical errors and potential lawsuits, apologies made by the medical practitioner to the patient have the ability to defuse the spur of litigation and restore the relationship of trust and confidence between them. Often, when things go wrong in a medical treatment, the patient wants to know what actually happened, why it happened and be assured that it will not happen again in the future. At this juncture, apologies which are ‘statements acknowledging error and its consequences, including accepting responsibilities and communication of regrets’ can reduce the intensifying anger and desires to retaliate. Nevertheless, apologies may also have the potential to be seen as admissions of guilt by the medical practitioner and may at certain circumstances, expose him to risks of impending lawsuits. In weighing the drawbacks of apologies against their benefits, several countries have enacted ‘apology laws’ that mandate open disclosure of medical errors and at the same time, shielding those who apologise from legal liability. For instance, Canada and Australia have enacted ‘apology laws’ in which apologies that have been given after adverse events cannot be used in future legal proceedings. This paper seeks to discuss the role of apologies in the resolution of medical disputes, particularly, in reducing the number of potential lawsuits and promoting prospects of settlement. Against this backdrop, the barriers faced by the medical practitioners in subjecting themselves to acts of open disclosure after a mishap should not be overlooked to ensure the inculcation of a sustainable culture of honesty, openness and respect that is fundamental for patient safety improvements and public trust within the healthcare system.

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1. Introduction

Apology has always been viewed as an important social conduct that is able to heal and preserve relationships. By apologizing, a person shows respect and empathy towards the wronged person and if it is done sincerely and effectively, the negative consequences of the wrong actions can be avoided. A person who has been harmed is usually overwhelmed by anger, frustration and a desire to retaliate. An apology made by the wrongdoer has the ability to disarm a person’s anger and vengeance and subsequently, opens the door to forgiveness towards the wrongdoer. Particularly, medical treatment that results in injuries and death of a person tends to build up the anger from within the injured person and the affected families. Consequently, the injured victims or their families will try to resort to court litigation as a means of showing their anger and dissatisfaction and at the same time, demanding monetary compensation to ensure that the medical practitioner is responsible to pay for all the losses they have suffered. Apologies made by the medical practitioner at this point may be able to defuse the spur of litigation and reduce the intensifying anger felt by the affected parties. However, medical practitioners are in constant dilemmas as to whether to apologise fearing that apologies made would be interpreted as admissions of guilt (Mongiello, M.C., 2012) and used against them in legal proceedings. This paper seeks to explore the benefits and the drawbacks of apologies in resolving medical disputes and the legal implications if apologies are being placed in a proper regulatory framework to ensure the validity of its consequences.

2. Medical Errors and the Desire to Litigate

Medical negligence claims in Malaysia is on the rise every year. It can be seen from the year 2006 to 2010, the Malaysian government has paid out an amount ranging from RM 2,184,406.21 to RM 12,919,083.12 as ex gratia payment (a form of out-of-court compensation afforded those suffering from medical injuries) to victims of ‘potential’ medical negligence (MOH, 2010). Frequency of medical negligence claims and the size of compensation awards not only fosters the culture of ‘defensive medicine’ (Whitehouse v Jordan [1981] 1 All ER 267) but also causes a sharp increase in the cost of doctor’s liability insurance. According to the Medical Defence Malaysia (MDM), subscription rates for medical negligence insurance premiums have been on the rise annually, varying by specialties, levels of risk and the history of past litigation within those specialties (MDM,
On top of the list is Obstetrics & Gynaecology (O&G) where insurance premiums for specialists in this area had increased sharply from RM15,300 in 2004 to RM43,610 in 2009, rising averagely between RM5,000 to RM6,000 annually. To date, Malaysian Obstetricians have to pay RM62,000 to protect themselves from the threat of litigation and the numbers are expected to rise in the future. Insurance premiums for specialists in neurosurgery, spinal surgery and plastic surgery are also on the rise averagely from RM3,000 to RM4,000 annually, from RM10,000 in 2004 to RM27,150 in 2009, and RM39,500 in 2013. Premiums for orthopaedics had risen from RM10,000 in 2004 to RM21,120 in 2009, and RM39,500 in 2013, averaging from RM2,000 to RM3,000 annually (MDM, 2013). From this figures, it can be seen that patients nowadays are no longer passive recipients of medical care. There is clearly an increasing awareness of patients’ rights and public’s expectations on the outcome of the medical treatment. Discrepancy between the expectation of the patient and the service received or outcome of treatment tend to trigger claims in the court of law.

For some patients, having their time in court achieves retributive justice and able to appease their vengeance. Nevertheless, claims in the court of law often starts because the patient cannot get the information he is seeking, explanation or apology from the appropriate persons. Not all patients want to obtain financial compensation, some merely want to ensure that there is no repetition of the mishap that had occurred and to receive an apology for what had happened. According to Action for Victims of Medical Accidents (AVMA), “what they want is ‘satisfaction’…what that means is a full explanation of what went wrong and if appropriate, an apology for what actually happened…. there are times when financial compensation is also necessary and that will form part of the ‘satisfaction’ that the patient wants.” Thus, bringing medical negligence claims in court has never been viewed by patients as profit-making ventures but to sufficiently compensate patients for the injuries they have suffered caused by the breach of duty on the part of the doctor to exercise reasonable care. Litigation has also viewed as the last resort to be taken by the patient as the litigation process tend to be cumbersome and costly (Drabsch, T., 2005). More often, the patient actually needs proper explanation on what had actually happened, the remedial steps that have been taken to prevent the recurrence of the same incident (Szostak, D.C., 2011) and ultimately, is an apology forthcoming to appease the emotional consequences of the harm done (Saitta, N & Hodge, S.D. 2011). Studies have also shown that anger is the main motivator for the start of a
litigation process, thus, an apology offered at this time may be able to defuse the desire to litigate as it is able to reduce the patient’s anger, creates an open communication between the doctor and the patient to voice their concerns and eventually, curb the patient’s motivation to litigate (Slocum, D.J. et al., 2011). At this juncture, possibilities of settling matters out of court may be forthcoming. Settlements out court may be beneficial to both parties as it not only able to reduce the confrontational attitudes amongst the parties in the court room but would also be able to reduce the backlog of cases in the court of law (Saitta, N. & Hodge, S.D. 2011).

3. The Concept Apology in Medical Disputes

Apologies are statements acknowledging errors and its consequences, including accepting responsibilities and communication of regrets. Apologies can be defined as a “written or spoken expression of one’s regret, remorse or sorrow for having insulted, failed or injured, or wronged another” (Raper, S.E, 2011, at 292). Besides expressing one’s regret, apologies also may signify an admission of responsibility or become part of a confession (Slocum, D.J. et al., 2011). The act of apologizing has been identified as a form of remedial work and has healing values to the affected parties including the party who offered the apology and the party receiving it. The benefits of apology has been researched on and identified in the area of psychology (Engel, B., 2002). Although the consequence of apology in law has always been discussed, the benefits of apology from the legal perspective in relation to medical disputes have yet to be thoroughly explored (Barcena, M., 2013). Nevertheless, the concept of apology is not an alien concept in the legal system as it has been an effective mitigating factor in defamation and contempt of court cases (Datuk Patinggi Abdul Rahman Yakub v Abang Mohd Abang Anding [1979] 2 MLJ 185). Further, it has also been effective in settling family disputes particularly, in expediting the reconciliation and forgiveness process (Hyde, E., 2011). The potential of apology in settling medical disputes in Malaysia have yet to be thoroughly researched on in terms of its position in the legal system and the implications it has on the medical negligence claim process. Nevertheless, the concept of apology needs to be discussed with regards to its legal ramifications as well as its position in the procedural aspects of a medical negligence claim in court.
4. The Benefits of Apologizing in Medical Disputes

Apology is recognized for having psychological effect as it is a remedial behavior in nature where it has the potential to make wrongful behavior becomes acceptable either verbally or by acts that attempt to explain the real situation and the showing of compassion and regret (Slocum, D.J., et al., 2011). Although apology cannot undo the outcome of the negligent act, the words of empathy may have the ability to defuse anger and can undo the negative effect or consequence from that negligent act (Saitta, N & Hodge, S.D. 2011). Other than offering psychological benefits, apology law also provides legal benefits which can be seen as follows:

(a) Discourage Litigation

Apology encourages or influences the reconciliation or forgiving process. As anger is the main motivation for medical negligence litigation, apologies has been found to be effective in reducing patient’s anger, increase communication between the medical practitioner and patient and ultimately reduce patient’s motivation to litigate (Slocum, D.J., et.al., 2011). Although the patient realized that the outcome of the negligence act cannot be reversed, but in certain circumstances, they only wanted to learn as to how and why the incident happened and they also want to be assured that the medical practitioner will take preventive measures to so that the same incident will not happen again to others (Szostak, D.C., 2011). Besides that, apology promotes emotional healing as it will remove the hatred between the patient and medical practitioners and the patient will no longer perceive the medical practitioner as a personal threat (Engel, B., 2002). On the part of medical practitioner, apology helps to comfort them emotionally as it eradicate the feeling of guilt or self-reproach while reducing arrogance and promoting self-respect (Saitta, N & Hodge, S.D. 2011). If apology has successfully defused the anger on the part of the patient, there will be no issue on prospective litigation fostering the ‘name, blame and shame’ culture.

(b) Promote Fast Settlement of Claims

Litigation is a lengthy and tedious process both to the patient as well as the medical practitioner. The substantive law of medical negligence coupled with complex procedural aspect of a tort based civil claim will not assist the patient much in procuring compensation for the injury suffered or even for any psychologically injuries suffered (Kellett, A.J., 1987).
In some cases, the court take years to come up with a decision after the claim have been being initiated by the patient. This will not only delay the patient’s right to get compensation for the loss he had suffered but it will also increase the tension and anger between the patient and the medical practitioner. Prior to a settlement discussion, an apology is very much needed as this will start the healing process on the part of the patient and ultimately, encourage the discussion on the monetary compensation required (Ebert, R.E., 2008). In many instances, when the medical practitioners did not apologize, the relationship between the patient and the medical practitioner tend to worsen. This does not only discourage negotiation but will prevent any chance of settlement. At this juncture, encouraging the use of apologies can promote settlement discussions and protect the emotional well-being of both parties (Barcena, M., 2013). In the United States, it was found that States which enacted apology laws has experienced an increase in number of resolved cases due to fast settlement time (Saitta, N & Hodge, S.D. 2011). This is because since there is no more anger, the patient is demotivated to pursue the claim and this will encourage them to settle the matter out of court. Therefore, by defusing anger at initial stage, it will promote lesser litigation and faster settlement in medical negligence dispute (Ho, B. & Liu, E., 2010). Consequently, the cordial relationship between the patient and the medical practitioner will be preserved.

(c) Promotes Disclosure and Transparent Communication

Good communication incorporating an apology may be important in maintaining a cordial relationship between a medical practitioner and the patient after an adverse event (Ebert, R. E., 2008). If there is a breakdown in the communication, serious consequences will occur to the relationship between the parties. Further, the use of good communication behaviors tend to decrease the likelihood of a lawsuit and increase positive perceptions portrayed by the medical practitioner. Good communication will undeniably lead to better outcome and automatically discourage litigation (Lester, G. & Smith, S. G., 1993). In some circumstances, medical practitioners tries to hide or prevent themselves from making any contact with the patient after an adverse event had occurred. However, if the medical practitioner is more transparent in that particular circumstances, patient’s anger will not be stirred up. When the medical practitioner apologizes, it will usually be accompanied with justification or explanation of what really happened and this is something that is really desirable to the patient (Szostak, D.C., 2011).
5. The Drawbacks of Apologizing in Medical Disputes

Although apologizing has its benefits, the drawbacks of apologizing need to be weighed against its benefits. Medical practitioners are often hesitant to apologize fearing the negative consequences of such actions. The drawbacks of apologizing can be seen as follows:

(a) Admission of Fault

An admission is a statement against a person’s own interest, and generally, admission is considered in the court of law to determine the liability of the parties. (Rehm, P. H. & Beatty, D.R., 1996) The rationale for such acceptance is that, a person will not make a statement against his own self or interest unless the statement is true. In the course of a litigation, an apology may constitute an admission because in the normal course of human behavior, a person will not make a testament against themselves unless they were true (Taft, L., 2005). This is the most important factor which prevent medical practitioners from apologizing.

The consequences of an apology can be illustrated in the case of Norizan bt Abd Rahman v Dr Arthur Samuel [2013] 9 MLJ 385. In this case, Four months after the birth of her fifth child, the plaintiff, discovered she was pregnant again and requested the defendant, an obstetrician and gynaecologist, to terminate the pregnancy and at the same time insert an intrauterine contraceptive device (‘IUCD’). However, while the procedures were being performed, the plaintiff’s right uterine wall and right artery of the uterus were perforated necessitating an emergency life-saving operation by the defendant to remove her womb and right ovary. The plaintiff claimed that they were informed that this is just a simple procedure and were not informed about this risk. The court in allowing the claim which amounted to RM 220,000 in general damages and RM 3,000 in special damages has also considered the contention by the plaintiff that an apology was made by the defendant and the defendant was not present to answer or deny such claim. The court held that such apology made reflected the guilt which the defendant failed to deny, thereby, establishing negligence on the part of the defendant. Thus, it can be seen through this case that, apologizing by the medical practitioner may be used by the court in the determination of his liability.
(b) Fear of Litigation

Although apology is always needed by the patient, the fear of litigation has always become a major impediment for apologizing. This fear leads to defensive and strategic disclosure practiced by the medical practitioners (Taft, L., 2005). Lawyers usually encourage medical practitioners not to apologize and labeled such action as a “legal suicide” as it can be used by the patients against them in court and may jeopardize their insurance coverage event (Ebert, R. E., 2008). In much insurance coverage, the medical practitioner is required not to make any form of admission, due to this provision, medical practitioners are not encouraged to apologize due to the fear that their insurance will not cover such action (Cohen, J., 1999). Medical practitioners feel intimidated to be dragged into the intricacies of courts’ trials which are usually lengthy and cumbersome. The threat of litigation compels the doctor to view his patient as a future adversary in a courtroom proceeding. Even if the negligence claim is settled out of court, there is still an effect on the doctors as settlements out of court leave them with no chance of vindicating themselves. At the end of the day, they still feel that there is a cloud hanging over their head. A retired Canadian doctor stated that “…I’d rather not talk about it, even though in the end no fault was found. For 7 years it went on, months of sitting in court listening to what a terrible person you are, no one recovers from that. It is on your mind every day, every minute. It changed the whole way I practiced. The empathy I had, that I was known for, just wasn’t there anymore. Every patient was a potential law suit” (Silversides, A., 2008). Thus, the threat of litigation destroys proper relationship between doctor and patient by introducing confrontational element between them. Although apology alone is not sufficient to establish negligence but it is one of the factors that the court will consider as it can reflect the admission of guilt on the part of the medical practitioner (Ebert, R. E., 2008).

(c) Personal Character and Ego of the medical practitioner

The society always have high regard towards medical practitioners due to the nature of the profession that requires intelligence and doctors are considered to be among the honorable professions. This perception has created the ‘nonapologetic’ culture amongst the medical practitioners as by apologizing, a person is in a way admitting his fault and consequently, lowering his position amongst his peers (Ebert, R. E., 2008). Therefore, when a mishap
occur, medical practitioner do not want to apologize as they believe that they are in higher position than the patient. This ego on the part of the medical practitioners, unfortunately, shield them from being apologetic whenever there is a dispute with their patients.

6. The Role of ‘Apology Law’ in Medical Disputes

Although apologies offer much benefits in defusing the desire for patients to litigate, it also has the effect of being a ‘double-edge’ sword and be seen as self-incriminating on the party who apologises. In other words, apology made by the medical practitioner can be seen as an admission of guilt and be tendered as evidence in court proceedings. This problem have led to several countries enacting ‘apology laws’ that mandate open disclosure of medical errors but at the same time, shielding those who apologise from legal liability (Raper, S.E., 2011).

There are two types of apology law (Wheeler, C., 2013). The first type is the ‘full apology law’ that protects the medical practitioner against any expression of regret and remorse for what has happened, statements of sympathy and also any acknowledgement of that person’s wrongdoings including statements that contain admission, fault, mistake, errors and liability (Carroll, R., 2014). The second type is the ‘partial apology law’, which only protects the medical practitioner against statements of sympathy, commiseration, condolences and compassion alone without any expression of admission (Ho, B. & Liu, E., 2010). In some jurisdictions, the law give protection over apology made by a medical practitioner and will not allow it to be used in determining his liability in court. However, such apology may be used by the medical board in a licensure actions brought by the State (Mongiello, M.C., 2012). In such cases, the medical practitioners will still be subjected to internal or domestic inquiry by the relevant authority. However, there also exist apology law that expressly protect apology in such circumstances such as in the state of Victoria, Australia (Studdert, D.M. & Richardson, M. W., 2010).

The workings of apology law differ from one jurisdiction to another and it is thus, important to examine the relevant jurisdictions that have implemented apology law for resolving medical disputes.
(a) Australia

There was a call for law reform in Australia that was initiated by the belief that litigation rates concerning medical practice has been significantly increasing (Barr, G.A.B., 2009) and coupled with a crisis in medical insurance which needed the attention of the Australian government (Vines, P., 2005). This medical insurance crisis refers to the “sudden large increase in premiums” (Cane, P. 2003 at 658). With these concerns, a panel was established by the Australian Government in 2001 to look into the reforms that can be made to the law of negligence. Amongst the concern that the panel need to report and address was regarding the perception that the way the law of negligence has been applied in the court is unpredictable and unclear. Further, it has also become too easy for plaintiffs in personal injury cases to establish liability and quantum of damages awarded by the court has also been frequently too high (Ipp Panel, 2002). The issue of legislating apologies was initiated by a Legal Process Reform Group with the support from Australian Health Ministers’ Advisory Council after they were asked to report on issues concerning medical negligence. They recommended for a legislation that provides an apology “made as part of an open disclosure process to be inadmissible in an action for medical negligence” (Vines, P., 2005 at 2). This recommendation was made in reference to the development of the Open Disclosure Project and the National Open Disclosure Standard for Public and Private Hospitals developed by the Australian Council for Safety and Quality in Health Care, which include that the giving of an expression of regret as part of important element in an effective disclosure (Australian Commission on Safety and Quality in Health Care, 2008). This reform was aimed to ensure that an effective disclosure will be made to help the patients in the healing process, better learning for the medical practitioners and ultimately, reduce the rate of medical negligence litigation (Vines, P., 2005). Although apology is included as a part of disclosure promoted in the National Open Disclosure Standard, medical practitioners are still slow in embracing this policy due to “uncertainty about doctor’s legal and professional obligations in relation to open disclosure and concern about medico-legal risk” (Finlay, A.J.F. et al., 2013 at 445). Besides that, the evidential significance of apology in litigation is another reason why medical practitioners are still advised to reserve their apology due to the different status of apology from one state to another in Australia (Carroll, R., 2014).
The application of apology law in Australia is rather unique because the types of apology vary in different states throughout Australia (Barr, G.A.B., 2009). States such as New South Wales, Australian Capital Territory and Queensland enact the ‘full apology law’ whereas the rest of the states such as Victoria, Northern Territory, South Australia, Tasmania and Western Australia offer the ‘partial apology law’ (Wheeler, C. 2013), which only protects expression of regret and sympathy alone (Carroll, R., 2014) and will no longer protects the apology if it contains any mea culpa (‘through my fault’) statements (Studdert, D.M., & Richardson, M. W., 2010). For states that offer ‘full apology law’, the definition of apology does not only covers expression of sympathy or regret but it also includes expression that implies admission or fault related to the matter (section 68 Civil Liability Act 2002) (section 72C Civil Liability Act 2003 Queensland) (section 13 of Civil Law (Wrongs) (Australian Capital Territory) 2002). The law in these states specifically provides that an apology is admissible in any civil proceedings as evidence of the fault or liability. From these provisions, it shows that these states give full legal protection for all types of apologies made by any member of the community including admission of fault by a medical practitioner (Wheeler, C. 2013). The workings of ‘full apology law’ require three main elements that concern the position and consequence of such apology, i.e. declaratory element, relevance element and procedural element (Wheeler, C. 2013). For instance, in the Civil Liability Act 2002 (NSW), section 69(1)(a) declares that apology is not an admission of fault or liability. This refers to the first element which is the ‘declaratory element’.

Secondly, in determining a fault or liability on the part of the defendant, section 69(1)(b) exclude apology from being taken into account as a relevant fact in determining fault. This provision is concerned with the ‘relevance element’. Thirdly, with regards to the ‘procedural element’, from the law of evidence perspective, apology made is inadmissible as evidence of fault and therefore, cannot be used in court against the person who gave it (section 69(2)).

Another factor that prevents medical practitioners from apologizing is that it will void any protection under the professional indemnity insurance if such admission of liability is made. This is a frequent clause in any insurance contract and are known as “admission and compromise clause” (Vines, P., 2005 at 3). If an apology was given by the medical practitioner, the insured medical practitioner is at risk of not being protected by the insurance. However, apology law may prevent the termination or allows the insurer to reduce the claim
according to the amount affected by the ‘admission or compromise’ (Commonwealth Contracts Act 1984). Although the application of apology in Australia is not uniformed (Finlay, A.J.F. et al., 2013), its workings in the tort law reform has significantly reduce number of new claims for compensation, increasing number of closed claims and eventually, reduce the proportions of large damage awards (Corbett, A., 2011).

(b) Canada

In Canada, it was found that “litigation was generally commenced for the purposes of obtaining information, receiving an acknowledgment that harm was caused by error, and addressing treatment of an affected party following an adverse event” (Curial, B. et al., 2010 at 2). It was discovered that the “patients considered the financial compensation is unhelpful and not a primary motivator of litigation” (Curial, B. et al., 2010 at 2). Although apology is in need for such situation to defuse anger, “healthcare providers and organizations were often reluctant to provide an apology out of fear that such statements would be used against them as an admissions of liability in subsequent litigation” (Curial, B. et al., 2010 at 2). By offering apology, medical practitioners are afraid that the apology made will void the provisions of their insurance policies (Carman, C., 2006). The proponents of apology law suggest that the existence of such law will enhance the dispute resolution process, promote accountability in the medical profession, increase the affordability and speed of justice by shortening or avoiding litigation (Diedrick, Y., 2009). In this regard, a discussion paper was made by the Ministry of the Attorney General of the province of British Colombia, which is the pioneer State for developing apology law in Canada (Barr, G.A.B., 2009). The purpose of the discussion paper is to resolve the conflicting needs between the medical practitioners and the patients. Thus, the enactment of apology law is to encourage the offering of full apologies which in turn would act as a positive dispute resolution mechanism between them. The apology legislation would ‘promote early, effective and affordable resolution of disputes and this proposal was supported by Canadian healthcare providers as well as the governmental bodies (Barr, G.A.B., 2009). The law will therefore protect apologies from becoming an admission of liability or voiding provisions of an insurance policy (Carman, C., 2006).
The bill on apology law was drafted by referring to the New South Wales Civil Liability Act (2002) as the basic foundation (Barr, G.A.B., 2009). However, the British Colombia Apology Act incorporated not only the essential elements based on the Australian legislation but also included specific provisions for insurance contracts. This is an extension of the protection where the law does not only renders such apology inadmissible in court but also prevents the insurance contract from becoming void if apology was made (Carman, C., 2006). Legislators in other states in Canada such as Saskatchewan, Manitoba, Alberta, and Ontario have also passed similar law reform as British Colombia. Further, the protection given by the Canadian apology law is not only available for medical negligence claims but it is applicable to all civil claims (Worton, B.C. & Pavlovic, M., 2015) except in the province of Prince of Edward Island where the protection for apology is exclusive for healthcare related cases only (Barr, G.A.B., 2009). The Apology Act in British Colombia was given royal ascent in 18th May 2006, The Act defines apology as “an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate” (Apology Act (SBC) 2006). The Act also provides that an apology does not constitute an express or implied admission of fault or liability and does not void, impair or otherwise affect any insurance coverage that is available, or that would be available by the person who is connected to the apology. It further provides that apology must not be taken into account in any determination of fault or liability in connection with that matter (Apology Act (SBC) 2006). Currently, most states in Canada adopted the Uniform Law Conference of Canada Uniform Apology Act (Worton, B.C. & Pavlovic, M., 2015). The purpose of this uniform legislation is to promote uniformity on the substance of the law as well as the application of apology law thorough Canada (Uniform Law Conference of Canada, 2007).

Before the enactment of apology law in Canada, some apologies are already protected by law such as admission made without prejudice and also apologies made in the course of confidential dispute resolution proceedings such as mediation. However, after the apology legislations in Canada came into force, the law now explicitly preclude parties from relying on the apology as an admission of fault or as evidence to prove liability of the parties (Worton, B.C. & Pavlovic, M., 2015). Nevertheless, even though the Canadian apology law
protects apology from being admissible in court, it does not protect all types of apology. The law only give statutory protections over apologies that fall under the definition of “apology” under the legislation. Therefore, it does not cover extraneous statements that are not part of the apology such as statement about restitution and repayment of debt or any admission related to the facts of the dispute (Worton, B.C & Pavlovic, M., 2015). It can be seen that one of the major implications of Canadian apology law is towards the contract of insurance. All medical practitioners are required to have professional liability insurance in order to practice medicine. It is a duty imposed in the insurance contract that the person insured must give their full cooperation in defending their claim and some insurance provisions requires that the person insured must not voluntarily assume or accept any form of liability in settling a claim (Cohen, J., 1999). If a person insured apologies or admit such fault, a medical practitioner may lose their coverage and they themselves must be personally liable for damages claim by the patient in court. The insurance company will use the apology as a prove that the insured medical practitioner failed to give cooperation and therefore, the medical practitioner is in breach of his general duty as agreed in the terms of the insurance contract. Consequently, medical practitioners fear that the apology given might have negative implication towards their professional insurance coverage. Thus, by implementing the apology laws, the contractual barrier is eliminated and offer certainty that apologies made will not cause provisions in the insurance contract to be void. The apology laws prevent insurance company from refusing to give protection to the insured medical practitioner on the ground that the insured medical practitioner apologize and failed to give cooperation to them to defend the case (Barr, G.A.B., 2009). However, since the law was introduced throughout Canada in 2009, there has not been any specific statistics available to reflect the effectiveness of apology in settling medical negligence claims (Curial, B. et al., 2010). However, a 2014 report by the Canadian Medical Protective Association showed that the number of cases is decreasing 5% from 2005 to 2015, and the numbers for settled cases has been increasing from 31% in 2010 to 36% in 2015 (Canadian Medical Protective Association, 2015).
7. Apology in Islam

Islam encourages its believer to apologize and forgive wrongdoers. Forgiving when one has been wronged is considered a commendable act and will be rewarded immensely by Allah s.w.t. Although Islam does not make it compulsory for a person to forgive after apologizing but Allah s.w.t. has promised abundance of reward to those who forgive based on the following verse which Allah s.w.t. states to the effect: “And if you do catch them out, catch them out no worse than they catch you out: But if you show patience that is indeed the best (course) for those who persevere (The Holy Qur’an, Surah an-Nahl, 16: 125). In this verse, Islam promotes forgiveness and states that showing patience and giving forgiveness is the best practice of a good Muslim. Other than that, in Surah Al-Maidah, verse 13, Allah s.w.t. states to the effect that: “But forgive them, and overlook (their misdeeds): for Allah loveth those who are kind” (The Holy Qur’an, 16: 125). From this verse, it can be seen that Allah s.w.t categorized those who forgive as those who are kind and it encourages Muslims to forgive whenever a person apologize or commit any mistakes. Besides that, we can see from the act of the Prophet Muhammad p.b.u.h. when he had forgiven everyone in Makkah for their former wrongdoings after the Muslims managed to free Makkah from the unbelievers during the fathu Makkah in 10th Ramadhan 8th Years after Hijrah. Furthermore, Islam promotes people to speak the truth. In a hadith reported by Tirmidhi which stated that “If you have four characteristics, whatever worldly advantage passes you by does not matter to you: keeping a trust, speaking the truth, a good character, and (moderation in eating)” (Al-Tirmidhi, Hadith 1370). Furthermore, Islam also encourages its followers to speak the truth or make disclosure even if it is not in favor of oneself. This is based on the hadith which states that “God, show mercy to Umar, (for) he speaks the truth even if it is bitter” (Al-Tirmidhi, Hadith 1613).

Consequently, apology plays an important role as once a person has been forgiven, punishment will not be imposed on that person. For instance, in the case of murder under the Islamic law, if the family forgive the murderer, he will not be punished with death penalty (Zaharuddin, 2007). This can be seen in the following Quranic verse, in which Allah s.w.t. states to the effect: “Never should a believer kill a believer, but (if it so happens) by mistake (compensation is due); if one so kills a believer, it is ordained that he should free a slave and
pay compensation to the deceased family, unless they remit it freely” (The Holy Qur’an, *Surah an-Nisa*, 4: 92). In a hadith narrated by Abu Shurayh al-Khuza’i that the Prophet p.b.u.h said: “If a relative of anyone is killed, or if he suffers *khabl*, which means a wound, he may choose one of the three things: he may retaliate, or forgive, or receive compensation. But if he wishes a fourth (i.e. something more), hold his hands. After this whoever exceeds the limits shall be in grave penalty” (Sunan Abu Dawud, Book 39, Number 4481). From these authorities, it can be seen that that apology is highly encouraged in Islam and Allah s.w.t. offers special treatment to those who forgive. Similarly, disclosing the truth is also encouraged and promoted in Islam as it is very beneficial to mankind.

8. Conclusion

The benefits of apologizing are beyond doubt and it is understandable that patients want a sincere apology and acknowledgement of the harm they have suffered. However, in encouraging medical practitioners to practice a culture of transparency and openness, the legal consequences of apologizing need to be stated in a clear legal framework so that medical practitioners are aware of the outcome of apologizing to their patients. Enacting apology laws that allows medical practitioners to receive legal protection in certain circumstances when apologies are made to act as a remedy for unintentional wrongdoings that have occurred, should be introduced in Malaysia. Lessons can be learned from the Canadian and Australian experiences in drafting and legislating apology laws as well as making amendments to the law of evidence in their quest to resolve medical disputes in a more amicable manner. A structured apology law will reduce the number and severity of medical practitioners’ liability claims, defuse the spur of litigation and ultimately, preserve the sanctity of relationship between the medical practitioner and the patient.
References:


British Colombia Apology Act 2006

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Civil Liability Act 2003 Queensland)

Civil Law (Wrongs) (Australian Capital Territory) 2002

Commonwealth Contracts Act 1984 (Australia)

Whitehouse v Jordan [1981] 1 All ER 267

Norizan bt Abd Rahman v Dr Arthur Samuel [2013] 9 MLJ 385
THE CONCEPT OF RETRIBUTIVE AND RESTORATIVE JUSTICE IN ISLAMIC CRIMINAL LAW WITH REFERENCE TO THE MALAYSIAN SYARIAH COURT

Wan Muhammad, R.*

1. Introduction

Crime and punishment under Islamic law are basically categorized as determined and discretionary1 which basically founded based on the revealed sources, that are Qurān and Sunnah2 as well as other rational secondary sources such as qiyās, istiḥsān, istiṣḥāb, maṣlaḥahmursalah as well as sadd al-dharīʿah.3 As a branch of law in the Islamic law or Sharīʿah, Islamic criminal law and its justice system form part of the religion of Islam rooted from the concept of Oneness of Allah (tawḥīd) and the individual human being is accountable for his conduct. Basically, in Islam; an individual Muslim is bound with religious or moral obligations as well as juridical obligations which both of the obligations form an integral part of devotional matters (ʿībādāt) that governs the relationship of Muslim with Allah and civil transactions (muʿāmalāt) that governs the relationship between a Muslim and other individuals in the society.4

More than that, the obligations of Muslim is categorized into right of Allah (ḥaqq Allah) and right of man (ḥaqq al-ʿabd).5 Uniquely, in Islam; all virtue and good conduct of an individual Muslim is considered as an ʿībādāh based on the concept of Allah-consciousness (taqwā) and this basic value itself forms the core of Islamic criminal justice system – a Muslim is bound to observe the right of Allah (ḥaqq Allah) and right of man (ḥaqq al-ʿabd) through the performance of his duty or ʿībādāh, and thus accountable for any infringement or violation of the rights.

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1 Al-ʿAwwa, Muhammad Salim (1982): 127
2 Jubeir, Mohammad Ibn Ibrahim Ibn (1996): 42
3 See Nyazee, I. A. K. (2003):141-250 for further reference on primary and secondary or revealed ad non-revealed sources of Islamic law
5 Ibid
Islamic law or *Sharīʿah*, in general; and Islamic criminal law, in particular is a designed system that are meant to achieve its objectives or *maqāṣīd al-Sharīʿah*, that are to preserve and protect the religion (*al-dīn*), life (*al-nafs*), reason (*al-ʿaql*), lineage or progeny (*al-nasl*) and property (*al-māl*). Within the Islamic criminal justice system, it serves to promote justice to the offender, victim and the victim’s family as well as to the society at large. The objective of the implementation of Islamic criminal law is to protect the rights of the individual, regardless of his/her religion, and public at large. Therefore, for an example, the ḥadd punishment for apostasy (*riddah*) and drinking alcohol (*shurb al-khamr*) are respectively significant to preserve and protect the religion (*al-dīn*) and reason (*al-ʿaql*).

As “justice” forms as a building block in Islamic criminal justice system, this writing discusses and analyses the concept of retributive and restorative justice in Islamic criminal justice system which it is dedicated in Part 2 of this writing. It follows with the discussion on the concept and fundamental principles of restorative justice, as well its practice today in Part 3. Part 4 of this paper is to discuss the extent of the application of restorative justice in the Malaysian Syariah Court practice with reference to some selected and decided cases within the year of 2010-2013. The analysis of this discussion and observation are provided in Part 5 before it accordingly summarized the whole discussion.

## 2. The Concept and Objectives of Punishment in Islamic Criminal Justice

In a general understanding, the concept of punishment involves imposition of unpleasant or harmful consequences by a person who have the authority to do so upon a person who have sufficient mental control (*mukallaf*) but have breached certain established norms. In criminal justice system, punishment is an unavoidable consequence by a person who is found guilty in accordance to the enacted law in each legal system. Therefore, the theory and principles of punishment are generally interrelated with the substantive and procedural criminal law under which a person are charged or tried.

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6 *Supra* note 3:199

7 Greenawalt, K. (2002): 1282-1293
Hallevy (2013) outlined the general purposes of punishment to include retribution, deterrent, rehabilitation and incapacitation. However, Bittner & Platt (1966) discussed that the meaning and objectives of punishment is varied as it was looked from the perspective of moralist, philosophers, jurist and social scientist; and consequently lead to the debate and polemic on the concept, objective and practice of punishment. The idealism school of thought in view that punishment is needed based on the principle of retribution, whereas the utilitarianism school of thought in opinion that punishment plays its deterrent function which both of the thoughts are criticized. In spite of the concepts and theories, Conti (1918) regarded punishment has its essential purpose to restore the public peace or tranquility that tarnished by the occurrence of the committed crime.

The theoretical framework of retribution purpose of punishment is based on the *lex talionis* i.e. the law of retaliation. In essence, it based on the “principle of equal and direct retribution.” Under the retribution concept of punishment, the offender is deserved to be punished if he committed a blameworthy offence since a person must be responsible for their guilty conducts if he is found guilty under the criminal law by satisfying the requirements of *actus reus* (a guilty act) and *mens rea* (a guilty state of mind). Therefore, the proponent of retributive theory of punishment viewed that the guilty offender must suffer the sanctions as to achieve justice.

The deterrent functions of punishment, as viewed by utilitarian; justified punishment as the mechanism of crime prevention in the society. Hence, the deterrence or incapacitation of the convicted criminals would restraint the individuals in the society from committing the similar act of crime. Another distinct theory which also forms part of utilitarian, viewed that crime is a societal disease and need to be cured. Hence, the proponent of the view regards placing the convicted person under focal point of punishment is irrational since it was not his actual fault. Therefore, a gentle mechanism such as rehabilitation, prevention, reformation

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8 Hallevy, G. (2013): 16-54
10 Ibid.
11 Conti, U. (n.d.): 237-238
13 Ibid
15 Ibid
16 Ibid
and educational program should be implied to substitute the deterrence and incapacitation in order to cure the society and prevent the occurrence of crime.\textsuperscript{17}

According to Munir (1980), the concept and purpose of punishment in Islam are preventive, reformative, retributive and deterrent in nature. The nature of the punishment can be implied through the practice of punishment in Islamic penology, as for example; stoning the convicted person to death and amputation of hand in certain ḥudūd cases reflects the deterrence nature of punishment in Islam. On the other hand, retaliation practiced in qiṣāṣ punishment implies the nature of retributive punishment. Whilst other aspects of punishment; i.e. preventive and reformative; can be seen through the implementation of taʿzīr punishment.\textsuperscript{18}

Basically, the punishment under Islamic law are different based on the classification of the criminal offences, that are; ḥudūd, qiṣāṣ and taʿzīr. The ḥudūd crime are regarded as the most serious crime with strict requirements prior to the execution of the punishments, and abominable conduct which lead to a grievous effect or result to the victim in particular, as well as to the society in general. The term ‘ḥudūd’ (plural: ḥadd) in Arabic means ‘the limitation’ which it implies the limit that are authoritatively fixed by Allah as prescribed in the Qur’ān.\textsuperscript{19} Likewise, it also means “boundary, limit, barrier and obstacle”.\textsuperscript{20} The Jurists are in disagreement on the numbers of ḥudūd crimes.\textsuperscript{21} However, for the discussion and scope of this writing, the ḥudūd crime is classified into five as agreed and accepted by all Jurists, that are: 1) Fornication and adultery (zinā), 2) Wrongful accusation of zinā (Qadhf), 3) Drinking alcohol (shurb al-khamr), 4) Theft (sariqah); and 5) Highway robbery (qat` al-ṭarīq).\textsuperscript{22}

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\textsuperscript{17} Ibid
\textsuperscript{18} Munir, M. (1980): 121-122
\textsuperscript{19} Shabbir, M. (2002): 48
\textsuperscript{20} Ibid
\textsuperscript{21} The Shafie School, for example; classified ḥudūd crime into six types which include theft, armed robbery, drinking alcohol, zinā, apostasy and qadhf. On the other hand, the Maliki school in opinion that ḥudūd crime are seven which al-bahgy is the most grievous crime and followed with apostacy, zinā, qadhf, sariqah, hirabah and drinking alcohol. The Hanafischool recognized six types of offence as ḥudūd crime, that are zinā, shrub al-khamr (drinking the fermented brew of grapes), al-sukr (drunkenness caused by consumption of any intoxicant), qadhf, sariqah and qat` al-ṭarīq (highway robbery). There is no express numeration of ḥudūd crime in any books of Hanbalischool. However, the writings of the school on ḥudūd exposed their unanimity on zinā, qadhf, shrub, sariqah, qat` al-ṭarīq and riddah as ḥudūd. See Ahmad, M. ’Ata al-S. S. (1995): 36-40 for further explanation.
\textsuperscript{22} Hallaq, W. B. (2009): 310-311
The form of punishment prescribed for each ḥudūd crime is different as the requirement, condition and method of proof for each crime is varies from one and another. As punishment for zinā, for example; forms into two different categories; that are one hundred lashes of flogging to the unmarried convicted adulterer or adulteress (ghayrmuhsan) and stoning to death for married convicted adulterer or adulteress (muhsan)\(^\text{23}\) since the word ‘zinā’ in Arabic refers to include both act of illegal sexual relations between two married persons and fornication or sexual relations between unmarried persons.\(^\text{24}\)Ibn Al-Qayyim, as cited in El-Awa (2000); highlighted the reason behind the difference of the ḥadd punishment for ghayrmuhsan (unmarried) and muhsan (married) is based on the fact that a convicted muhsan has the opportunity to find pleasure of legal sexual relations with his or her spouse as the similar opportunity is unavailable to convicted ghayr muhsan, and therefore the punishment for convicted ghayr muhsan is lighter than that of convicted muhsan or married persons.

In parallel to its severe punishment, the requirement for standard of proof in zinā case is also higher as compared to other form of ḥudūd offences and it must either be proved by the testimony of four male Muslim and trustworthy eye-witness or by the confession of the accused persons\(^\text{26}\) in which the former is almost impossible to be obtained.

In another example, the amputation of hand is provided as the punishment for theft (sariqah) as provided by Allah in the Qurʾān\(^\text{27}\) and all Jurists are in agreement that the right hand of the thief must be amputated from the wrist for the first time offence regardless of the gender of the convicted person and differs on the punishment on the subsequent convicted offence by the similar person. The majority of Jurist in Sunni schools, except Hanafi school; are in opinion that the thief’s left foot must be amputated for the subsequent committed offence by the similar person, whilst the Hanafi school is in view that the punishment of taʿzīr should be applied.\(^\text{28}\)

\(^{23}\) See Supra note 15: 99
\(^{25}\) See Ibid at 19.
\(^{26}\) See Supra note 15: 88
\(^{27}\) Sūrahāl-Māʿidah: 42
\(^{28}\) See Supra note 15:146-147
Because of the grievous nature of the amputation of hand in ḥadd punishment for theft, the conditions and essential requirements for an act of dishonestly or wrongfully took away another’s movable property from its owner possession must be accordingly and thoroughly satisfied in classifying the wrongful act as a theft offence within the context of ḥudūd crime. Shabbir, M. (2002) outlined the conditions, among others; the thief must be a sound adult person (mukallaf) with the intention to steal the property. In addition, the property must be of a prescribed value (nisāb) and its nature must be movable and illegally or secretly taken from the possession of its owner. Equally important, the property must also be under custody and the act was voluntarily committed by the thief without any force or duress.\(^{29}\) On the similar ground, the conviction of theft under ḥudūd crime must be based on either the testimony of witnesses or by the confession of the accused accordingly required under the Islamic law of evidence.\(^{30}\)

Apart from ḥudūd, qisāṣ(retaliation) is a form of punishment under Islamic criminal law for intentional murder, voluntary killing, involuntary killing, intentional physical injury and unintentional physical injury. For a convenient reference, Bassiouni, M. C. (1982) categorised the offences under two main category, that are 1) Homicide, and; 2) Battery. As the term ‘qisāṣ’ means “equality” or “equivalence”, it significantly shows the mechanism of qisāṣ punishment that a person who committed and found guilty with the offence must be punished in the same way or means that he used in killing, violating or harming the victim.\(^{31}\) The prescribed punishment for qisāṣare either the qisāṣi.e. the equivalent infliction of physical harm against the offender, or the payment of diyah that is designed to compensate the victim.\(^{32}\) In specific, the qisāṣ or retaliation of punishment only applicable and inflicted in the cases of wilful murder and intentionally causing injury, whereas the payment of diyah is designed to unintentional killing or unintentional causing bodily harm to others.\(^{33}\) However, as the Lawgiver; Allah laid diyah and forgiveness to take priority over the infliction of the

\(^{29}\) See Ibid at 128-144 for further explanation on the conditions and essential ingredients for theft (sariqah) offence.


\(^{32}\) Qur’an, Al-Mā’idah:45, Al-Nisa’: 94 and 135, Al-Baqarah:186

\(^{33}\) The rules, concept and principle regarding qisāṣ offence and punishment can be referred further in Supra note 15 at page 270-311
qiṣāṣ punishment.\textsuperscript{34} This preference illustrates the beauty of the punishment which works on the material compensation and spiritual installation as the mechanism. In contrary to the retributive and retaliative nature of the hudūd and qiṣāṣ punishment, Ibrahim (2000) viewed that they are aim to prevent the occurrence of crime in the society, hence; they are not conclusively punitive\textsuperscript{35} since the interest of the society is the main concern in the eye of Islamic law as compared to an individual interest.

Another types of criminal offence in Islamic law is taʿzir which attracts various form of punishment based on the discretion of the Judge since the infliction and mechanism of taʿzir punishment is not specifically provided in the Qurʾān and Sunnah.\textsuperscript{36} The taʿzir punishment is discretionary, reformatory and deterrent in nature.\textsuperscript{37} According to Shabbir, M. (2002), taʿzir punishment is based on the mixed theories of deterrent and reformatory since the term “taʿzir” is originated from the verb “azar” in Arabic; which means “to prevent, to respect and to reform”. Hence, the dual intention of the punishment is meant to prevent the offender from repeating the similar crime as well as to reform him.

In contrary to the nature and objective of the punishment in the Islamic criminal justice system, they were commonly criticized and alleged by the Westerners as uncivilized, barbaric and illogic. However, the value and wisdom behind the punishment is Islamic criminal justice in Islam is unable to be appreciated without deep understanding on the concept and principles of maqāṣīd al-Sharīʿah as shortly discussed in Part I of this writing. The logicalness of the punishment in Islam can be based on the understanding of why a certain punishment is provided in Islamic criminal law and how an offender is tried or proved to be guilty for the offence based on the principles of evidence in Islam in the light of maqāṣīd al-Sharīʿah. Therefore, in spite of prejudice; the “barbaric” nature of amputation of hand for theft in ḥadd punishment, for example, must be analyzed and viewed based on the true knowledge on Islamic principles as a religion and system of life.

In addition, Islamic criminal law and punishment work on the philosophy of ‘prevention is better than cure’ and punishment form as a last resort in responding to a criminal act of an offender. Because of the reason, the Islamic teaching prioritizes the

\textsuperscript{34} Bassiouni, M. C. (1982): 205  
\textsuperscript{35} Ibrahim, A. M. (2000): 582  
\textsuperscript{36} See Supra note 15 at page314  
\textsuperscript{37} Siddiqi, M. I. (1985): 158-158
principle of good morality or *akhlāq* in governing the relationship between a Muslim with other human beings since it is a nucleus to a social and economic system. In reality, a criminal act or offensive conduct can be restrained or controlled when the social and economic needs of a person in a state are fulfilled. For example, Islam dictates certain rules concerning the relationship between the opposite genders, segregates both man and woman in certain activities, prohibits *khalwat* as well as highly promotes lawful marriage with the aim to prevent the commission of offence relating to sexual and decency of a person.

### 3. The Concept and Significance of Restorative Justice in Islam

In spite of the discussion on the concept and nature of punishment in the Part II of this writing, the concept of restorative justice is regarded as the most prevail and effective mechanism in eliminating and preventing crime whilst at the same time intended to restore the emotional and material loss of the victims and their family.\(^{38}\) In contrary to the retributive justice which more focused on the criminal act of the offender, restorative justice process actively involved the offender, victims and society in the criminal process as both victims and society are affected with the crimes committed by the offender.\(^{39}\) In other words, restorative justice indirectly lays on the concept of restitution where the offender not just accountable for his act or offence, but also responsible to remedy the injury or restore the condition as before the crime is committed.

For that reason, restorative justice may play its role at any stages of the criminal process either during pre-trial process, during court prosecution as well as during sentencing process.\(^ {40}\) In addition, it can be applied by all relevant agencies involved in the criminal justice process.\(^ {41}\) On this point, Umbreit(2002) listed the examples or mechanism which restorative justice may be applied through the policies and practices of a state or community, that are: “victim support and advocacy, restitution, community service, victim impact panels, victim-offender mediation, circle sentencing, family group conferencing, community boards

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\(^{40}\) Daly, K. (2008): 12

\(^{41}\) *Ibid*
that meet with offenders to determine appropriate sanctions, victim empathy classes for offenders, and community policing.”

As restorative justice is regarded as “a more victim-centered criminal justice system”, therefore; the mechanism of restorative justice is flexible and may include compensation, conciliation and pardon since the victim is actively and directly involved in the criminal process. Despite of the flexibility nature, Qafisheh (2012) noted that restorative justice is impracticable to be exclusively applied or operated in all offence, to all persons or victims and in all communities.

In analyzing the concept and models of restorative justice mechanism, it is interesting to highlight that the similar concept and mechanism has been practiced within the Islamic criminal justice system. It can be viewed from the context of qisāṣ punishment where the priority is given to victim’s rights and options even though it also provides corporal punishment (as discussed in Part 2 of this writing). In qisāṣ offence, the victim has a significant role during the prosecution and sentencing process where he may determine the method or option of punishment imposition to the offender. The victim or the victim’s family (in case of homicide) may insist upon the imposition of qisāṣ or retaliation punishment on the offender if he is conclusively proven to be accountable to the offence. Alternatively, the victim may demand the payment of diyah as the compensation or waive his rights by forgiving the offender and leave him unpunished. In a modern perspective, the practice and role of the victims in qisāṣ punishment reflect the idea and practice of restorative justice in the victim-offender mediation, circle sentencing and family group conferencing as commonly practiced in restorative justice today since family members or heirs of the victims in qisāṣ offence also play their role during the process.

As Islamic law is directly founded based on divine sources and designed to govern both the relationship between human beings with his Creator (Allah) and human beings with other individual people or society; Islam strongly encourages and recommends Muslims to

43 Braithwaite, J. (2000): 328
44 Qafisheh, M. M. (2012): 488
45 See supra note 29
46 See supra note 37. Also see Hascall, S. C. (2012): 42-46 for the example of restorative justice policies and practices as applied in some selected Western countries.
repent.\textsuperscript{47} In this respect, it can be directly linked to the rehabilitation process as a mechanism to reform the moral character of the offender, to reform his integration and to restore the tranquility of the society as recognized in the modern concept of restorative justice.\textsuperscript{48}

As restorative justice views the harm resulted from the committed offence should be a teachable lesson to the offender, therefore; he must be encouraged to reform himself in order to be part of the society. For that purpose, the community and religious institution plays a significant role in developing a moral standard in the society.\textsuperscript{49} Hence, the rehabilitation process in the concept of repentance as encouraged by Islam is recognized as a form of the offender reintegration.

4. Restorative Justice in Malaysian Syariah Court Practice: An Observation on the Selected Cases

The constitution and administration of the Syariah Court in Malaysia is governed by the Federal Constitution which specifically listed under State List of the 9\textsuperscript{th} Schedule of the Federal Constitution. It have jurisdiction over Muslim concerning both civil and criminal matters. Each States in Malaysia enacted its independent Syariah Enactment as the jurisdiction and administration of Syariah Court is governed by each individual States, except for the Federal Territories which legislated by the Parliament.

By taking the Syariah Criminal Offences (Federal Territories) Act 1997 as an example, the Syariah criminal offences in Malaysia are basically categorized under the offences relating to ‘aqidah (including wrongful worship and propagation of other religious doctrine other than the religious of Islam), offences relating to the sanctity of the religion of Islam and its institution (among the examples are insulting the religion of Islam, failure to perform Friday prayer, disrespect for Ramadhan etc.), offences relating to decency (such as incest, sexual intercourse out of wedlock, liwat, khalwat etc) as well as other offence such as destroying or defiling mosque, qazaf and abuses of halal sign). However, by virtue of the Syariah Courts (Criminal Jurisdiction) Act 1965, the sentencing power of the Syariah Court is

\textsuperscript{47} Qur\textsuperscript{ā}n, al-\textit{Nār}:5, Al-\textit{Mā‘dah}:34 and 39, Al-\textit{Nisā‘}:16-17
\textsuperscript{48} See Zehr, H., & Gohar, A. (2003): 57
\textsuperscript{49} See Claassen, R. (n.d.) at http://peace.fresno.edu/rjprinc.html
limited to only 3 years imprisonment, a RM5000 fine and 6 strokes of whipping. Therefore, it is important to note that the offence relating to homicide and causing bodily injury or harm is governed under the Penal Code of Malaysia and falls under the jurisdiction of Malaysian Civil Court.

As far as the discussion on restorative justice is concerned, this Part refers and analyzes certain selected cases decided by the Syariah Court in Malaysia in order to understand the extent of its application in Syariah Court practice as decided within the year of 2010 – 2013. In the case of Pendakwa Syarie lwn.Kartika Seri Dewi Binti Sukarno, where the accused person was charged under Section 136 of Administration of the Religion of Islam and the Malay Custom of Pahang (Amendment) Enactment 1987 with consuming intoxicating drink and pleaded guilty. The Syariah High Court of Pahang decided that she was liable for RM5000 fine and six strokes of whipping. Since they were the maximum punishments for fine and stroke, the Judge highlighted the purpose of the punishment is to correct and to reform the accused as well as to refrain the society from committing the similar offence as ordained by Allah.

The case of Muhammad Faris Bin Ismail & Shahidah Binti Abdul Wahab lwn.Ketua Pendakwa Syarie Negeri Melaka is one of the examples of decided cases on offences relating to decency. The Appellant 1 and Appellant 2 were charged for khalwat offence under Section 53(1) and (2) of Syariah Criminal Offences Enactment 1991. Both of the Appellant 1 and Appellant 2 were respectively fined with RM3000 and RM2000, and 3 days imprisonment. The Syariah Court of Appeal, however; set aside the order for imprisonment and only retained the amount of the fine as the punishment. However, it is interesting to

50 The provisions on the sentences are commonly known among the authors and practitioners in Islamic law as “3-5-6 Principles”.
51 [2010] JH 30 BHG.2 269
52 [2011] JH 32 BHG.1 45-67
53 Other example of simila nature of punishment can be referred to the case of Muhammad Ridhwan B. Tokiri & Seorang Lagi lwn. Ketua Pendakwa Syarie, JH 34 BHG.2 1433 H 213; where the Appellants were charged for khalwat under Section 27(a) and (b) of Syariah Criminal Offences (Federal Territories) Act 1997 where the Syariah Appeal Court retained the fine amount, RM3000 and set aside the punishment of 7 days imprisonment imposed by the Syariah High Court. Similarly, the Syariah Subordinate Court imposed a fine amounted to RM2000 and 1 month imprisonment to the offender in the case of Samsudin b. Md. Hasihak lwn Ketua Pendakwa Syarie JH 34 BHG.2 229 for the offence of khalwat where the similar punishment was retained by the Syariah High Court. Similarly, the punishment for the offence of performing sexual intercourse out of wedlock can be referred to the case of Ketua Pendakwa Syarie WP lwn Junaizulhisham b. Juhari & Seorang Lagi [2013] JH 35 BHG.2 221-234 and the case of Jumadi b.
refer to the case of *Pendakwa Syarie Wilayah Persekutuan Iwn Siti Nurazniza binti Kamaruddin*\textsuperscript{54} in comparing the punishment on the similar nature of offence with the former case.

In the latter case, the accused was charged under Section 23(2) of Syariah Criminal Offences (Federal Territories) Act 1997 for committing sexual intercourse out of wedlock within the period of January 2008 – December 2008 when her age was within the range of 15-16 years old. She pleaded guilty and was fined with RM2,7000. However, the Court ordered the accused to live with a good conduct and behaviour for 6 months under the observation of her close family, and to present before the Sulh Officer for counseling sessions for each 3 months. Even though the order for the counseling session was made based on the capacity of the accused as a young offender by virtue of Section 128 of Syariah Criminal Procedure Enactment (Federal Territories) 1997, it is important to highlight that such ‘punishment’ is parallel with the concept and practice of restorative justice.

In addition, the case of *Sumathi A/P Maniam Iwn Majlis Agama Islam Wilayah Persekutuan*\textsuperscript{55} regarding the application of denunciation from Islam can be viewed as an example of the application of restorative justice, where the Syariah High Court rejected the application and decided that the Plaintiff is a Muslim since the date she converted from Hindu. The Court ordered the Applicant to repent and learn the religion of Islam so as to instill its teaching into practice. Besides that, the Court also ordered the Plaintiff to attend counseling sessions for 6 months period.

5. Finding and Analysis

The restorative justice is practiced within the Islamic criminal justice system, especially in the implementation of *qisās* and *taʿzir* punishment. As far as the application of restorative justice in Syariah Court practice in Malaysia, it can be observed that certain policies are consistent with the fundamental elements of restorative justice (as discussed in Part 3 of this writing). For example, the Syariah Criminal Offences (Federal Territories) Act

\textsuperscript{54} [2013] JH 35 BHG.2 234-249. The Syariah Appeal Court reduced the fine amounted RM5000 imposed by the Syariah Subordinate Court to RM1500 in the former case and the Syariah Hight Court retained the fine amounted to RM3000 as decided by the Syariah Subordinate Court and set aside the 4 strokes of whipping punishment.

\textsuperscript{55} [2011] JH 32 BHG.1 123-134

[2013] JH 36 BHG. 1 143-159
and Syariah Criminal Offences (Selangor) Enactment 1995 grant the power to the Syariah Court in deciding or determining the rehabilitation center for the purpose of the Acts, particularly to provide a relevant and practical place for the offender to undergo the rehabilitation or counseling process. In specific, the provisions in both Act and Enactment are designed for the offence relating to ‘aqidah and decency where the inner self of the convicted person is naturally need to be reform spiritually and it is interestingly to note that this objective is basically parallel with the foundation nature of the religion of Islam as the religion of fitrah.

With due regards to the facts of each cases, it is observed that the “3-5-6 principles” are widely applied by the Malaysian Syariah Court in deciding the punishment for each offence. Therefore, the gravity of the punishment in the cases are relatively similar where the offender are mostly be fined and rarely be whipped or imprisoned. To serve the deterrent purpose of punishment and to restore the peace in the society, it is suggested for the Court to ‘step a distance’ from the principle of judicial precedent and exercise its discretionary power to apply the principles of restorative justice since the nature of the decided cases are the offence related to the sanctity of the religion of Islam and the offence relating to decency in which the society will be directly or indirectly affected.

6. Conclusion

As a religion that promotes justice in every angle of human life, the concept and practiced of restorative justice is not a new concept in Islamic criminal system. It is practiced within the Islamic criminal justice system through the implementation of ḥudūd, qisās and taʿzir punishment. As far as the practice of restorative justice in Syariah Court practice in Malaysia is concerned and observed, this writing finds that the “3-5-6 principles” are widely applied by the Court in deciding the punishment for each offence.

Therefore, to restore the integrity of the offender and the peace of the society, it is important to widely apply and practice the principle of restorative justice in deciding the punishment in Syariah criminal offences in Malaysia. Hence, it is advisable for the Malaysian

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56 See Section 54, 55 and 56 of Syariah Criminal Offences (Federal Territories) Act 1997
57 See Section 53 and 54 of Syariah Criminal Offences (Selangor) Enactment 1995
58 See R. Muhammad (2015) for the rehabilitation and counseling process in the case of offences related to ‘aqidah, particularly in the case of renouncement from the religion of Islam.
Syariah Court to ‘unknot’ the decision of punishment from the principle of judicial precedent which resulted to a relatively similar nature of punishment. It is also important for the Court to use his discretion and do not limit the punishment within the “3-5-6 principles” as provided in the existing law in order to ultimately apply the principles of restorative justice. Besides that, the importance of the principle and awareness of the purpose of restorative justice is need to be enhanced among the practitioners and judiciary officers in Malaysian Syariah Court with the hope that the offender is not just being punished, but also be reformed and reintegrated spiritually.

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*Sumathi A/P Maniam* lwn *Majlis Agama Islam Wilayah Persekutuan* [2013] JH 36 BHG. 1 143-159
ABSTRACT

The phenomenon of child soldiers had become worldwide concerns for humanitarian advocates and child rights activists alike as it robbed children of their precious childhood and considered as a modern international humanitarian and human rights crisis. It occurs in various parts of the globe, from Africa and Asia, to Europe and the USA. It is a common misconception that only non-state armed groups or rebels groups deploy child soldiers. Government also has been doing the same by recruiting under-18 years old into government national armed forces. Different reasons have been cited for the children’s’ involvement in the armed conflicts and it varies in each countries. The truth remains that these children being soldiers in an armed and hostile situations have gone through tough times and it made a deep impact on these child soldiers emotionally and psychologically. Although there is in existence impressive international instruments, which supports efforts to stop using children as soldiers, the constant question is as always in their effectiveness towards eradicating this practise. As an initial study on the child soldier the methods used are by way of doctrinal analysis of statutory provisions, judicial decisions and relevant government policies. This article attempts to provide a general overview on the issue of children in times of war as child soldiers, the reasons for such occurrence and reviews the various international legal treatises that regulates on the use of child soldiers.

Keywords: Child soldiers; child in armed conflict; Convention of Child Right

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1. Introduction

Disturbing images of children bearing arms and other military weapons in Liberia, El Salvador and of teenage Tamil Tigers posted in the media and online, has increases global awareness on the use of children in warfare. The images depict these children in army uniform and in normal day clothing. It creates an irony of the child’s life; as Amnesty International rightly suggests they are old enough to kill and be killed but too young to vote.

There is no authoritative or exact data on the number of children involved in armed conflicts and serving as soldiers. UNICEF’s estimation in 2005 of almost 250,000 children currently serving as child soldiers in armed conflicts around the globe was more of a rough estimation of the children involved in the armed conflicts globally due to the increase warfare in many countries. The rough figure represented by the Human Rights Watch Report 2004, it is a possible assumption that the number of child soldiers active in the current armed conflict worldwide is about 300,000 and remains constant at all times. Nonetheless, this cannot be ascertain as the correct global figure as the real proper data on child soldiers are unknown for a number of reasons such as lack of proper recording of birth records or falsification of it in certain countries, and inadequate mechanism to verify the age of a new recruit’s. The Coalition to Stop the Use of Child Soldiers which is the predecessor to Child Soldiers

International, no longer provides estimated figures on child soldier since 2008. However, there is a sense that the numbers have fallen over the past decade, as conflicts in some countries have ended and demobilization agreements have been reached. Scarborough, of Child Soldiers International however remarked that the usage of children in armed conflicts is still a severe and persistent problem as presently seven national armies and 50 armed groups were listed by the United Nation Secretary General as parties that recruit and use children in as members of their armed forces. As such, no one can precisely determine the exact number of child soldiers\textsuperscript{5}. The minimum age limit in for a child soldier can be as young as eight years old as evidenced in the recruitment of paramilitaries in Columbia\textsuperscript{6} and it transcends the gender gap, comprising of both girls\textsuperscript{7} and boys.

Who is a child soldier? The Paris Principles on the Involvement of Children in Armed Conflict 2007 defines a child soldier as:

“A child associated with an armed force or armed group refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes.”\textsuperscript{8}

The description by UNICEF includes any person under the age of 18 who becomes a member of “a regular or irregular armed group in any capacity”\textsuperscript{9}. The involvement of such person includes children who take part in combatant and non-combatant actions. A combatant


\textsuperscript{7} Though both gender are involved in this phenomenon, case study carried out shows that girls are more affected, deeply and badly than boys are. See, Fox, M. 2004. Girl soldiers: human security and gendered insecurity. Security Dialogue, 35, 465. for further details.

\textsuperscript{8} Text of the Paris Commitments and Principles can be found in http://www.unicef.org/protection/57929_58012.html (January, 2016)

action would involve the carrying of arms and being an active participant in a war-like situation for example as human mine detectors, whereas a non-combatant situation is where a child is employed for example as cooks, messengers, porters and other domestic tasks which includes girls recruited for sexual purposes and forced marriages\textsuperscript{10}. This definition includes activities, which are military related, any sort of preparation for ‘military preparedness training’ and other activities in support capacity - both direct and indirect participation in an armed conflict.

Child soldiers who are on active service encounter consequences equivalent to an adult soldier – possibility of being injured or maimed, captured or death itself. They are punished with imprisonment for desertion or upon capture. In fact, Maslen argues that their delicate age make them more susceptible to sickness and malnutrition brought by the hardship of military life\textsuperscript{11}. Their physical differences to an adult become more apparent in military life resulting in their disproportionate misery and suffering compared to their adult counterpart. The fact that they receive little training or none at all before they were sent to the front line, make them more expose to dangers due to their inexperience.

2. **Child Soldiers – Why Does It Happen?**

Scholars\textsuperscript{12} pointed out that children involvement in wars or armed hostilities either direct or indirectly, have begun a long time ago. From the time of the Middle Ages where young boys are trained as squires assisting knights in preparation of battles to the time of World War II where children are recruited as active participants in military like activities\textsuperscript{13} though not as an active combatant. They no longer become mere bystanders or civilian victims of the wars. However, the accelerated number of child soldiers after the end of World War II and especially so after the end of Cold War has taken it to a new extreme dimension.

\textsuperscript{10} Ibid.

\textsuperscript{13} Such activities include taking watches or guard duty, relaying of information to military personnel, helping in the cleaning of arms.
Although the practise prevails in developing countries, nonetheless, it is a widespread trend in countries suffering from political, economical, and social instability and approximately half of its population are children. Fox claims that this new trend in child recruitment in armed conflicts promotes the notion that children are ‘fair game’ and ‘expendable commodities’ in war. This diminishes any requirement for special rights and protection for them. The term armies of children can be aptly applied to the present increased in child involvement in armed conflicts globally.

3. Root Causes for the Use of Child Soldiers

In our clamour to regulate the issues of child soldier we also need to ascertain the causes for the drastic increase in child soldiering. Collmer suggested two elements that contributed to this firstly, the changing nature of warfare itself and secondly the predominant increase and availability of weapons. De Berry further advances the idea that the incident upsurge whenever a state’s legitimacy or power is under crisis and leads to manifestation of civil intrastate wars rather than inter state collision.

Wars fought before the Second World War can be categorised as “traditional” or “conventional” wars. These wars were between nation states where there were clear and distinguished ‘role’ between combatants and civilians. Troops were mobilised by centralised state onto another state for political and territorial motives, with a definite purpose towards the end, targeting the armies of the opponents rather than just anybody crossing their path. The devastation and destruction inflicted on the life of civilians undoubtedly remains the same but children during these times were recognised as civilians’ non-combatants who deserve special attention and protection along with women and the elderly.

14 Countries that are known for having child soldiers in its ranks are African counties such as Rwanda, Liberia, Democratic Republic of Congo; in South East Asia – Myanmar, Philippines, and Indonesia, in the Middle East – Yemen, Iraq, Iran, Israel and Afghanistan; in South America – Columbia, Mexico, Peru; in Western Europe – Turkey, Yugoslavia, Uzbekistan.
By the end of the 20th century and post Cold War period, the nature of warfare went through tremendous shift. New types of wars are being fought. These contemporary wars are not confined only to some part of continent but rather widespread as what occurred in Bosnia-Herzegovina, Chechnya, El Salvador, and Columbia. These ‘new wars’ as classified by the scholars distinguish itself from the ‘traditional’ wars by their very nature. It blurs any distinctions between traditional concepts of wars and organised crime which result into an organised and systematic use of mass violence and large violations of human rights. Initiated always, in most cases, as an act of rebellion against a colonial or totalitarian state it can be termed as ‘anti-regime’ or ‘autonomy and secession’ wars. Among reasons cited for this new type of organised violence are the inequalities in economy and social structures that resulted in poverty among certain groups in a state. These new wars are further heightened if the armed forces in such states split and join as opposition rebel groups, resulting in a growth in organized crime, paramilitary groups, and the ready availability of weapons and mercenaries. Collmer points out that these new types of wars present an ‘asymmetric structure of conflict’ between a ‘variety of non-state-actors’ and the law enforcement arm of the state. These actors, a mixture of fighters, with weak military capabilities employ techniques commonly used in guerrilla warfare to inflict violence and avoid direct confrontation with the national armies. They also tend to retreat to their territorial sanctuaries to regroup and reinforce their forces resulting in a longer duration of armed conflicts such as in Afghanistan, Sudan and Ethiopia.

How does these prolonged new wars relate to child soldiers? The new wars are not carried out in specific battlefield as in the traditional war but rather erupted and disrupted in the middle of a civilian daily life, without any warning. Creating a dangerous environment for children, these long and mass conflicts have separated children from parents or made them orphaned, fending for themselves. Faced between starvation or death and life in the militia or national armed forces, many children choose the latter as being the safer alternative. This will be a more rational choice for the child in such circumstances because at least he will be given protection in exchange for his commitment to the group.

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The long duration of these conflicts such as evidenced in Sudan which had been in conflict since 1956, resulted in thousands of casualties and causes shortages in adult manpower. Children are recruited to fill these gaps enabling these conflicts to prolong. From the financial perspectives, the financial ability of the actors in these wars is limited and the demand for cheap fighters has escalated the numbers of child soldiers in the battlefield all over the globe. Children are perceived as the cheapest and expendable source of labour making them the ultimate target. Children who have been living in these war-torn zones all their life, lack educational facilities that can equip them with other life skills besides soldiering or military training, would readily join these armed groups for their own survival.

The second factor that contributes to the increase of child soldiers in the battlefield is the availability and accessibility to small weapons and arms. In the era of advanced technology, weapons can be procured easily through illegal networks of international organised crime. Collmer claims that the small weapons range from “simple handguns to armour-piercing bazookas” and of relatively cheap price. They are not new weapons but rather used goods that proliferates the global market, courtesy from post Cold War period and reports are they are circulating in these conflict areas. These weapons, which require minimal training to use, are lightweight and are manageable in the small hands of the young soldiers. The Machel Report observed that even a small boy of 10 would have the strength to assemble and use an AK-47. The new wars make full use of these small arms rather than large scale military weapon as they require less logistical arrangement and financially sustainable. The abundance of small weapons and their very nature have facilitated and contributed to the growing number of child soldiers, as many are able to utilise them.

4. Classification of Recruitments

Recruitment of child soldier can be either voluntary (enlistment) or by force (conscription). Recruitment includes accepting volunteers into armed forces but does not cover children studying in military schools but not being part of the armed forces. Voluntary and consensual enlistment of a child in any armed forces will preclude him or her from being

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19 There are reports that weapons known to be used in Lebanese civil war had been transferred to Croatia. See Collmer, p.5.
20 The Machel Report, at 27.
protected as a victim of child trafficking under the trafficking statutes\textsuperscript{21}. Enlistment denotes a more acceptable act of recruitment in the sense it requires the child to agree to it rather than being forced to it. It also embraces the concept of voluntary enlistment by the government national army of children under the age of 18 years. The Global Report 2008, compiled by the Coalition Group reported a decrease in number of countries enlisting children under-18 to front line combat. Even so, 14 countries still recruits children into auxiliary forces linked to their national armies, or into local-level civilian defence groups established to support counter-insurgency operations, and militias and armed forces acting as proxies for government forces. Children also has been trained as spies and other intelligence gathering purposes\textsuperscript{22}. The international community through the work of many NGOs and human and children’s’ rights activists has been advocating the ban on under-18 from recruitment in any way into any armed forces, government and non-government alike. Some countries such as UK, US and Pakistan argue that children as young as 16 should be allowed to volunteer themselves into the national armed forces even though are not allowed to be in the front line. The debates still rages as each country has their own reasons, economic, political, and social for such advocacy.

Tiefenbrun argues that the voluntariness of a child enlisting himself/herself in an armed forced is laced with doubts\textsuperscript{23} as there is always an element of coercion. She argues that the environment in which a child lives plays an important part in ascertaining whether such decision is made on pure voluntariness basis or not. Factors such as parental and family background, peer pressures, lack of intellectual capacity and maturity, lack of education, illiteracy and misinformed can influence a child to make a choice of which he/she is not well informed of neither fully understand.


\textsuperscript{22} Global report on Child Soldier 2008, pp.15.

The word conscription of child soldier connotes a bad image of children being forced into such situation. The countries of the African continents has been cited as ‘hot-spots’ for forced and abusive recruitments of young children into warfare, nonetheless the problem is actually a global one. Tales of forced recruitment into armed forces consisted of young children being abducted, intimidated, or threatened with harm upon themselves or immediate family members in case of refusal. Others are forced out of desperation, a survival tactic – join or be killed. Children, who try to escape but failed, are severely punished or even killed as a warning to others.

5. Factors Propelling Children joining the Armed Forces

Reported incidents tell of tales of children being recruited form as young as 8 years old. Most common age for recruitment starts from the age of 10 and continues until the age of adolescent. It is not only confine to male but includes female alike. Human Rights Watch estimated that one third of the child soldiers in Uganda, El Salvador, and Ethiopia are female. Children become a child soldier for physical, psychological, and social reason.

Most of reported occurrence of a child’s participation in armed forces are involuntary usually either through force, kidnapped, abducted, coercion, deceit or intimidated. Nonetheless, there are also instances where children joined these forces with their own free will, technically.

These are cases where children have to support himself and his family – to fulfil the physical needs. When there is scarcity of meal and work, the prospect of being given a small sum of salary and food is compelling enough for a child to be part of the armed group. This will at least ensure his family is not going to starve to death. Orphans, streets children, and children separated from family members are also likely candidates. The desperation to live and survive makes them choose one evil over another.

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24 Interview with ex-child soldiers of Rwanda, Sierra Leone, Liberia and the Lord resistance Army of Uganda testify to this. They told of being abducted on their way to school, from orphanages or from their own bed and watching their family members being killed or raped by their abductees in the process. Reported incidents of such nature also occurred in Kosovo, Sri Lanka and Myanmar.

25 [www.hrw.org/campaigns/crp/index.htm](http://www.hrw.org/campaigns/crp/index.htm)
Psychological reasons can be as compelling as the physical needs. Children who have been subjected to violence and torture, living in uncertainty and fear desires to be in control of situation rather than being dictated by helplessness. By joining a side and holding a weapon, being proactive instead of just waiting to be the next victim, it offers a feeling of greater safety to these young people. This is true in the case or youth joining rebel forces in El Salvador in the 1970s-1980s after being subjected to increase torture and rampant death target by government army. By being in the army also allows a young child to exert power and control to those in authority who have mistreated him/her. Revenge also motivates the child to inflict pain upon those who had done the same on his/her family member, this is especially true in cases where government troops carry out rampant looting and massacre in their attempt to crushed rebel forces. This would make a young child with limited education and understanding of the reasons for such mistreatment, to take side with the fighting group.

Social structures may make a child feels that he/she is doing something worthwhile by joining the armed group. It brings honour and nobility not only to them but also to their family, community and in fact country. Taking arms in protection of one own religion, ethnicity, and social groups signify loyalty and dedication to one’s cause. Such is the case of the Afghanistan war against the Russian, and the Palestinian youth attacking the Israeli soldiers. In the Teso region of Uganda, the young fighters, take arms due to the destruction of their livestock and join the army to regain wealth and resources so that they could regain their social standing and starts their own family.

Every child’s story and reason for joining the armed groups differs widely from one another all over the globe as the nature of arm conflicts differ in each country. Their culture, family history, economic and social structure influences of these child soldiers reflect differently on their reason to join the armed groups. However, one common thread for their engagement with the armed groups is the breakdown of a political community and its protection over them. There is always the scenario of a broken government and imbalance of power and wealth within the territory, creating arbitrary laws and destroying their life as a child.
6. International Laws Regulating Child Soldiers

Human rights (directed to the States) and humanitarian laws (applies to both state and non-state actors in certain circumstances) are the two main branches of international law governing this issue. The international legal framework for the protection of children is not condensed in one specific treaty but rather constitched in many specific and general treatises in all spheres of international humanitarian law. The law and practise of each state also plays a vital role in regulating protection of children at international level. Though the various treatises on general human right and humanitarian law explicitly talks about the rights and protection to be afforded to a child, no reference is made to the category of a child soldier. The two just do not go together. Provisions in the international regulations are for children who are victims of war – those who are captured, not those who fought as soldiers.

As early as the 1970s, the international community has recognised the need to tackle this issue through the vaguely worded provision of the Additional Protocols to the Geneva Conventions of 1949. From then on, child rights’ supporters have worked tirelessly towards the prohibition of recruiting children as members of any armed forces in whatever capacity they might be. The success of a group of NGOs, the Coalition to Stop the Use of Child Soldiers (predecessor to Child Soldiers International) in putting pressure on the international community to agree to a minimum age ban in recruitment of child soldiers can be considered as another winning milestone in efforts concerted to eradicate this matter. This article will highlight a few of those treatises which is of particular relevance in regulating the issue of child soldiers, namely the Geneva Convention of 1949 and Additional Protocols, the Convention on the Rights of Children 1989, the International Labour Organisation Convention No. 182 and the Rome Statute of International Criminal Court 1998.

The Geneva Convention and Additional Protocols

The Geneva Conventions of 1949 and their Additional Protocols forms the basis of international humanitarian law. The Conventions has now considered as customary international law regulating states’ relations in times of international armed conflicts. Geneva Conventions 1, 2 and 3 is an improvement on selected conventions concerning the treatments to be afforded to casualties and prisoners of wars and captured military personnel. Geneva Conventions 4 on the Protection of Civilian Persons in Time of War recognises the minimum
protection for children as non-combatant regardless of their age and their rights, maintenance and entitlements. However, no mention is made to the prospect of armed minors. Geneva Additional Protocols I (AP1) and II (AP2) are supplements to Geneva Conventions, dealing with international and non-international armed conflicts.

AP1 is more extensive in nature, consisting of 102 articles, is formally adopted on 8 June 1977. It relates to the Protection of Victims of International Armed Conflicts, reaffirming and improving the protection provided to the victims. Of particular relevance is Article 77 of AP1, which went further than Geneva Conventions 4 by prohibiting recruitment of minors into the national armed forces if they are less than 15 years of age and should not take a direct part in hostilities. Regardless of that, if the under 15-years do take part in such hostilities and they were captured, they are to be provided protection in accordance with Articles 77 (1), (4) and (5) of AP1.

AP2 consists only of 28 articles and is more limited in application. It further clarifies the protection of victims in non-international armed conflicts. It encompasses all conflicts between well-organised and well-armed forces in state meaning civil wars. Article 4(3) (c0) stipulates clearly that no children under-15 years of age can be recruited in armed forces or groups nor take part in hostilities. The following provision Article 4(3) (d) further reiterates the provisions in Article 77 of AP1. Though it seems as if AP2 lay down a stronger measure towards child protection in armed conflict, prohibiting all forms of direct and indirect participation of under 15-years old child - its application is restrictive to non-international armed conflict that fits the specific criteria.

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27 It has been argued that Article 77 has actually classified minors into two separate groups of under-18 and under-15, where only under-15 are directly prohibited from directly involving themselves from any armed conflict whilst under-18 group are not so. The phrase “feasible measures” used in Art 77 (1) limits the capability of the state meaning the state or non-state can refrain from doing so if they are unable to carry out any measures. The word direct participation limited the applicability of the restriction earlier indicated. For elaborate discussions see Ibid, Breen, C. 2007. When is a child not a child? Child soldiers in international law. Human Rights Review, 8, 71-103. and Fox, M. 2005. Child soldiers and international law: Patchwork gains and conceptual debates. Human Rights Review, 7, 27-48.
28 Ibid, Breen, pp. 78-79, Fox, pp.35-36.
Convention on the Rights of Children (CRC) 1989

This is the first significant international instrument that specifically applies towards protection of children human rights under a wide range of issues and has been universally ratified to date by almost every country albeit with certain reservations on the terms. The CRC as a human rights document has limited application, only towards the States in an armed conflict excluding non-state armed groups. Article 38 of the CRC relates directly to the issue of children in armed conflict wherein it specifically prohibits an individual under 15-years from taking direct part in hostility. The state is to take all ‘feasible measures’ to ensure such compliance. This Article merely echoes the stand taken in AP 1 and AP2 and fails to address the same issue as in the previous Protocols. Voluntary recruitment, indirect participation, and feasible manner – are the vague phrases that remain unsettled and subjected to too many interpretations.29.

Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict is currently the most specific international legal treaty that prohibits the employment of child soldiers. It is ratified by 120 states in 200730 and consisted only 13 articles. It raised the previous age limit of children’s involvement in hostilities from 15-years as set by the CRC and the Geneva Conventions 1949 and Additional Protocols of 1977 to 18 years. This includes the 18-years age limit for compulsory recruitment and direct participation in conflict and raising the minimum age limit for voluntary recruitment to be above 15-years31. It gives birth to the ‘straight-18’ policy whereby all methods of recruitment in all armed forces and all methods of participation of armed conflict are disallow until an individual attains the age of 1832.

30 The support has increased from only 77 countries in mid-2004 as reported by the Coalition to Stop the use of Child Soldiers Global Report 2008 at p.13 www.childsoldiersglobalreport.org/.../FINAL_2008_Global_Report.pdf (23/2/2010)
31 The Coalition to Stop the use of child soldier, in their Global Report 2008 states that 63 countries permits voluntary recruitment of children into armed forces where up to 23 of these states have under-18s in the ranks. Others introduced young children to military culture through military training in schools, cadet corps, and various other youth initiatives. See p.16.
International Labour Organisation Convention No. 182

In 1999, the International Labour Organisation (ILO) adopted a Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182). Article 3 of the Convention categorises four types of child labour that no government shall tolerate which includes among others pornography, prostitution, and child soldiering. It thus prohibits the forced and compulsory recruitment of children but not voluntary enlistment of children under-18 into armed conflict. Breen claims that this Convention constitutes an elevation of current legal awareness on standards of human rights and may help states deal with the problem of recruitment of child soldiers by way of abduction, coercion or forced recruitment.\textsuperscript{33}

Rome Statute of International Criminal Court 1998

By July 2002, the Statute of International Criminal Court entered into force. It establishes a permanent court wherein persons charged with committing war crimes, crimes against humanity and genocide are tried. This legal development is important as it now makes the individuals responsible for recruiting minors in armed conflict to be accountable for their act. It makes the acts of conscription, enlistment, or use of children under age of 15 in hostilities either by the national armed forces or by non-state group as a war crime. Article 8(2)(b)(xxvi) of the Statute constitutes such acts as violation of a customary international law norm and open to criminal sanctions. An adult recruiting an under age child to be in armed forces can face criminal sanctions but the Courts jurisdiction does not extend to persons under age of 18 at the time of alleged commission of such crime.\textsuperscript{34} Thus, any child soldiers between the ages of 15 to 18 years are considered as victims though they committed acts of atrocities during wartime. The debate remains as to whether these groups of child soldier should be allowed to escape from their criminal acts unpunished.

Prior to 2000, the international legal framework set the standard age for legal recruitment of children in combat was 15 years of age whilst in CRC defines child as any person under eighteen to be entitled to special protection. The effort put forward by NGOs, especially the hard work of Coalition to Stop the Use of Child Soldiers led to promulgation of

\textsuperscript{33} See Breen, C. 2007. When is a child not a child? Child soldiers in international law, pp. 95-97.
\textsuperscript{34} Article 26 of the Statute.
important treaties that strengthened international legal norms regarding the use of child soldiers. All these endeavour are concerted to improve on the life of children throughout the world.

7. Malaysian National Service Programme

The Malaysian National Service Training Program, was initiated in 2002 and implemented in the 2004. This three months program aims to promote patriotism and bonding among Malaysian young generation in togetherness to develop a Malaysian nation. This programme includes in part of its module basic military training for the youth who attended it. Failure to attend the National Service Training Program may result in either fine or imprisonment or both on the defaulter. Similar punishment might be inflicted to any person who persuades another not to attend, abetting or causing another not to attend any National Training Service Programs. In light of this paper, the question posed is whether this National Service Training Program is a type of armed force or can be regulated only as for educational purposes per se?

The Malaysian National Service Training Program is also known as “Latihan Khidmat Negara” was gazetted under the National Service Training Act 2003. According to this statute, the Yang Di Pertuan Agong may require through proclamation that any person who are between the age of 16 year and until 35 year of age to attend and participate in this program. All Malaysia youths who are within this age category will be selected randomly to join this program. Even some of them might be still be considered as a child and minor due to their age at the time of joining the programme. The Malaysian Age of Majority Act 1971 considers a person to be an adult when he has attained 18 years of age. In practicality, only youth above the age of 16 are enlisted as the secondary school period normally is completed once a child attain the age of 17 years. Nonetheless, the youth joining the National Service Training Programme is still a minor if he or she is to attend it at the age of 17 before his or her 18th birthday.

35 Rome Statute for International Criminal Court, Convention 182 of the ILO and Optional Protocol to the Convention of Rights of Children by UN.
36 See Sections 18, 19, 27 and 29 of the National Service Training Act 2003.
37 Section 3(a) of National Service Training Act 2003.
The training module comprises of four modules, designed to meet the program’s objectives. The modules are; Physical Module, Nation Building Module, Character Building Module and Community Service Module. All of these modules are implemented separately during the three months period and supervised by National Service Department to ensure the effectiveness of the program. In the Physical Module, all trainees will be exposed to several extreme outdoor activities such as marching, combating which might include hand to hand and weapon usage, obstacle course, and survival training. Character Building Module emphasises more on encouraging good values and Self-confidence, leadership and self-evaluation by participation in group and teamwork between the participants and their supervisors to achieve the program objectives in developing good character among Malaysian youth. Nation Building Module is more class-room based, which attempts to create awareness among the youth generation on the importance of national security and defence. It also highlights the citizen's responsibility to the nation, and loyalty towards the government. Lastly, in Community Service Module, trainees will be exposed to community awareness programs by involving themselves in project which takes place within the surrounding and nearby communities. It is the government’s hope that, through this module, trainees will appreciate the diversity of the nation and learn on the environmental restoration and protection.

A look into the modules implemented to the youth and participants under the National Service Training Program does not falls into the category of recruitment or enlistment of child soldiers into government armed forces. This is because though the participants learn basics military training and combat tactics as well as usage of military of weapons in the Physical Module, there are more of a learning experience to the youth rather than for actual combat training. Furthermore, the main objective of this program is to develop good values among the teenagers and create awareness on the importance of protecting national security. The whole program does not emphasis only on military combats and physical training per se but rather a wholesome programme combining spiritual awareness and community services as well.
8. Conclusion

Putting an end to the issue of child soldiers requires not only the existence of strong legal standards but also consistent international cooperation, regional and national initiatives. Penal sanctions on recruiters of child soldiers as in the case Sierra Leone has to some extent portrays the seriousness of the international community to address the problem. It is further recommended that the national as well as the international court system can further develop a systematic procedure for investigation and prosecution, in order to crack down on the usage of children as weapons of arms. Funding and support towards demobilisation and rehabilitation of ex-child soldiers are also crucial to ensure that the ex-soldiers will be able to lead a normal life and not revert to a life of violence. By providing educational opportunity and marketable life skill learning and assistance, the future of these young soldiers would be brighter. The captured ex-child soldier should not be treated as criminal but rather be offered with psychological, socioeconomic, and educational opportunities for rehabilitation. The UN Security Council should impose sanctions on countries, which facilitates the infiltration of illegal weapon used in the small wars. This again requires not only negotiations but also criminal and economic sanction to be truly effective. It is unfortunately true that success will only be achieved by continued monitoring and advocacy, practical assistance for demobilisation and rehab, and effective use of political and military leverage by international actors and uncompromising commitment by national, local and international authorities to hold perpetrators accountable. To drive a point home, the most effective solution as succinctly stated by Ms Gracha Machel in her UN Report in eradicating this phenomenon is by preventing the outbreak of armed conflict.


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THE DUTY OF GOOD FAITH IN COMMON LAW: A NEW VIEW ON CONTEMPORARY CONTRACT LAW.

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Abstract

The concept of good faith encompasses the theme that all parties to a contract owe a duty to each other beyond those expressly provided by the terms of the contract. This is a popular concept in civil law countries whereby good faith is clearly included in the civil law codes. However, good faith has apparently been gaining recognition in common law countries as well. Common law judges and scholars are divided concerning the desirability of qualifying the concept of good faith into Contract law. The objective of the paper is to analyse common law judges and scholars’ perspectives on the application and interpretation of good faith. This paper is mainly a library based research which uses a qualitative approach to the analysis. The findings show that good faith is a well-accepted concept in common law which benefits contracting parties.

Keywords: good faith, contract law and common law.

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1. Introduction

Good faith is a ubiquitous but poorly understood concept in contract law. There are many different interpretations of the meaning of good faith, some of which are contradictory and confusing. Justice Steyn argued that ‘a definition of good faith and fair dealing is impossible’. The concept of good faith encompasses the theme that all parties to the contract owe a duty to each other beyond those expressly provided by the terms of the contract. In this context, it is expected that the contracting parties take into account other parties’ interests when exercising their contractual rights. This is because the law of contract is viewed as a bargain that is made between the contracting parties, with the intention to make the contract binding. For this reason, the court will try whenever possible to uphold bargains of contract through the duty of good faith to ensure the fair functioning of the contract done by the contracting parties.

There are three types of legal systems in the world that discuss the concept of good faith; the civil law, common law and Islamic law. The concept of good faith, which has its roots in civil law, has lately influenced common law. Because civil law has its origins in Roman law, this has directly influenced the continental system of law. Thus, the civil law legal system has been widely adopted in Europe, Latin America, Asia, Africa and the Middle East. The common law system however originates from the English legal system.

There is a fundamental difference between civil law and common law legal systems. Civil law is based on codification, where its legal rules are predominantly written. The role of the judge in the civil law system is limited to the interpretation and application of the law

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3 Elisabeth Peden, Good Faith in the Performance of Contract (lexisNexis,2003)1
4 In Common law, the concept of good faith has no general foundation but it is recognised in specific settings for example the most common expression of good faith can be found in the insurance context.
5 For the purpose of this article, good faith in Islamic law is not discussed.
7 These countries had been colonised by the British and used English law in their legal system. For example United Kingdom (UK), the US (excluding Louisiana), Canada (excluding Quebec), Australia, New Zealand and other countries colonised by the British, including India, Hong Kong, Singapore and Malaysia.
based on the civil law code. While common law, the legal rules are developed by judges through decisions of the court or based on the doctrine of a binding precedent. Both common law and civil law adopt two different legal systems. However, in the law of contract, there has been a tendency of common law lawyers to refer to the civil law. According to Nicholas, ‘it is in the law of contract also that common lawyers have most often looked to Roman or civil law’. In civil law, the influence of Roman law can be traced back to the law of obligation, particularly in the law of contract. Therefore, there is a higher chance that good faith, which is rooted in civil law to have a big influence on common law lawyers pertaining to contract law.

This article elaborates the position of good faith in terms of its application through the use of *Bona Fides* in civil law, common law approaches to good faith and lastly, it outlines the varying perspectives of good faith in common law countries.

2. **Civil law Approaches to Good Faith: Bona Fides**

   Amongst the features of Roman law characteristic of the civil law system is *bona fides*. The concept of *bona fides* require that ‘one’s word must be kept’, and ‘one’s conduct should be in exact conformity with it [promise]’. Therefore, it is a kind of social and moral concept that regulates the relationship. The underlying theme of *bona fides* is to ensure justice and fairness is upheld regardless of the expressed intention of the parties to the contract.

   Prior to *bona fides*, the concept of *strict juris* (formal contract) had already existed in Roman contract law. *Strict juris* is a concept whereby a judge is required to decide a contractual dispute according to the strict rules of the civil law. A right in the contract could only be applied when the right is expressly granted. Therefore, it is difficult to fulfil the requirement of *strict juris* when the right needs to be implied. However, the requirement of *strict juris* seems of little value regarding the rights and duties concerning everyday dealings

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10 Ibid.
such as sale, letting and hiring, and especially those rights and duties which were not explicitly expressed but implied.

This concept caused problems when the plaintiff pleads breach of contract but is unable to assert a definite and express right in the contract. Therefore, there were problems with the use of *strict juris*. Firstly, upon breach of contract, according to *strict juris*, the issue must be defined in precise Latin words, sometimes invoking the Roman god.\(^{14}\) This situation was problematic to non-Roman citizens not well versed in Latin and who did not believe in the Roman gods. This made it difficult for non-Roman citizens to comply with the requirement that was set by the *strict juris*. Secondly, as early as the third century, with the expansion of business between Rome and other countries, there was a need for the court to provide adequate remedies for breach of contract. Therefore, in order to accommodate these two limitations, Roman law introduced the concept of *bona fides*.

There were procedural differences between the two concepts. In applying *bona fide*, the court has to consider other elements. For example, the circumstances of the case and parties’ intention, compared to when applying *strict juris* which relies on the right given.\(^{15}\) The praetor (Roman magistrate) would always reject a remedy if the person seeking it was not in good faith, without having to show any element of bad faith in the contract.\(^{16}\) The ultimate effect which *bona fides* had on Roman law is described by Martin Schermaier:

> The expansion of the judicial discretion in assessing the merits of a case lay at heart of the brilliant development of Roman contract law form time of the late Republic until the end of the classical period. Before the introduction of the *bonae fidei iudicia* the judge was confined to determining whether the claim asserted under the procedural *formula* did or did not exist. The *bona fide* clause enabled him to consider the parties’ relationship in its origin and all its effects, within the framework of all surrounding circumstances and the conduct of the parties.\(^{17}\)

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\(^{14}\) Ibid.
\(^{16}\) Watkin, above n 8, 309.
The historical origin of *bona fides* within the Roman law has played a vital part in the acceptance of good faith within contemporary contract law in European civil codes. Most European civil codes contain a general good faith provision. In addition to that, some codes contain specific rules in which reference is also made to the concept of good faith. The inclusion of good faith both in specific code provisions and as a blanket concept of importance for entire fields of law has given good faith an ‘institutional’ or formal role in codified civil law systems unlike in common law.\(^{18}\) Moreover, many specific rules in the codes are said to be special applications of good faith.\(^{19}\)

To exemplify, in Germany, a general good faith provision is enshrined in the *German Civil Code* s 157 which provides that contracts must be interpreted in accordance with good faith, having regard to common usage. Similarly, s 242 of the *German Civil Code* provides that the debtor is bound to perform the contract in accordance with good faith having regard to common usage. In France, the *French Civil Code* Article 1134 (3) pronounces that contracts must be performed in good faith. The Code does not define good faith or the standards by which it is to be judged. However, Article 1134 (3) seems to impose a minimum obligation of honest conduct where duties are not prescribed by the contract or by the law.\(^{20}\)

In the Italian law, by virtue of the *Italian Civil Code* Article 1375 states that contracts are to be performed to an objective standard of good faith. Furthermore, in the *Swiss Civil Code*, Article 2 provides that every person is bound in exercising their rights and fulfilling their duties as well as to act in accordance with good faith. In addition to that, the *Greek Civil Code*, and the *Dutch Civil Code* (Article 6:248) all make reference to the concept of good faith. It is evident here that good faith has an important role in the civil law by its inclusion in the civil law codes which provides a strong position for the concept.

\(^{18}\) Schermaier, above n 17, 85.


\(^{20}\) Powell, above n 12, 30.
3. Common Law Approaches to Good Faith

Unlike civil law, there is no overriding general positive duty of good faith imposed on the parties to a contract either in negotiation or performance in common law. Lord Ackner commented that:

…[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making representations. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties.\(^{21}\)

This parallels the features of the common law itself, which is based on precedent. The development of good faith in common law stems from the English law through the Court of Chancery.\(^{22}\) In the Court of Chancery, the first Chancellors were ecclesiastics well versed in the Canon law. The principle of good faith is inherent in Canon law (the law of the Church of England). Therefore, Canon law has been significant in the development of common law. In Canon law, it is emphasized that every promise was binding on the conscience of the person who made it and that failure or refusal to keep it was a breach of that person’s duty to God.\(^{23}\) The jurisdiction of Common Law Courts over contracts was limited during the Middle Ages, and was no remedy for the breach of a simple contract. However, the Ecclesiastical courts were willing to enforce such contracts. For this reason, Common Law Courts issued writs of prohibition to prevent recourse to the Court of Chancery as a means to avoid conflict.

Due to the rapid development of international trade in the 13\(^{th}\) century, a general remedy for breach of contract was needed. Even though there were many available statutes and petitions that were addressed to the King that called for contracts to be honoured, the available statutes and petitions were insufficient to provide a remedy for breach of contract. In the 16\(^{th}\) century, the Court of Chancery progressed and developed from a Court of Conscience to being a Court of Equity. This event led to the development of the concept of good faith. It also implies that the concept of good faith is separate from the concept of

\(^{22}\) Powell, above n 12, 22.
\(^{23}\) Powell, above n 12, 21.
conscience. Thus, it would appear that the basic obligation of good faith arising from a promise or an agreement (pacta sunt servanda), which was enforced on grounds of conscience in the Court of Chancery became the basis of the general remedy for breach of contract in common law. In view of this, it is beyond dispute that the Court of Chancery was mainly responsible for the development of good faith in common law.

By the 18th century, under the influence of Lord Mansfield, it seemed that good faith might have emerged as a broad principle of significance in English contract law. Lord Mansfield emphasised the basic fairness and intentions of the parties as governing principles. In his famous decision in *Carter v Boehm*, Lord Mansfield, relying on the ideal of good faith bargaining in contract formation, held that:

> The governing principle is applicable to all contracts and dealings. Good faith forbids either party from concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

The position of English law with relation to the principle of good faith can be found in the landmark case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, where Lord Bingham held that:

In many civil law systems and perhaps most legal systems in the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’, or ‘putting one’s card face upwards on the table’… English law has, characteristically,
committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith by treating as irrecoverable what purport to be agreed estimates of damage but are in truth as disguised penalty for breach, and in many other ways.\(^{29}\)

Despite good faith being a well-recognised principle in civil law legal systems and also in many common law legal systems, English law takes a different position. This means English law’s preference for pragmatic solutions means that no such overriding principle of good faith has been adopted. The fact that English law does not recognise a duty of good faith does not mean that the rule of contract law does not generally conform to the requirements of good faith. Instead, English law responds to perceived cases of unfairness by developing piecemeal solutions in which good faith is implied.

References to good faith are increasingly found in both common law and legislation.\(^{30}\) In the insurance context, good faith is a well-known concept. Apart from insurance, good faith is also recognized in fiduciary and employment relationships where there is a ‘special kind of relationship’ established by the contract which carries an implied obligation of good faith via mutual trust and confidence. The duty of good faith in insurance law was introduced almost 250 years ago in \textit{Carter v Boehm},\(^{31}\) in which Lord Mansfield commented that:

\begin{quote}
Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstances do not exist. The keeping back of such circumstances is fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any
\end{quote}


\(^{30}\) In \textit{Bropho v Human Rights & Equal Opportunity Commission} [2004] FCAFC 16 [84], the court held that there are at least 154 federal Acts that mention the term good faith.

\(^{31}\) (1766) 3 Burr 1905.
fraudulent intention, yet still the underwriter is deceived and the policy is void; because the
risqué run is really different from the risqué understood and intended to be run at the time of
the agreement[...] The policy would be equally void against the underwriter if he
concealed[...] Good faith forbids either party, by concealing what he privately knows to draw
the other into a bargain from his ignorance of the fact, and his believing the contrary.\footnote{32}

In a similar case occurring in the US, Stephen J, in Comunale \textit{v} Traders & General
Insurance Co., further commented that good faith is an important principle in the insurance
contract to ensure the benefits of the agreement is achievable by the insurer and the insured.
His Honour stated that ‘there is an implied covenant of good faith and fair dealing in every
contract that neither party will do anything which will injure the right of the other to receive
the benefits of the agreement.\footnote{33} This principle is applicable to policies of insurance. The rights
of the insured ‘go deeper’ and that implied obligations are imposed ‘based upon those
principles of fair dealing which enter into every contract.’\footnote{33} Later, the concept was codified in
the \textit{Insurance Contracts Act 1984} (Cth) by requiring the insurer and the insured to exercise
utmost good faith before entering into an insurance contract. Section 13 of the \textit{Insurance
Contracts Act 1984} (Cth) provide that ‘A contract of insurance is a contract based on the
utmost good faith and there is implied in such a contract a provision requiring each party to
act towards the other party, in respect of any matter arising under or in relation to it, with the
ut-most good faith.’\footnote{34}

Furthermore, a fiduciary relationship is a relationship in which one party undertakes
or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a
power or discretion that will affect the interests of that other person in a legal or practical
sense.\footnote{34} It is a requirement to act in the interests of another as a consequence of a ‘special
kind of relationship’. In \textit{Hospital Products Limited v United States Surgical Corporation},\footnote{35}
Mason J noted:

\footnote{32} (1766) 3 Burr 1905, 1910.\footnote{33} 50 Cal.2d 653, 328 P.2d (1958).\footnote{34} It is a kind of relationship of trust and confidence or confidential relationship, viz trustee and beneficiary, agent and principal, solicitor and agent, employee and employer, director and company and partners.\footnote{35} (1984) 156 CLR 41.
The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position … It is partly because the fiduciary’s exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.36

In this context, the special relationship requires trust and confidence that carries with it an expectation of utmost loyalty and good faith.37 In the partnership agreement, there is a relationship of trust and mutual confidence which gives rise to a fiduciary duty of full disclosure on the part of both parties. The partners are bound to exercise the utmost good faith in their dealings with one another. The requirement of trust and mutual confidence was observed in Helmore v Smith,38 where Bacon VC observed that ‘their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on’.39

In employment, the duty of good faith is implied from the relationship between the employer and employee. It was clearly stated in Wessex Dairies Limited v Smith that ‘it is a necessary implication which must be engrafted on such a contract (employment) that the servant undertakes to serve his master with good faith and fidelity’.40 Riley argues that the duty of good faith in the employment context is consistently implied as a duty of ‘mutual trust and confidence’ where both parties are expected to act in the best interests of maintaining trust in the relationship.41 This statement is elaborated further in Eastwood v Magnox Electric Plc, where Lord Nicholls held that ‘the trust and confidence in an implied term means, in short, that an employer must treat his employers fairly. In his conduct of his

38 (1886) 35 Ch D 436.
39 (1886) 35 Ch D 436, 44.
40 [1935] 2 KB 80.
business, and his treatment of his employees, an employer must act responsibly and in good faith’. 42

On the other hand, the legislature increasingly relies on good faith as a mechanism to achieve justice. In legislation, there are two types of expressions to the concept of good faith, which are a) express and b) oblique. Express means a statutory obligation to act in good faith and oblique means good faith is a factor that has to be taken into account. An example of express good faith is the Insurance Contracts Act 1984 (Cth), s 13, which states that:

A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

By virtue of the above, the requirement of good faith has been interpreted to mean that both parties, namely the insurer and the insured must act with fairness and honesty particularly when disclosing information to each other. 43 Due to its long engagement, the good faith requirement is considered as an important element in the insurance contract to ensure a successful contract. There is an increasing recognition in specific instances like the Unfair Terms in Consumer Contract Regulations 1999 that was introduced to protect the presumed weaker parties. From the above discussion, the pervasiveness of the concept of good faith in common law and legislation indicates that good faith behaviour is the expected norm.

4. View on Good Faith

To this date, the common law judges and scholars are divided as to the desirability of qualifying the concept of good faith in common law. Some common law judges and scholars welcome the concept of good faith in contract because it helps to overcome gaps in the contract. In Australia, Good faith was first put onto the judicial agenda through obiter comments by Priestley J in the landmark case of Renard in 1992. His Honour held that:

The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this

implication is not yet been accepted to the same extent in Australia as part of judge-make Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.\footnote{44}

However, common law judges and scholars disagree with the introduction or acceptance of the concept of good faith of fear that it will overwrite the essence of the contract. One of whom disagreed was Bristow who claims that ‘defining the concept of what good faith actually encompasses is an exercise that frequently proves to be frustratingly circular’.\footnote{45} The following discussion outlines the varying perspectives adopted in relation to the concept of good faith.

5. Views Not in Favour of Good Faith in Common Law

The recognition of an implied duty of good faith has been seen as an unnecessary and undesirable judicial intervention, especially for commercial parties. English law takes the view that, in general, it is for the parties themselves to allocate risk through the terms of their contract, and it is not the role of the courts to do it for them.\footnote{46} Thus, it gives freedom and autonomy to the commercial parties to the contract.\footnote{47} The court’s duty is to respect and enforce the parties’ intentions in the contract. This was supported by Rt. Hon Sir Robert Goff who said:

We [the United Kingdom Commercial Court] are there to help businessmen not to hinder them: we are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.\footnote{48}

\footnote{44}{(1992) 26 NSWLR 234, 264.}
\footnote{46}{Ibid 20}
\footnote{47}{Bristow, above 45,19. Fear that an ambiguous good faith doctrine would somehow jeopardise the Anglo-Canadian legal tradition of individual autonomy and free to contract. The tension between the individual and the society is clearly illustrated in a recent House of Lords case, \textit{Walford v Miles} [1992] 2 AC 128.}
\footnote{48}{Rt Hon Sir Robert Goff, ‘Commercial Contracts and the Commercial Court’ (1984) \textit{Llyod’s Maritime and Commercial Law Quarterly} 382, 391.}
When parties bargain there is an expectation of an outcome similar to the intention of the contract. Therefore, implying a requirement that the parties deal with each other in good faith may go against the parties’ intention and consequently make the contracting process no longer reflect their intention. Contract law must provide parties with certainty. However, good faith creates uncertainty because it has no definite meaning. Good faith is often associated with the concept of honesty, reasonableness, fairness and cooperation. These concepts are believed to be too subjective and uncertain. Therefore, the concept of good faith has been described as a ‘mystery’ with its meaning susceptible to ‘change’ which shows that there is a lack of clarity around the concept.

Carter and Peden argue that ‘[e]very aspect of contract law is, or should be, consistent with good faith because good faith is the essence of contract’. Because good faith is inherent in all contract doctrines, it seems obvious that if a court implies a term of good faith, the court is either implying a redundant term or implying a term which by definition, must impose a more onerous requirement. Carter and Peden explain that one of the criticisms of recent cases is the failure to acknowledge the good faith element of contract rules. For example, in the law of contract, many elements to enforce a valid contract underlie the concept of good faith. One of them is the contract between offeror and offeree, where there is a concern from the law of contract that the offeror acts in good faith. Any revocation must be communicated to the offeree prior to the time of the acceptance. Because an offer does not create any legal obligations, there can be a justification for the requirement that the revocation be communicated. Carter and Peden view that it can only be in good faith that elementary considerations of honesty and fairness have the right of revocation. Thus,

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53 Ibid.
54 Ibid.
although it has sometimes been recognised that many rules of contract law give expression to ideas that can only be explained in terms of good faith, the implications of this may not have been fully understood or appreciated in recent Australian cases.\textsuperscript{56}

Similarly, there is no general duty of good faith in the making of contracts in English law, in relation to performance as well as formation of contract.\textsuperscript{57} The underlying reason against the adoption of a general principle of good faith in English contract law is to apply a specific legal concept rather than to have a general principle to police unfairness. There are various specific legal concepts that clearly tackle issues of unfairness and injustice such as unconscionability, duty of cooperation, non-derogation from grant and fiduciary duty.

On the other hand, the common law has long used recourse to interpret parties’ intentions to achieve a variety of normative results,\textsuperscript{58} with the aim of ascertaining the actual intention of the parties by looking at the typical intentions or expectations of the parties to the type of contract in question. In this context, it means that the interpretation of expressed contractual terms or the implication of terms where one of the parties is held to be responsible to the other for defects in the subject matter of the contract, whereby some information was not disclosed before the contract took place will lead to legal consequences. In such circumstances, other systems are dealt with by a general requirement of good faith.\textsuperscript{59} Thus, there is strong support by Lord Steyn who stated that ‘there is not a world of difference between the objective requirement of good faith and the reasonable expectation of the parties.’ \textsuperscript{60}


\textsuperscript{57}Atiyah, above n 25, 164.


\textsuperscript{59}Nicholas above n 9, 950.

6. Views in Favour of Good Faith in Common Law

There is a need to have good faith as a universal term to act as a gap-filling term in the absence of express terms of the contract. This means the duty of good faith is a gap-filling term which supplements to express terms of a contract to prevent uncooperative or unfair conduct in the course of performing a contract or exercising contractual powers. To exemplify this, a principal who engages a contractor to excavate a construction site provides in a contract that he [the principal] may terminate the contract provided following any specified breach of the contract by the contractor. This should of course be subject to the contract being given opportunity to show cause to the satisfaction of the principal why the contract should not be terminated. However, when the contractor breaches the contract but presents a reasonably good cause not to be terminated, the principal nonetheless decides that the contractor is unreliable merely based on rumors that he had overheard about the contractor. The principal terminates the contract on the ground that the contractor has not shown cause to the principal’s satisfaction. Based on cases like the above, there should be a role for a duty of good faith in promoting cooperation in contract performance in the exercise of contractual powers.

Good faith is a concept which promotes fairness and cooperation. The concept of good faith encompasses the theme that all parties to the contract owe a duty to each other beyond those expressly provided by the terms of the contract. In this context, it is expected that the contracting parties take into account other parties’ interests when exercising their contractual rights.61 Good faith is pivotal to the contracting parties in achieving cooperation and fairness as well as in the prevention of unfairness when express terms are absent from the contract. Good faith is therefore treated as an implicit expectation of the parties. Burrows further explained the function of good faith stating that:

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The concept of good faith is regularly invoked not only to condemn deception and lack of candor at the time a bargain is concluded, but also to require a forthcoming attitude, to condemn chicanery and sharp practice in the carrying out of contractual obligations.\(^{62}\)

Many European countries adopted the requirement of good faith in their civil code, some of which are: s 242 of the *German Civil Code*, Article 1375 of the *Italian Civil Code*, Article 1134 (3) of the *French Civil Code* and more recently Article 6:2 of the *Dutch Civil Code*.\(^{63}\) The application of good faith covers every stage of the contract from the negotiation process, to formation as well as to the performance of the contract.

The legislature increasingly relies on good faith as a mechanism to achieve justice. There are more than 154 federal Acts that mention the term good faith.\(^{64}\) In legislation, there are two types of expressions to the concept of good faith, which are a) express and b) oblique. Express means a statutory obligation to act in good faith and oblique means good faith is a factor that has to be taken into account. An example of express good faith is found in the *Insurance Contracts Act 1984* (Cth), s 13, in which it is stated that:

A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

By virtue of the above, the requirement of good faith has been interpreted to mean that both parties, namely the insurer and the insured must act with fairness and honesty particularly when disclosing information to each other.\(^{65}\) Due to its long engagement, the good faith requirement is considered as an important element in the insurance contract to ensure a successful contract. Another example of good faith in legislation can be found in the *Corporations Act 2001* (Cth), s 181(1), where the requirement of good faith is implied based on the best interests of the corporation as opposed to the mandatory requirement in the insurance contract. The section provides that:

\(^{62}\) See J.F. Burrows, ‘Contractual Cooperation and Implied Terms’ (1968) 31 *Modern Law Review* 390 for an interesting discussion of a somewhat broader notion of good faith, an implied duty of cooperation, for discussion of the extent to which each party has a duty to cooperate in the contractual undertaking, 395-405.


\(^{64}\) Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16 [84].

\(^{65}\) See *Kelly v New Zealand Insurance Co Ltd* (1993) 7 ANZ Insurance Case 61-197 [78, 258].
A director or other officer or a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.

An example of oblique good faith is found in s 22(1) of the *Australian Consumer Law* as prescribed in schedule 2 of *Competition and Consumer Act 2010* (Cth). This section provides a list of factors, which the court may have to consider for the purpose of determining unconscionable conduct. One factor that needs to be taken into account is the good faith factor as illustrated below:

‘To the extent to which the supplier and the customer acted in good faith.’

The concept of good faith is widely employed at international levels, where many international trade instruments incorporate it.\(^{66}\) In *Nuclear Tests Case (Australia v France)*, the International Court of Justice claimed that ‘One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith’.\(^{67}\) The *United Nations Convention on Contracts for International Sale of Goods*, known as the Vienna Sales Convention (hereinafter CISG), is a tool to harmonise international sales law. It was drafted to govern international sales between contracting parties. The CISG was developed by the United Nations Commission on International Trade Law (UNCITRAL) and was signed in Vienna in 1980. After many debates and conferences in resolving the parameters of good faith in CISG, the concept of good faith was finally mentioned by Article 7(1) which states that:

In the interpretation of the Convention, regard is to be had to its international character and the need to promote uniformity in its application and the observation of good faith in international trade.

\(^{66}\) See also the *Principles of International Commercial Contracts* (UNIDROIT Principles 2004) article 1.7, which clearly supports the duty of good faith. It stated that;
In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade and prohibits the parties from limiting or excluding the duty in their contracts.
The *Vienna Convention on the Law of Treaties* article 31(1) provides that;
A treaty shall be interpreted in good faith in accordance with the ordinarily meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
The *Principles of European Contract Law* article1.201 provides that;
In exercising his rights and performing his duties, each party must act in accordance with good faith and fair dealing.

\(^{67}\) [1974] ICJ REP. 253, 268.
Good faith is also mentioned in the Principles of International Commercial Contracts (hereinafter UNIDROIT Principles 2004). In 1994, the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) gave its imprimatur to the publication of the UNIDROIT Principles 2004. UNIDROIT is an independent intergovernmental organization that aims specifically to harmonize international commercial contracts between merchants and other professionals with a territorial scope.

The general duty to act in good faith is expressly stated in the UNIDROIT Principles 2004. This means that good faith is the expected behaviour of the parties in the international commercial contracts. The UNIDROIT Principles 2004 Article 1.7, clearly supports the duty of good faith. It states that:

(1) Each party must act in accordance with good faith and fair dealing in international trade.

The reference to ‘good faith and fair dealing in international trade’ means that the standard which has ordinarily been adopted within the different national legal systems should not be applied unless commonly accepted by all legal systems. Indeed, the duty of good faith is also found in a number of articles of the UNIDROIT Principles 2004 which constitute a direct or indirect application of the principle of good faith and fair dealing in all phases of the contract. These articles make it clear that good faith and fair dealing are considered as fundamental principles underlying the UNIDROIT Principles 2004.

By the same token, the Vienna Convention on the Law of Treaties (hereinafter VCLT) opened for signature on 23 May 1969 also recognised the concept of good faith. VCLT is the law that guides interpretation of international treaties that include its formation and operation of treaties. One of the principles in the VCLT observed that the principles of good faith and the *pacta sunt servanda* rule are universally recognised.

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69 See for instance arts 2.arts 2.4(2)(b), arts 2.15, arts 2.16, arts 2.18, arts 2.20, arts 3.5, arts 3.8, arts 3.10, arts 4.1 (2), arts 4.2(2), arts 4.6, arts 4.8, arts 5.2, arts 5.3, arts 6.1.3, arts 6.1.5, arts 6.1.16(2), arts 6.1.17(1), arts 6.2.3(3)(4), arts 7.1.2, arts 7.1.6, arts 7.1.7, arts 7.2.2.(b)(c), arts 7.4.8 and arts 7.4.13.
70 *pacta sunt servanda* means agreements are to be kept; treaties should be observed. According to customary international law of treaties, *pacta sunt servanda* is the foundation of international law. Without such an acceptance, treaties would become worthless.
71 The Nuclear Tests case (*Australia v France*)1974] ICJ REP. 253, 268., illustrates that good faith is the integral part of the rule of *pacta sunt servanda* whereby the International Court of Justice held that:
The concept of good faith is particularly relevant in the performance of treaties. It is illustrated in Article 26 of VCLT which states that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’. This means good faith is the foundation to the rules of pacta sunt servanda. It is always an implicit expectation that whenever states enter into a contract, they have willingly committed themselves to its terms to ensure the successfulness of a contract. In drafting the VCLT, the Special Rapporteur referred to this provision by commenting that:

The intended meaning was that a treaty must be applied and observed not merely according to its letter, but in good faith. It was the duty of the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty.72

Article 31(1) mentions that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. This means that all obligations deriving from treaties are to be interpreted in good faith. According to O’Connor, the provision above means that the requirement of good faith shall be interpreted by considering the literal meaning of the treaty to reflect the principle of pacta sunt servanda.73 The Commission on European Contract Law produced the Principles of European Contract Law (hereinafter Principles) with an aim to harmonise the law of contract in the international business community by taking into account the requirements of the European domestic trade. The Principles also mentions the concept of good faith. The general obligation of good faith was clearly mentioned in Article 1.201(General Obligations) whereby ‘[e]ach party must act in accordance with good faith and fair dealing and the parties may not exclude or limit this duty’. This is a clear indication that good faith is the basic principle which is required in the performance and enforcement of the contractual duties in the contract. The formula of ‘good faith and fair dealing’ is used in the Principles in which this proposition is made plain by the commentary in the Principles

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.

relating to Comment E in Article 1.201 that distinguishes the two concepts in the following manner:

‘Good faith’ means honesty and fairness in mind, which are subjective concepts. A person should, for instance, not be entitled to exercise a remedy if doing so is of no benefit to him and his only purpose is to harm the other party. ‘Fair dealing’ means observance of fairness in fact which is an objective test.  

By virtue of Article 1.102 (Freedom of Contract) which states that ‘[p]arties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.’ Furthermore, Article 1.106 laid down guidelines for the interpretation and supplementation in the Principles which includes the promotion of good faith. It is clearly illustrated in Article 1.106 that ‘[t]hese Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application.’ Despite the differences in its purpose, these international trade instruments show that good faith plays an important role for international contracts.

7. Conclusion

It is interesting to discover that, despite good faith being rooted in Civil law countries by way of inclusion in the civil law codes, good faith apparently has a huge influence in countries that practice the common law. There is an emerging interest in good faith in common law countries whereby many references to good faith in the common law and legislation have been made. Although the recognition of good faith in common law is mainly through piecemeal solutions, there is a strong a positive inclination towards recognising the concept. Therefore, it is not surprising that there remains imbalanced views by common law judges and scholars towards the concept of good faith. However, this article has shown that good faith is widely used in common law, therefore there is a higher chances for good faith to be a recognized and accepted as one of legal principle at common law such as the legal concept of unconscionability, duty of cooperation, non-derogation from grant and fiduciary duty.

REGULATING CHARITABLE ORGANIZATIONS IN MALAYSIA;
ISSUES AND PROPOSAL.

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Abstract
Charities play an important role in the legal field and their affairs are of public concerns. Most charitable trust, whether it is in the form of society or company or even organization must be for the benefit of public. Charities law in Malaysia follows the English law. Under the English law, the concept and purposes of the charity has its origin from the Preamble to Charitable Uses Act 1601. Generally, there are four classification of charitable purposes. First is the relief of poverty, second, the advancement of education, third, the advancement of religion and lastly, other purposes beneficial to the community. In England and Wales the prevailing Act that covers matters relating to charity is The Charities Act 2011. This Act has listed down 12 prevailing headings that come under charity and above all, the courts and the Charity Commissioners will help to enforce charitable purposes and prevent abuse through trust law. The main highlighted issue is the fact that all types of charity is not subject to proper and single monitoring mechanism. In other words, there is no single regulator that focused solely on monitoring the existing charitable organizations, as to whether money or property donated by the public has been used solely for charity or not. Currently charitable organization in Malaysia can be in the form of societies, foundation and company and there are different regulators in these different organizations. Abuse in charity organization may occur directly or indirectly. Objectives of this paper are proposing uniformity of laws and procedures relating to charitable organizations and a single and competent body to deal with matters exclusively within the scope of charity with the purview of local legislation, society and customs prevailing in Malaysia.

Keywords: Charities, organizations. Trust, charitable trust, charitable organizations, company.

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1. Introduction

Charity in its widest sense denotes “all the good affections that men ought to bear towards each other; in its most restricted and common sense it denotes relief of the poor.”[per Sir William Grant M.R in Mourice v Bishop of Durham]. The word charity in Malaysia may reflect many meanings and perception as it needs to be looked from both civil and shariah law. Charity under civil law is a direct descendant of the Latin word ‘caritas’, meaning ‘love’. Despite a few attempts to have a statutory definition of charity, the word charity is a wide and elastic word, which has a much wider meaning in law than it has in popular speech. Charity under Islam refers to help given to those in need and it must not necessarily reflect the public. There are many types of how charity can be performed and the concept is very wide compared to the one that is legally recognized under the civil law.

As the charity law in Malaysia is following the English law, the spirit and intendment of Charitable Uses Act 1601 together with 4 main charitable purposes as introduced by Lord MacNagthen in Income Tax Special Purposes Commissioners v Pemsel, are applied. The four purposes are trusts for the relief of poverty; trusts for the advancement of education, trust for the advancement of religion, trust for other purposes beneficial to the community, (not falling under any of the preceding heads). Under the English Charities Act 2011, charity means any institution which is established for charitable purposes and falls under the control of the High Court in the exercise of its jurisdiction relating to charity. There are 13 charitable purposes laid down by this Act, which can be considered as a huge extension compared to the earlier four principal purposes of charity introduced in 1839.

In most of countries around the world, donation or direct giving is one of the simplest forms of charity. The donor can choose whichever organization that he has an interest it, donate some money and has no say as to the usage of such money unless the donor himself is very much involved in the setting up of the charitable organization or its administration. This brings us to a few advantages and benefits accorded to charitable trust under two aspects, namely validity and fiscal advantages. Charitable trust has always been a type of trust for specific purposes and its existence is in perpetuity. In achieving the charitable status, there is

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1 (1805) 9 Ves at 405.
2 [1989] AC 531
no need to identify what are the objects for its existence or who are the beneficiaries. More importantly, any trust or organization which is charitable in nature will be given exemption from tax. What needs to be proven is the element of public benefit in each charitable purpose. The requirement for public benefit is very important as it need to be charitable purposes must confer a benefit on the public or a sufficient section of the public.\textsuperscript{3}

As for Malaysia, the provisions relating to charity can be found scattered in a few Acts and Enactments. There is neither single statute governing matters relating to charity nor any statutory interpretation on the word charity. The laws governing charity follow the English laws. Nonetheless, there are certain aspects that need a vital attention, namely the monitoring of the movement of these charitable organizations. This article will discuss about the need to have a proper body or mechanism to monitor and regulate charitable organizations in Malaysia and this will be done by looking at the current situation in Malaysia. Whilst at the same time a highlight on the situation prevailing in England and Wales, upon which the existence of Charity Commission as the fundamental regulator and backbone in any matters relating to charitable organizations.

2. Charity in Malaysia

As far as charity is concerned, there is no single statute governing this subject matter and references has been made to English principles of charitable trusts as the basis in overcoming conflict or matters relating to charity. Under the Ninth Schedule of the Federal Constitution of Malaysia, matters relating to charities and charitable institutions; charitable trusts and trustees (excluding wakafs and Hindu endowments) are within the Federal list. There are a lot of charitable organizations in Malaysia and these usually come either under the purview of the Registrar of Societies of Malaysia or the Company Commission. There is no single regulatory body that is assigned to monitor the movement or administration of charitable organization in Malaysia. This has led to lack of through information on the exact number of registered charitable organization in Malaysia as it comes under different purview altogether.

Despite not having a single statute on charity, the fiscal advantages relating to charity can be seen in some provisions under the Income Tax Act 1967. Section 34 of the Income Tax Act 1966 that deals with adjusted income from businesses that can be deducted from tax laid down several circumstances that that can come within purview of charity although not specifically mentioned. The followings are circumstances where deductions are allowed to be made from adjusted income from businesses where expenditures are incurred for the following reasons:

a) Assisting any disabled person employed by such relevant person
b) Translating or publishing any books relating to cultural, literary, professional, scientific or technical in the national language, approved by the Dewan Bahasa and Pustaka.
c) Providing library facilities which is accessible to public and also includes contribution to public libraries and also libraries in school and institutions of higher education. Deduction not exceeding one hundred thousand ringgit can be given to any person who has incurred
d) Provisions of services, public amenities and contributions to a charity or community in project pertaining to education, health, housing, conservation or preservation of environment, enhancement of income of poor, infrastructure and information and communication technology approved by the Minister.
e) Provision of infrastructure managed by the company in relation to its business available for public use.
f) Provision and maintenance of a child care centre for the benefit of persons employed by him in the business.
g) Managing a musical or cultural group approved by the Minister.

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4 Section 34(6)(e) of the Income Tax Act 1966. This expenditure is used to purchase any equipment or alteration or renovation of premises to assist any disabled person employed by the relevant persons.
5 Section 34(6) (f) of the Income Tax Act 1966
6 Section 34(6)(g) of the Income Tax Act 1966
7 Section 34(6)(h) of the Income Tax Act 1966
h) Sponsoring any arts, cultural or heritage activity approved by the Minister of Information, Communication and Culture.\(^{11}\)

i) Providing scholarship to a student for any course leading to an award of a diploma or degree (includes a Masters or Doctorate level) at a higher educational institution established or registered in Malaysia or under the Universities and University Colleges Act 1971.\(^ {12}\)

Since matters relating to charities are under the Federal list, section 9(1) of the Government Proceedings Ordinance 1966, which is considered a mandatory provision,\(^ {13}\) has clearly stated that in case of any alleged breach of any express constructive trust for public, religious, social or charitable purposes or where the direction of the court is deemed necessary for the administration of any trust, the Attorney General or two or more persons having interest in the trust and having obtained consent in writing of the Attorney General may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of obtaining relief specified in the subsection. The Attorney General is considered as the protector of charitable trusts as the latter is a public trust and not private.\(^ {14}\)

The significance of knowing the exact number is to ensure public confidence in the administration of charitable organization and also the fiscal advantages particularly, which is important in boasting charitable organization and voluntary activity by citizen, is being observed. There is at least a need to have a workable charitable framework that will ensure the matter of integrity and good governance in charitable organization can be fully enforced.


As to whether Malaysia need a monitoring commission in Malaysia can be subject to a variety of opinions. There is a need to have a proper monitoring mechanism in order to obtain public confidence and at the same time to detect fraud and abuse. There are two main

\(^{11}\) Section 34(6)(k) of the income Tax Act 1966. The amount deducted for sponsoring those activities shall not exceed five hundred thousand ringgit and as for sponsoring foreign arts, cultural or heritage activity shall not exceed two hundred thousand ringgit.

\(^{12}\) Section 34(6)(i) of the Income Tax Act 1966. There are certain limitation imposed together with the grant of scholarship and among others, the student has no means of his own and the total monthly income of the parents do not exceed five thousand ringgit.

\(^{13}\) Letcheumanan Nagappan v R Nadarajah & 2 Ors [1993] 4 CLJ 254

\(^{14}\) Commissioner of Taxation v Bagwanna [2009] CA 260
bodies that are involved in the establishing and monitoring any organization, not necessarily charitable, namely The Registrar of Societies and the Company Commission. Each posses different mechanism as the focus and purpose of this two existing regulators are also different.

i) Registrar of Societies

The history behind the creation of the Registrar of Societies started when the British during its colonization took initiatives to curb dangerous criminal activities posed by the underground movement of the Chinese immigrants. The first move was to set up the Secretary for Chinese Affairs (SCA). Later Societies Enactment 1899 was introduced in 1913 at the Federated Malays States and under this Enactment the post of Registrar of Society was introduced in order to monitor the movements revolving around any societies being set up back then. The main function of the Registrar of Society was to impose total controls on all societies’ activities established at that time. Societies Enactment has been amended from time to time in 1927, 1947 and 1949.

This Enactment was amended in 1949 and being in force on 1st Sept 1949, where it was made compulsory for any societies to be registered. Until 31st December 1949, there was about 1,590 enactments being registered. 1899 Enactment was repealed again by the Parliament in 1965/66 and was in force on 1st February 1966 and this was known as Societies Act 1966 (Act 13 year 1966). The 1966 Act is the combination of three different Ordinances namely Ordinance 1949 for the Federated Malay States, Sarawak Societies Ordinance 1957 and Sabah Societies Ordinance 1961. As the result of this 1966 Act the office of Registry of Societies was established in 1966 in order to give full force for the implementation of the Act after the office was separated from the Registry of Trade Unions.15

The establishment of any society or organization of any nature is under the purview of the Registrar of Societies16 and this is governed by two Acts namely the Societies Act 196617 and Societies Regulations 1964. The office of Registrar of Societies in Malaysia is a department under the Home Minister handling non-governmental organizations and political

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16 The appointment of the Registrar of Societies and the Deputy Registrars are made by the Yang Di Pertuan Agung (the King) whilst appointment of Assistant of Registrars are by the Minister. S3(1) and (1a) of the Societies Act 1966.
17 This Act shall apply throughout Malaysia. Section 1 (3) of Societies Act 1966.
parties. The objective of this department is to ensure the growth and development of a healthy and orderly society which is not in conflict with the requirements of peace, welfare, security, public order or morals. Under this 1966 Act refers to any club, company, partnership or association of seven or more persons whatever its nature or object, whether temporary or permanent.18

There are a few divisions of societies that come under the purview of this office. This includes religious societies, trade related societies including financial institutions, developers or manufacturers and chambers of commerce or entrepreneurs. Besides that political organization and societies that focused on the environment, consumerism and international friendship are also within this confine. Though in some categorization, the element of charity can be found, it is not the task of the Registrar of Societies to ensure or declare as to whether these societies are charitable in nature. The division that in charge of enforcement will have to ensure that all society are registered with the office followed the rules and regulations under the Societies Act 1966. Intelligence works will be carried out at in order to discover any existence of illegal societies and also beside investigating and coordinating complaints from publics and also other agencies such Public Complaints Bureau, police and others. Currently any decision made by the office of the Registrar of Societies that relate to the establishment, enforcement and dissolution are subject to judicial review by the courts in Malaysia.19

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18 Section 2 of Societies Act 1966. Exception to this definition are a) any company registered under any written law relating to companies; b) any company or association constituted under any written law; c) any trade union registered or required to be registered under the provision of any written law relating to trade unions for the time being in force in Malaysia; d) any company, association or partnership formed for the sole purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof; e) any co-operative society, registered as such under any written law; f) any organization or association in respect of which there is for the time being in force a certificate (which may be granted, refused or cancelled at his discretion) by a person or authority appointed under the provisions of the written law for the time being in force relating to the registration of schools that such organization or association forms parts of the curriculum of a school; or g) any school, management committee of a school, parents' association or parent-teachers' association registered or exempted from registration under any law for the time being in force regulating schools.

19 Kerajaan Negeri Selangor & Ors v Pendaftar Pertubuhan Malaysia and another suit [2012] 3 MLJ 795; Dato’ Justine Jinggut v Pendaftar Pertubuhan [2012] 3 MLJ 212; Ch’ng Team Soo@Cheng Chiu Seng & Ors v Khor Hok Kee & Ors [2012] 10 MLJ 280.
ii) Companies Commission of Malaysia

Prior to the establishment of the Companies Commission of Malaysia (CCM), the Registrar of Businesses and Registrar of Companies, were the two government’s divisions, which are responsible to manage the system of registration of business and companies, respectively. Although these two divisions are independent from each other, both have the same objectives, that is, to ensure that the registration of companies and business are done effectively and efficiently. Taking into consideration the rapid growth of business in Malaysia, the Ministry of Domestic Trade and Consumer Affairs, proposed for the establishment of the Companies Commission of Malaysia, which merged both the ROC and ROB. The Commission has the power to regulate companies and business in Malaysia and to administer any law, which confers functions and the powers of the Commission. The intention is to equip the Commission to efficiently and effectively carry out its functions in a corporate sector that is growing bigger in number, sophistication and dynamism.

The Bill of Companies Commission of Malaysia was presented and read for the first time in the Dewan Rakyat on the 24\(^{th}\) April 2001. There are a number of reasons submitted by the Ministry to justify the establishment of the Companies Commission of Malaysia. Among others, the need for one government central agency to administer the business sector. By merging the ROC and ROB, the resources can be pool to produce greater synergies and optimum usage of resources.

The Bill of Companies Commission was later accepted by the Parliament, obtained its royal assent on the 6\(^{th}\) September 2001, gazetted on the 27\(^{th}\) September and came into operation on the 16\(^{th}\) April 2002

Under the new set up, the functions of the Registrar of Companies and the Registrar of Businesses in Malaysia are transferred to the Commission. The main powers of the Companies Commission include the power to process, approve and register companies and businesses, and the power to do all things in connection with its enforcement of the respective laws, such as rights to call for information and to conduct inspections and investigations of companies and businesses. It also has the power to undertake proceedings for any offence
against the respective laws, and power to enforce and collect fees as an agent of the
government under the laws.

CCM reports to and advises the Minister of Domestic Trade and Consumer Affairs on
all matters concerning companies, corporations and businesses which are related to the
respective laws.

The functions of CCM are:

1. To ensure that the provisions of the Companies Commission of Malaysia Act and
   laws are administered, enforced, given effect to, carried out and complied with;
2. To act as agent of the Government and provide services in administering, collecting
   and enforcing payment of prescribed fees or any other charges under the laws
   administered;
3. To regulate matters relating to corporations, companies and businesses in relation to
   laws administered;
4. To encourage and promote proper conduct amongst directors, secretaries, managers
   and other officers of a corporation, self-regulated corporations, companies,
   businesses, industry groups and professional bodies in the corporate sector in order to
   ensure that all corporate and business activities are conducted in accordance with
   established norms of good corporate governance;
5. To enhance and promote the supply of corporate information under any of the laws
   administrated, and create and develop a facility whereby any corporate information
   received by the Companies Commission may be analyzed and supplied to the public;
6. To carry out research and commission studies on any matter relating to corporate and
   business activities;
7. To advise the Minister generally on matters relating to corporate and business
   activities in relation to the laws administered; and
8. To carry out all such activities and do all such things as are necessary or advantageous
   and proper for the administration of the Companies Commission or for such other
   purpose as may be directed by the Minister.

As regards to charitable organisations, CCM is important as it is the agency to register foundations, even though such foundations are established for charitable purposes.\textsuperscript{21} The foundations shall be registered as a company limited by guarantee and the authorized share capital required is RM 1 million. The main difference between a foundation and a corporation is that a foundation does not have any shareholders. Assets that are held in the name of the foundation are to be used for purposes clearly defined in its constitutive documents. The administration and operation of the foundation are set out in contracts, not fiduciary principles.

There are three main different types of foundation set up:

1. Independent Foundation

This type of Foundation Set Up is where the funds are derived from an individual or a family and is the most common type of private foundation. This type of Foundation Set Up may be administered by the donor or members of the donor's family, or by an independent board, making it one of the easiest Foundation Set Ups because of the minimal number of people involved in its operation.

2. Corporate Foundation

This type of Foundation Set Up is formed and funded by corporations, but is a separate legal Entity which has a Board of Directors usually made up of officials from the corporation. A Corporation may embark on Foundation Set Up with endowments or from periodic contributions or both.

3. Operating Foundation

This type of private Foundation Set Up has its prime objectives of research, welfare, or other programs stated in its governing body. Most of the funds go towards these primary activities, though grants can be made to pursuits outside the primary activities.

\textsuperscript{21} A Foundation is a corporate body with a separate legal entity, usually established by the founder to hold assets with the objective of managing these assets for the benefit of a class of persons on a contractual basis. It is deemed a separate legal entity from its managers (i.e. its officers and its council) and is typically used for private wealth management and charitable purposes.
4. Charity Commission in Other Jurisdictions

i. England and Wales

Charities under English Law applies the Charities Act 2011. It was originated from the Preamble to the English Statute of Charitable Uses Act 1601 which laid down the basic foundation or useful guidance as to what can be considered as charitable. Although the Preamble of Charitable Uses Act 1601 was repealed by the Mortmain and Charitable Act 1888 section 13(2) of such Act set out that references to such charities shall be construed as references within the meaning, purview and interpretation of the said preamble.

One very significant step taken by English Parliament in order to monitor any negligent and mismanagement of charitable funds was being the establishment of the Charity Commission under the Charitable Trust Acts 1853, 1855 and 1860. For the past fifty years, in the following enactments of the Charities Act 1960, 1993, 2005 and the latest 2011, the power of monitoring given to the Commission have been further expanded and strengthened. Charity Commission is an independent regulator, non ministerial government department which is accountable to the Home Secretary.22 Its functions are to promote the effective use of charitable resources by encouraging better methods of administration, by giving charity trustees advice and by investigating and checking abuses.

The Charity Commission has a few objectives set out in the statute, namely the public confidence, the public benefit, compliance, charitable resources and the accountability objectives.23 All these indicate the importance of having proper monitoring bodies to regulate matters relating to charities. The public confidence objective for instance is to increase public trust and confidence; whilst public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement and under Part 2 of the Charities Act 2011, section 15 laid down the Commission’s general duties which includes among other matters, determining whether institutions are or not charities and encouraging and facilitating better administration of charities. The latter can be done by giving advice and guidance to charities, any class of charities or particular charities as the Commission

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23section 14 of Charities Act 2012
considers appropriate. More importantly, the Commission has a duty to identify and investigate apparent or mismanagement in the administration of charity.

In order to ensure proper monitoring, any registered charities which a gross annual income exceeding £100,000 must submit annual accounts to the Commission. What is so unique about this Charity Commission is that the power given in the Statute is corresponding with those possessed by the Attorney General, whereby in case of enforcing any obligation against a default charitable organization or its trustee, they are allowed to take the case straight to court. The Commission is also given a restricted concurrent jurisdiction with the High Court to try matter pertaining to charities. This basically covers three matters; first to establish a scheme for the administration of charity; second to appoint, discharge or remove a charity trustee or trustee for charities or to remove an officer or employee and lastly to vest, transfer property to person entitling to it.

Although the Home Secretary is responsible in the appointment of Commissioners, the Home Secretary has no power to direct the latter about the exercise of their statutory functions or no parliamentary questions can be addressed to him about their actions in particular cases as the Commission is only responsible to the courts in applying the law of Charity. The need to have a regulatory body in England and Wales has been solved by the existence of the Charity Commission. Nonetheless it is still subject to reform as there is a big call for more transparency and accountability of charities.

5. Conclusion

The move to have a single regulator in monitoring charitable organization is very vital and at the moment the move to have this has not been widely campaigned by the current ruling authority in Malaysia. The act of giving for more is indeed part and parcel of Malaysian society and charitable organizations are allowed to exist although in so many different forms. Registrar of Societies’ office is very much concerned with the establishment of society to be in line with the requirements of peace, welfare, security, public order or morals. The decision in *Kerajaan Negeri Selangor & Ors v Pendaftar Pertubuhan Malaysia*

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and another suit[25] clearly showed that although the decision of the Registrar of Societies’ decision is subject to judicial review, there is an indication on the importance of having a single regulator to monitor any activities revolving around any charitable organization. The court can go to the extend deciding whether there is any infringement of legal right and legal interest and the question of integrity and transparency that has no relation with the latter will unlikely produce positive outcomes. The recent announcement made by the Minister in the Prime Minister Department on the need to monitor non profit organization (NPO) in order to ensure there is no profit making business deals. This will be done by the Legal Affairs Division of the Prime Minister’s Department together with Bank Negara Malaysia and the Inland Revenue Board (LHDN). She further said that NPO are encouraged to register under the Trustee (Incorporation) Act 1952 and up to this date, there are 371 NPOs that are registered under this Act and the number keeps on increasing. In 2014, there was a total of RM 1.3 billion tax exemption given to these NPOs.[26] This is proven that the need for monitoring is very important and it is not just because of tax exemption purposes but more importantly the need to strengthen the integrity of these charitable organizations especially the ones with noble causes so that they are able to survive without any negative impression of lack of proper monitoring and mismanagement of public funds.

[25] [2012] 3 MLJ 795
“PARTNERS’ LIMITED” THE CHANGING FACET OF PRIVATE LEGAL PRACTICES ENTITY IN MALAYSIA AND SINGAPORE


Abstract

Prior to 2012, advocates and solicitors in Malaysia are only allowed to carry out their private practices via sole proprietorships or partnerships structure. With the passing of the Legal Profession (Amendment) Act 2012 in July 2012, foreign law firms are allowed to operate in Malaysian. Such development indicated that there should be changes to the business vehicles for private legal practices in Malaysia. In Singapore, the legal professions enjoy more business options compared to their counterparts in Malaysia. The advocates and solicitors in Singapore can choose to carry out their private practices in the form of sole proprietorships, partnerships, Law Corporation, limited partnerships and limited liability partnerships. The Singapore LLP is in fact the first LLP being introduced in the Southeast Asia region. Other than the LLPs, another interesting development in the Singapore legal fraternity is the law corporation. The business vehicle enables lawyers in Singapore to carry out their private practices in form of a company.

This paper discusses the developments in business vehicles for private legal practices in Malaysia and Singapore in lieu of the changes of the business requirements and liberalization of the legal services. Research methodology adopted in this paper is statutory and doctrinal analysis.

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1. **Introduction**

One of the recent issues concerning legal firms in Malaysia is the liberalisation of the legal service. With the passing of The Legal Profession (Amendment) Act 2012 and further amendments to the legislation, Legal Profession (Amendment) Act 2012 (Amendment) Act 2013 and Legal Profession (Amendment) Act 2013, which came into force on 3 June 2014 together with the Legal Profession (Licensing of International Partnerships and Qualified Foreign Law Firms and Registration of Foreign Lawyers) Rules 2014, foreign law firms and foreign lawyers will now be permitted to practice in Peninsular Malaysia in the manner set out in the legislation. Licences may be issued to foreign law firms to operate either as an International Partnership with a Malaysian law firm, or as a Qualified Foreign Law Firm (“QFLF”). Alternatively, a Malaysian law firm may choose to employ a foreign lawyer.

There are three (3) categories of new licences under the new amendments of the Act:

i. **International Partnership with a Malaysian Law firm**
   - a partnership between a foreign law firm and a Malaysian law firm. Approval shall be given for the name of the International Partnership to be a combination of the names of the foreign law firm and the Malaysian law firm.
   - Licence will be for a period of three years and are renewable. Application and registration fees will apply. Licences may be granted subject to terms and conditions
   - If approved, a Malaysian law firm will be granted a three-year licence to employ a foreign lawyer

ii. **Qualified Foreign law firms**
   - A foreign law firm licensed as a QFLF will not require a Malaysian law firm as a partner. However only up to five QFLF licences will be granted, as this avenue has been created to support the Malaysian Government’s Malaysian International Islamic Finance Centre (“MIFC”) initiative, as announced by the Prime Minister in his policy speech on 22 Apr 2009.1 QFLF licences will

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1. Part IVA of the Legal Profession Act (Amendment) 2012.
therefore only be granted to international law firms that have proven expertise in international Islamic finance, and which would be able to support and contribute to the MIFC.

- Licence will be for a period of three years and are renewable. Application and registration fees will apply. Licences may be granted subject to terms and conditions.

iii. Registration of Foreign lawyers

- All individual foreign lawyers working in an International Partnership, QFLF or Malaysian law firm will have to register as a foreign lawyer. Application and registration fees will apply, subject to terms and conditions, and will have to be renewed annually.

- Foreign lawyers working in International Partnerships and QFLFs will have to reside in Malaysia for not less than 182 days in any calendar year.

International Partnerships, QFLFs and foreign lawyers employed by Malaysian law firms can only practise in the permitted practice areas. This is defined as a transaction regulated by Malaysian law and at least one other national law, or a transaction regulated solely by any law other than Malaysian law. In the case of a QFLF, the Malaysian Bar has stated that there should be a proviso that such aspect of work regulated by Malaysian law shall be undertaken in conjunction with one or more advocates and solicitors of the High Court of Malaya holding a valid and subsisting Practising Certificate.

A legal firm registered with The Bar Council of Malaysia is required to maintain a 100% Malaysian equity ownership. The equity and voting rights of International Partnerships, QFLFs and foreign lawyers employed by Malaysian law firms shall be as determined by the Selection Committee. This will be determined by reference to a business plan that must be submitted as part of the application process. The Malaysian Bar recommended that the Selection Committee adopt the following guidelines in respect of this area:

1. The Malaysian law firm should not have less than 60%, and the foreign law firm no more than 40%, of the equity and voting rights and of the total number of lawyers in the International Partnership;
2. The number of Malaysian lawyers in a QFLF shall not be less than 30% of the total number of lawyers in that firm; and

3. The number of foreign lawyers employed by a Malaysian law firm shall not be more than 30% of the total number of lawyers in that firm.

Liberalisation of the Legal Services in Malaysia has made the issue of restructuring of law firms relevant in order to cater to the changing needs.

2. The Issue on Restructuring of Law Firm

Traditionally, legal practice in common law countries was only carried out by single practitioners (sole proprietorship) or partnerships of legal practitioners (traditional partnership). Incorporation of legal practices has been prohibited by professional regulation mainly due to the limited liability that goes with incorporation as a company is seen as inconsistent with personal responsibility and accountability for professional legal and ethical obligations towards clients, the community and the courts. This in most instances was dictated by their professional bodies, which view their members' professional skills and the required high sense of integrity, uprightness and honesty as adequate protection against malpractice claims. Present day business environment however has turned this notion into something of a myth and it is not hard to observe the now widespread moral malady of fraud and other greed-driven misconducts which have infiltrated all aspects of societal activities. In light of this, it is not hard to understand why the professional groups that are practising in such environment cannot be alienated from the spectre of untenable claims which could leave many innocent amongst them in financial ruins.

This is because under traditional partnership legislation in all common law jurisdictions, partners share unlimited liability and have joint and several liability for each other’s' frauds, fiduciary breaches and malpractice. This is supposed to provide an incentive for partners to monitor the quality and honesty of one another's work, to assist one another in working well and to train and mentor new recruits. It is also said that the joint and several

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3 See Kang Beng Hoe, ‘How LLP Partnership be taxed?’, The Star, 8 August 2012.
liability feature of a general partnership protects clients in two ways; first, it provides incentives for partners to monitor the quality of legal services, by requiring not only a firm but also its principals to stand behind the performance of other firm personnel, and second, by holding partners jointly and severally liable, it maximizes clients’ recovery in the malpractice actions. In fact, this time-honored tenet of partnership law (in terms of shared liability) can be said to be in line with the Islamic legal maxim “profits are concomitant to risk” in that persons can only claim a profit if they are willing to risk loss and this according to Islamic scholars apply to individual and partnership business.

The general partnership principle of “all for one, one for all” remained intact for most of the twentieth century, however, over the last 30 years, throughout the common law world, the prohibition against corporate structures for legal practice has come under pressure. Firstly, lawyers, particularly large firm lawyers, have wanted to limit their vicarious liability for the wrongs of their partners. For those firms risk management to protect ‘innocent partners’ from liability for frauds, breaches of fiduciary duty and negligent advice or representation cases has become a major management challenge and can sometimes result in making insurance cover unaffordable.

The legal practice culture is moving from a professional service model to a business-oriented model. Increased pressures have been thrown into the mix by the global financial crisis and the downturn in the legal market. In the Malaysian context, the liberalisation of legal service (as discussed above) makes it more pertinent than ever to consider alternative business model that can deal with issues of partners’ liability. With such a movement there is clear indication that there should be changes to the business vehicles through which the private legal practices are carried out, in order to remain competitive in this age of globalisation.

Law and Society 245 (which argues that partnership provides an incentive mainly only to monitor the wealth of other partners and that monitoring of quality either cannot be done or involves excessive costs).


Prior to 2012, advocates and solicitors in Malaysia were only allowed to carry out their private practices via the sole proprietorships or partnerships structure. Such restriction was derived from Bar Council Rulings which clearly stated that a legal firm refers to a firm of advocates and solicitors, regardless of it being a partnership or a sole proprietorship.

Contrastingly in Singapore, the legal profession enjoys more business options compared to its Malaysian counterpart. The advocates and solicitors in Singapore can choose to carry out their private practices in the form of sole proprietorships, partnerships, Law Corporation, limited partnerships and limited liability partnerships. The Singapore limited liability partnership (“LLP”) model is in fact the first LLP model introduced in the Southeast Asia region. Other than the LLPs, another interesting development in the Singapore legal fraternity is the “law corporation”. This business vehicle was actually introduced via amendment to the Singapore Legal Profession Act in year 2000 which enables lawyers in Singapore to carry out their private practice in the form of a company. Such notion is indeed a totally novel concept in Malaysia.

3. **The Characteristics of LLPs under the Limited Liability Partnerships Act 2012**

Malaysia had made the right first move by passing the Limited Liability Partnerships Act 2012. We shall now examine the business structure under this Act.

The LLP business model has been introduced in many countries as a new form of entity that rapidly gained acceptance and became the form of choice for many accounting and law firms and other professional ventures seeking to insulate their members against liability for debts while preserving their status as partnerships. LLPs in other jurisdictions have variations in its features, however the broad structural form of the Malaysian LLP derives from the United Kingdom model. Although the LLP under this form is essentially a corporation, it is however internally managed as a partnership.

The LLP's corporate status gives it the capacity to sue and be sued in its own name. It is this distinctive quality of a separate legal identity that mainly differentiates an LLP from a conventional partnership, particularly on the limited liabilities of the partners. As it is a body corporate or legal entity separate from its members, LLP effectively shields the partners from personal liability.

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9 See section 3 (4) (a).
10 See section 3 (1).
from the negligence or impropriety of other partners. A partner is not personally liable for the obligations of the LLP, whether in contract, tort or otherwise, or the wrongful act or omission of any other partner. A partner however will be jointly and severally liable for his own wrongful act or omission in the course of the business of the LLP. This means that a partner is still personally liable in tort for his own wrongful act or omission, and the LLP is liable to the same extent as the partner who has committed the wrongful act or omission.

Besides that, as a corporation, the LLP has no finite life, which is unlike a conventional partnership that ceases on the retirement or withdrawal of a partner. In the event of insolvency of the LLP, a partner’s liability is limited to his capital contribution. The table below, extracted from a presentation by The Companies Commission of Malaysia, summarises the key features of different common business vehicles as contrasted with those of the LLP.

<table>
<thead>
<tr>
<th>Capital contribution</th>
<th>General partnership</th>
<th>Sole proprietorship</th>
<th>Company</th>
<th>Limited Liability Partnership (LLP)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partners contribution</td>
<td>Partners</td>
<td>Sole Proprietor</td>
<td>Share Capital</td>
<td>Partners contribution</td>
</tr>
<tr>
<td>Owner(s) of the business</td>
<td>Partners</td>
<td>Sole Proprietor</td>
<td>Company (members/shareholders own ‘shares’ in the company that give them certain rights in relation to the Company)</td>
<td>Limited Liability Partnership (partners have a share in the capital and profits of the LLP)</td>
</tr>
<tr>
<td>Legal Status</td>
<td>Not a separate legal entity</td>
<td>Not a separate legal entity</td>
<td>Separate legal entity</td>
<td>Separate legal entity</td>
</tr>
<tr>
<td>Party that is liable for debts of the business</td>
<td>Partners</td>
<td>Sole proprietor</td>
<td>Company</td>
<td>Limited Liability Partnership</td>
</tr>
<tr>
<td>Responsibility for management of business</td>
<td>Partners</td>
<td>Sole proprietor</td>
<td>Board of Directors</td>
<td>Partners</td>
</tr>
<tr>
<td>Personal liability</td>
<td>Unlimited liability (jointly and severally liable with the partnership which can extend to personal assets of the partners)</td>
<td>Unlimited liability which can extend to personal assets of the sole proprietor</td>
<td>No personal liability of individual director or shareholder</td>
<td>No personal liability of partner, except for own wrongful act or omission without authority</td>
</tr>
</tbody>
</table>

11 See section 21 (1) (2).
12 See section 21 (3).
13 See section 21 (4).
14 See section 3 (3).
15 See section 22 (1).
The following are the other principle features of the LLP, in summary:\textsuperscript{17}

(1) An LLP is a body corporate\textsuperscript{18}, incorporated by being registered with the Registrar of Limited Liability Partnerships under the Limited Liability Partnerships Act 2012\textsuperscript{19}.

(2) An LLP is not a company but a new type of body corporate. An LLP does not have shares, shareholders or directors.

(3) Unlike a company, an LLP does not have a memorandum and articles, and any member’s agreement is a purely private document.

(4) Despite the name ‘limited liability partnership’, an LLP is not a partnership, and partnership law does not apply to an LLP\textsuperscript{20}.

(5) It is open to the LLP to limit its liability by agreement. However, there must be no limitation of liability below the compulsory minimum level of insurance cover under the indemnity rules.

The Act is generally similar to Singapore’s Limited Liability Partnership Act 2005 except\textsuperscript{21}:

i. The Act specifically forbids the establishment of multi-disciplinary professional LLPs in Malaysia.

ii. Unless otherwise stipulated in the LLP Agreement, no partner shall assign his or her interest in the distributions or capital of the LLP without the consent of all partners. The opposite default position is adopted in Singapore.

According to the Companies Commission of Malaysia (CCM)\textsuperscript{22}, there are many fundamental differences between an LLP and a company. Amongst others, the differences are:

– No issuance of shares;

– Flexibility in making decisions;

\textsuperscript{17} See Dato’ Dr. Cyrus V Das, The Journal of the Malaysian Bar, 56 (2002) XXXI No 2, Should Law Firms Restructure: Is the Trend towards Incorporation or Limited Liability or MDPs?

\textsuperscript{18} See section 3 (1).

\textsuperscript{19} See section 11.

\textsuperscript{20} See section 4.


– No formal requirement for Annual General Meetings;
– No requirement to submit financial statements to CCM; and
– Accounts need not be audited

The LLP business structure is often adopted by professional groups such as lawyers, accountants and architects because of the nature of these professions which require the exercise of high-level care and skill. An LLP effectively shields the partners from the negligence or impropriety of other partners. However, it has many of the flexibilities of the traditional partnership model and is not burdened by strict capital maintenance rules. Private equity funds have also adopted the LLP model, particularly given the flexibility afforded for purposes of distributing profits earned on capital\(^\text{23}\).

However, one drawback of an LLP regime as compared with a conventional partnership is the tax structure. The Malaysian Bar Corporate and Commercial Committee reported that\(^\text{24}\) the Minister of Finance concluded that the tax treatment of LLPs ought to be similar to the tax treatment of companies. Thus, LLPs would be subject to income tax at the rate of 25%. However, there is a provision that if the capital of a Malaysian tax resident LLP at the beginning of the year of the assessment is not more than RM2.5 million (and subject to some conditions and exceptions), then the applicable tax rate would be 20% for the LLP’s chargeable income of us to RM500,000, with chargeable income in excess of RM500,000 being subject to tax rate of 25%. This is akin to the tax rate for small and medium enterprises or SMEs\(^\text{25}\).

As such, under the Malaysian LLP model, the tax treatment for a LLP will be substantially similar to that of a company. This is a significant departure from several other common law jurisdictions that have also adopted the LLP, such as the United Kingdom and Singapore, where a LLP is treated for tax purposes in the same way as a conventional

partnership and not as a separate taxable entity.\(^{26}\)

The LLP model is not confined to legal firms but open to any professional firm or business. It is described as a body corporate and said to be much closer to a company than a partnership both in form and legal content,\(^{27}\) however it retains much more of the partnership element if compared to the Singapore model of Law Corporations, which we will now examine.

4. **Law Corporation (“LLC”) under Singapore’s Legal Profession Act Part IVA and Legal Profession (Law Corporation) Rules 2000**

A law corporation is defined to mean a company approved as a law corporation under section 81B of Singapore’s Legal Profession Act (‘the Act’), which provides for the approval for law corporations (see ‘Application and Approval’, below). It is provided that 'company' has the same meaning as in the Companies Act.\(^{28}\)

A solicitor (defined as an advocate and solicitor who has in force a practising certificate)\(^{29}\) who intends to have a company or a proposed company approved as a law corporation must first obtain approval from the Council of the Law Society (the ‘Council’).\(^{30}\) The Council may approve the company or proposed company as a law corporation if the memorandum of association of the company or proposed company provides that the primary object of the company or proposed company is to supply legal services and such other class of services as may be prescribed in the rules made by the Minister pursuant to section 81N (the ‘Rules’) and in its articles of association provide for such matters as may be prescribed in the Rules.\(^{31}\) Also, section 81L stipulates that Part VIA and the Rules made by section 81N are to prevail over any inconsistent provisions of the memorandum and articles of association of a law corporation. In the case of a proposed company, any approval given by the Council is only effective when that company is registered and incorporated under the Companies Act.\(^{32}\)


\(^{28}\) See section 81A.

\(^{29}\) Id.

\(^{30}\) See section 81B.

\(^{31}\) See section 81B (3).

\(^{32}\) See section 81B(4).
The Council has the power to approve the name or proposed name of a law corporation. No approval shall be given to a name that:

1. is misleading or detracts from the dignity of an honourable profession;
2. is so similar to that of an existing law corporation and may thereby cause confusion; or
3. is inconsistent with any of the provisions of any rules on publicity made under section 71(1)\(^{33}\).

A law corporation that is a limited company or a private company need not have the word 'Limited' or 'Private' respectively as part of its name\(^{34}\). However, every law corporation must have either the words 'Law Corporation' or the acronym 'LLC' as part of its name\(^{35}\). Any change in the name of a law corporation requires the approval of the Council\(^{36}\).

Section 75C provides that a solicitor is prohibited from practising as a director of a law corporation unless the solicitor fulfils the same conditions which would allow him to practise on his own account or in partnership. At least one of the directors of the law corporation must be a solicitor who has been in active practice in Singapore for not less than three continuous years, or, have been for three years out of a continuous period of five years\(^{37}\) employed for not less than three continuous years or three years out of a continuous period of five years. There is no requirement that all the directors of a law corporation must be solicitors.

According to section 81H, all shares in a law corporation must be held by solicitors subject to any Rules as to any shares or proportion of shares in a law corporation which may be held by such other persons or class of persons as may be prescribed. Therefore, strictly speaking, the Rules may permit persons who are not solicitors to hold shares in a law corporation; however, it has not done so as it is, as there will be a need to amend legislation governing the legal profession in Singapore which prohibits any arrangement that would involve a firm of solicitors sharing their fees with non-solicitors.

\(^{33}\) See section 81C.
\(^{34}\) See section 81C(2).
\(^{35}\) See section 81C(3).
\(^{36}\) See section 81C(5).
\(^{37}\) See section 75C (3A).
There is an important restriction in that no person shall transfer or dispose of any shares in a law corporation except in accordance with section 81H and the Rules (this is subject to any rules made under section 81N), where section 81H in effect lays down strict capital maintenance rules to be observed. Any transfer or disposal of shares of a law corporation made in contravention of section 81H is null and void. Among the other important restrictions under section 81H are:

1. no person can hold shares as nominee for another person; and
2. no security can be created over any share.
3. A person holding shares in a law corporation cannot hold shares in any other law corporation, be a director, partner or consultant or an employee of any other corporation, or practise as a solicitor in his own account.
4. Where a solicitor is suspended or struck off the roll, or has ceased to hold a practising certificate, that solicitor is not allowed to hold shares in a law corporation unless a grace period for the transfer of such shares is granted by the Council.

Apart from the grounds for winding up prescribed by the Companies Act, the Act lists two other grounds:

1. where the law corporation ceases to satisfy the requirements of the Act or Rules; or
2. where the business of the law corporation has been conducted in a manner unbefitting of the profession.

An application to wind up a law corporation on any of the two additional grounds can only be made by the Attorney-General or the Council (section 81I).

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38 See section 81H(8).
39 See section 81H (3).
40 See section 81H (5).
41 See sections 81F(3) and 81H(4).
42 See section 81H(7) and (9).
Effects of becoming a law corporation

Private exempt company

A law corporation is deemed to be a private exempt company for the purposes of the Companies Act, notwithstanding the fact that shares in the law corporation are held by more than 20 members (section 81M(2)), and shall not be regarded as a public company merely because it has more than 50 members (section 81M(3)). Therefore, a law corporation being deemed an exempt private company is excluded from the scope of sections 162 and 163 of the Companies Act which prohibit a company from making any loan to any of its directors having the requisite interest in the company or to any of the companies in which any of such directors have an interest and the provision by the company of any security in respect of any loan to any such directors or any such company.

Professional standards

A law corporation is authorised to do anything that a solicitor can do by law, and is required to do all that a solicitor is required to do by law (section 81D(1)). A law corporation has the same rights and is subject to the same fiduciary, confidential and ethical requirements that lawfully exist between a solicitor and his client with respect to its clients. Further, solicitor-client privilege exists between a law corporation and its client in the same way as it exists between a solicitor and his client, and this privilege extends to every solicitor who is an officer or employee of the corporation (section 81E). (Section 81E(3) states that sections 128-131 of the Evidence Act on professional communications shall apply to a law corporation, its officers and its employees as it applies to a solicitor.)

A solicitor who provides legal services as a director or employee of a law corporation is subject to the same standards of professional conduct and competence with respect to legal services offered as if he were personally providing the legal services as a solicitor in a law firm (section 81D(3)).

Professional liability

The directors of a law corporation who are solicitors shall be jointly liable to disciplinary proceedings under the Act if the business of the law corporation is conducted in a manner unbefitting of an honourable profession and where such conduct cannot be attributed to the act or omission of a particular solicitor or solicitors whose identity is known (section 81F(2)).

The mere fact that a solicitor personally provides legal services as a director or an employee of that law corporation does not affect his personal liability at law (section 81D(4)). Hence, any solicitor who provides legal services as a director or employee of a law corporation would still be liable for his own misconduct or negligence in the provision of legal services through that law corporation (section 81F(1)).

Professional indemnity

Section 75A which empowers the Council to make rules concerning indemnity against loss arising from claims in respect of civil liability incurred by solicitors have been extended to include civil liability incurred by a law corporation in connection with legal services performed by it or with any trust of which it is a trustee.

From the above, we can thus summarise the principal features of the LLC as follows:

(1) A solicitor (defined as an advocate and solicitor who has in force a practising certificate) who intends to have a company or a proposed company approved as a law corporation must first obtain approval from the Council of the Law Society.

(2) The Council may approve the company or proposed company as a law corporation if the memorandum of association of the company or proposed company provides that the primary object of the company or proposed company is to supply legal services.

(3) No approval shall be given to a name if, inter alia, it is misleading or detracts from the dignity of an honourable profession.

(4) Every law corporation must have either the words ‘Law Corporation’ or the acronym ‘LLC’ as part of its name.

(5) A solicitor is prohibited from practising as a director of a law corporation unless the solicitor fulfils the same conditions which would allow him to practise on his own account or in partnership.

(6) All the shares in a law corporation must be held by solicitors.

(7) A person holding shares in a law corporation cannot hold shares in any other law corporation, be a director, partner or consultant or an employee of any other corporation or practise as a solicitor in his own account.

(8) A law corporation is authorised to do anything that a solicitor can do by law, and is required to do all that a solicitor is required to do by law. A law corporation has the same rights and is subject to the same fiduciary, confidential and ethical requirements that exist at law between a solicitor and his client with respect to its clients.

(9) A solicitor who provides legal services as a director or employee of a law corporation is subject to the same standards of professional conduct and competence with respect to legal services offered as if he were personally providing the legal services as a solicitor in a law firm.

(10) The mere fact that a solicitor personally provides legal services as a director or an employee of that law corporation does not affect his personal liability at law. Hence, any solicitor who provides legal services as a director or employee of a law corporation would still be liable for his own misconduct or negligence in the provision of legal services through that law corporation.

5. Analysis

The Singapore Minister of State for Law, when moving the amendment Bill in Parliament on 17 January 2000, gave a comprehensive reason for permitting the corporatisation of law practices. He said the move was not only to protect them against crippling legal claims but also to provide flexibility to venture out and compete in the global market. He said that:\n
[See Singapore Parliament Reports Vol 71, Sitting No 7 on 17 January 2000 at pp 1-2.]
One characteristic of a partnership firm is that the liability of the firm is not separate from the liability of the partners. If a partnership does not have enough assets to meet a claim against it, the claim will have to be met from the partners’ personal assets. Indeed, all the partners in the firm are jointly responsible for the acts of every other partner. It is therefore possible for one partner’s mistake to wipe out the personal assets of all the other partners. This acts as a disincentive for the formation of larger law firms as, in reality, it is not possible for partners in a large law firm to adequately supervise matters handled by others partners. It may also hold law firms back from taking on new ventures or expanding operations overseas, as such ventures necessarily involve risks. Allowing law firms to form limited liability companies will encourage law firms to grow larger, giving rise to greater economies of scale and greater competitiveness. It will allow law firms to build up their institutional identities, thus encouraging them to commit to greater long term investments in information technology and other high-tech equipment. Other jurisdictions like the United States, United Kingdom, Australia and Hong Kong allow law firms to either form limited liability companies or limited liability partnerships. Hence, allowing Singapore law firms to corporatise will enable them to compete on a more level playing field with foreign firms. This move is timely both in facilitating the expansion of overseas operations by Singapore firms and also in preparing Singapore firms for the liberalisation of the legal market to foreign firms.

If we are to compare between Limited Liability Partnerships and Law Corporations in terms of structure, the LLP model may on the other hand offer certain advantages over the Singapore LLC in that it does not require a share capital base and avoids the tensions attendant in the duties and responsibilities that flow between shareholders and directors. Also, there would be onerous compliance with the requirements of the Companies Act with regard to filing and disclosures for the LLC. Financial transparency would dictate disclosure as to expenditures and also payments made to the partner – directors as earnings. Finally, there is likelihood that the new entity would incur higher insurance premiums to make itself competitive in the market place and to off-set any fear in the market that it could avoid its
liabilities. Perhaps it is due to these reasons that the Singapore LPA has been amended subsequently in 2004 in order to also allow law firms in Singapore to adopt the LLP structure, besides the LLC that was already in place. This is because both models provide for separate legal personality that would shield the partners from any liability arising from the negligence or impropriety of other partners.

However, there are other competitive advantages of corporate structures for legal practice as seen from the Singapore LLC example, which could include as follows:

(1) Management Advantages

Law Corporations create a more efficient and effective management structure by:

(a) differentiating between the duties and powers of partners and management,
(b) formalising decision-making powers in an appropriately accountable board of directors and corporate officers,
(c) providing a more flexible way of dealing with admission and resignation of partners, since ownership interests in the firm are easily transferred and the firm has its own continuity of existence not dependent on its individual members. This makes it easier to enter into contracts and other commercial relationships including groupings of practices (e.g. through franchise type arrangements or corporate groups).

(2) Financial Advantages

The corporate structure provides opportunities to reduce tax on law firm profits, by the firm paying tax at the corporate rate rather than partners paying at the personal income rate. It is to be noted that in Malaysia, an LLP is also to be subjected to income tax in a

47 See John Story, ‘Incorporation of Legal Practices’ (1999) 19(10) Proctor 16. One law firm management expert suggests that there is a natural limit on the size of a fully effective partnership because of the need to monitor against the risks of moral opportunism and moral hazard and the need for the partnership to be built on trust and susceptibility to peer pressure. ‘Thus’ he concludes ‘the condition which, in general business, would give rise to incorporation probably exist in the legal profession, too …the partnership structure as we know it may not be able to sustain itself economically or socially beyond a certain size.’ However the same author also says that he actually prefers partnership for legal practice and does not see why a partnership could not have the management maturity to remain a partnership without needing to incorporate: see Stephen Mayson, Making Sense of Law Firms: Strategy, Structure and Ownership (1997) 138-9.
manner similar to a company\(^{49}\), as such there will be no real difference between an LLP and a Law Corporation in terms of its tax facets.

(3) Capital Raising Advantages

A Law Corporation, similar to other companies, may grant security over its assets or issue unsecured debentures, bills of exchange and other debt securities. However, although a company can also raise equity capital by floating on the stock exchange or retaining profits rather than distributing dividends to its shareholders, this kind of flexibility and advantage on capital raising is not yet available for the Singapore structure of Law Corporation due to the limitation that the shares in a Law Corporation cannot be held by non-solicitors. This is because the current legislation governing the legal profession in Singapore, which is also the case with Malaysia as well as the United Kingdom, prohibits any arrangement that would involve a firm of solicitors sharing their fees with non-solicitors\(^{50}\).

(4) Employee Advantages

As a general proposition, employee motivation and loyalty is more profound in companies where staff incentive schemes such as bonus shares or options are offered to employees. Such schemes tend to improve teamwork and create a sense of loyalty and staff morale that facets of working life are often lacking in today's legal partnerships. Accordingly, staff incentive share schemes may be introduced in a Law Corporation situation, thereby providing the dual benefits of staff loyalty and retention for the Law Corporation and financial rewards for employees\(^{51}\).

6. Alternative Business Structure (ABS)

The UK allows for the Alternative Business Structures (ABS) which is a model allowing non-lawyers and entities that are not law firms to become managers or to have ownership interests in law firms. Law firms are traditionally 100% lawyer owned, and offer

\(^{49}\) According to the 2013 Budget, however no amendment has yet been made to the Income Tax Act or the Finance Act in order to reflect this.

\(^{50}\) See rule 52 of the Legal Profession (Practice & Etiquette) Rules 1978 (Malaysia), and rule 7 of the Solicitors Practice Rules 1990 of England and Wales.

only legal services. ABS are innovative law firm entity structures, where non-lawyers are allowed to be partners/directors/own a stake/share in the law firm entity’s profits. More liberal forms of ABS also offer multi-disciplinary services that go beyond just legal services e.g. accountancy services, etc\textsuperscript{52}.

Recently, Singapore is taking an incremental approach in allowing for a limited form of ABS. The Committee to Review the Regulatory Framework of the Singapore Legal Services Sector submitted its recommendations to the Singapore Ministry of Law on 21 January 2014\textsuperscript{53} on, inter alia, the establishment of a new entity regulator to oversee all law practice entities, due to the fact that in Singapore law firm structures are becoming increasingly complex. Among other roles, this new regime will also be updated to accommodate law practices wishing to adopt ABS in Singapore for various reasons such as to permit greater participation of non-lawyers with deep management or finance experience in the law practice, and the ability to offer multi-disciplinary solutions within one entity, subject to appropriate limitations and safeguards. For a start, Legal Disciplinary Practices (“LDPs”) will be permitted, where non-lawyer managers / employees will be allowed to own equity and/or share in the profits of the LDP. LDPs will only be allowed to provide legal services.

7. \textbf{Way Forward}

The practice of law in Malaysia needs to strive to keep pace with the times. The LLP offers a possible alternative business option for lawyers and there will be many more options in the future. Although our Limited Liability Partnerships Act 2012 has come into force, it cannot be made available as of yet to the legal practice since our Legal Profession Act has not been amended in order to allow this change to take place. Undoubtedly, some progress has been made by the Malaysian Bar Council to formulate the appropriate amendments to the Legal Profession Act\textsuperscript{54}, however it is timely for the Bar Council to proceed with all the necessary amendments without any further delay. Similarly, should Malaysia wish to adopt the Law Corporation structure for law firms modelled after Singapore, there is a need, as was


\textsuperscript{53} Id.

\textsuperscript{54} Lee Shih, Limited Liability Partnerships for Lawyers – A Long Wait, \url{http://themalaysianlawyer.com/2015/11/06/limited-liability-partnerships-for-lawyers-a-long-wait/} (accessed on 2\textsuperscript{nd} April 2016).
done in Singapore, to also amend our Legal Profession Act in order to reflect the availability of this structure for the legal practice.

On a balance, it is submitted that the corporatisation of law firms should be welcomed. It should be looked upon as a natural progression in the evolvement of large legal firms. Usually, it is the large firms that undertake the type of legal work where the exposure and risks could be well beyond the insurance cover of the firm or its asset-base. Thus, unless Malaysian law firms are given the impetus and provided the protection of limited liability, they are unlikely to become competitive in the years ahead. It is accordingly an option that should be made available to legal firms as to whether they wish to corporatise themselves with limited liability. The safeguard lies in that it is a change that will not in any way detract from the principles of the Legal Profession Act 1976 as regards to the conduct of the profession. At the same time, the public is protected in its dealings with the corporatised law firm by the continued requirement for minimum mandatory insurance cover.
TRANSPACIFIC PARTNERSHIP AGREEMENT AND INTERNET POLICING?

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Abstract

Internet Service Providers (ISPs) are the gate keepers of internet and free flow of information and expression. ISPs can also play strategic roles in policing the Internet from harmful and illegal content including copyright infringing materials. As gatekeepers, they can block access and identify or enforce others to the identify the origin and identity of infringing materials making them the best organization to police the internet. The recently signed Trans-Pacific Partnership Agreement (TPP) between Malaysia, United States of America and another 10 countries in Asia and Pacific Region contains obligations that mandates ISPs to expeditiously remove or disable access to alleged infringing material upon acquiring actual or constructive knowledge of the infringement. The ISPs are only obliged to do so upon receipt of a notification from the copyright owners. With this new obligation, ISPs are obliged to take action in certain situations even without notification from the copyright owners. This TPP obligation goes beyond the normal standards in international treaties and national standards in the US as well as in Malaysia. From the economic point of view, ISPs may expect to incur additional financial obligation in relation to the required active role to supply relevant information with the aim to identify the alleged infringer. Using content analysis approach, this paper examines the possible legal and economic impacts in relation to the newly imposed obligation on the ISPs to take action in certain situations even without notification from the copyright owners, considering the bulk of information and online materials that are available on the internet nowadays.

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1. Introduction

Internet Service Providers (ISP) stand between users and online content. As a gatekeeper to the Internet, ISPs are poised to be the ideal body to take action against copyright infringing material either by blocking access or taking down altogether these materials. As the controller of Internet traffic, ISPs can track the traffic of infringing copyright content and notify the copyright owners of information pertaining to them. As a result, a system of notice and take down procedures has been introduced in many countries as legitimate measure to combat copyright infringement. In Malaysia, such procedure was introduced in 2012 vide the Copyright Amendment Act 2012. This procedure complements an earlier notice and take down procedures already in practice under the Communications and Multimedia Act 1998.

This paper begins with a write up on the notice and take down procedure under the Malaysian Copyright Act 1987 and the Communication and Multimedia Act 1998. The second part of the paper delves into the TPP provisions on ISP before comparing the stand in the 12 member countries on notice and take down procedure. The third part of the paper explores the possible economic implication with a private notice system.

2. Overview of legislation and some recent development

In Malaysia, the communications and multimedia industry is regulated by the Communications and Multimedia Act 1998. The Act has been enacted to promote national policy objectives for the communications and multimedia industry and to establish a licensing and regulatory framework in support of national policy objectives for the industry. The Act is significant in the sense that it enables the establishment of the Malaysian Communications and Multimedia Commission (MCMC) to play the role as regulator for the converging communications and multimedia industry as well as to oversee the regulatory framework for the converging industries of telecommunications, broadcasting and on-line activities. The establishment of MCMC could be traced back to the government's effort to move the nation
towards becoming an information society. Despite the great challenges, the basic question remains as to whether the country is progressing or regressing in realizing the envisaged goal of becoming an information and knowledge society (Ramasamy, 2010). Legislative approach is one of the methods to encounter the challenges, in particular, to deal with the content of the information available on the internet. (Nawang, 2014).

In March 2001, the MCMC designated the Communications and Multimedia Content Forum of Malaysia (CMCF) as the Content Forum. The CMCF governs content by self regulation in line with the Malaysian Communications and Multimedia Content Code (Code). The Code is a set of industry guidelines on the usage and/or dissemination of content for public consumption. As far as ISP liabilities are concerned, the Code has set out the guidelines to be followed by an Internet Access Service Provider in Part 5 of the Code, inter alia; it shall have the right to block access to or remove such prohibited Content provided such blocking or removal is carried out in accordance with the complaints procedure contained in the Code. Nevertheless, the definition of ‘prohibited content’ does not include content which infringes other parties’ intellectual property or contains element of fraud. As such, the Notice and Take down procedure may not apply to such matters. In short, the Content Code does not provide for a notice and take down procedure for copyright infringing materials. There is also no provision under the Copyright Act 1987 that exempts content providers/ hosts from liability. In fact, there is a possibility that content providers may be liable for secondary infringement by simply hosting web pages or portals for copyright materials posted by others. The absence of any explicit provision on content provider’s liability may cause considerable concern. (Azmi, 2009)

Traditionally, an ISP has been equated with that of the traditional telecommunications carrier in that, an ISP was merely a conduit that passively allowed for the transmission of data and was therefore not responsible for the nature, or character of that data. The argument is based on the reasoning that it would be unjust, unreasonable and impractical to expect an ISP to monitor all of the services that it may give access to, so as to safe guard against illegitimate use and or criminal activity. The logic and practical fact is somehow true as ISPs usually host myriads of web-based services and allow access to a worldwide audience. Looking at this angle, placing such an obligation on an ISP would adversely affect the free
flowing nature of the internet. Nevertheless, from another angle, the ISP is seen as the best avenue to block and remove offensive material. Thus, by regulating the manner in which ISPs respond to abuses of the internet advances can be made to ensure that the internet remains as the super information highway and pulls away from the danger of becoming a haven for illegitimate practices and illegal activities. Some of the main issues encountered by the ISP revolve around content liability, intellectual property rights as well as crime detection and surveillance. (Cooray, 2015)

Countries in various jurisdictions have taken efforts in regulating access of the internet and hence the role of ISP as a mere conduit was also part of the debates. Interestingly, research literature saw myriad of discussions and debates over the efficacy and feasibility of such legislation. The governmental and legislative support is seen as the positive effect to ensure safer content of information available online for public dissemination. Many have favoured that the ISP market should be regulated in some way. Australia for example, has been very active in regulating the Internet and it has started as early as 1995 in relation the creation of ISP Code of Practice. (Goode, 2005)

The most commonly used means of enforcement are takedown notices—demands sent from content owners to Internet Service Providers (ISPs) or website hosts to remove infringing content hosted on websites under their control. Depending on the circumstances, an ISP may be compelled upon receiving a takedown notice to remove infringing content from a hosted website, or in some cases, an entire website, for a temporary or extended amount of time. (Michels, 2013). In the United States, the Digital Millennium Copyright Act (DMCA) as adopted by the Congress and has been made effective since 1998, attempts to curb infringing online activity by balancing the interests of both copyright holders and ISPs. It has been argued that the broad scope of the take down procedure disrupts the balance between the copyright holders and ISPs. Besides, it gives the chance of misuse under safeguard provisions and it increases the risk of wrongful take down. (Tehrani, 2012) It has also been reported that several industry stakeholders responded that they were sometimes hesitant and doubtful when they are obliged to take proactive steps in handling the existence of inappropriate content online, for inter alia, fears around liability. (Byron, 2008). All in all, internet use and policy development, as well as measures to tackle challenges posed by the
The rapid growth of internet, may vary between countries and from one jurisdiction to another, so legislation for one state or country may not work for another. (Hornle, 2011)

3. ISP liabilities – the Malaysian position

Provisions on ISP’s liabilities were introduced in Malaysia vide the Copyright Amendment Act 2012. As these provisions are rather new, they have not been tested in the court of law. The new provisions define who are the ISP’s subjected to the private notice and take down procedure and what type of exemptions from liabilities do they enjoy once they undertake the procedure.

3.1 Who is an ISP?

Section 43B of the Copyright Act 1983 defines ‘service provider’ as;

(a) for the purpose of section 43C, means a person who provides services relating to, or provides connections for, the access, transmission or routing of data; and

(b) for the purpose of this Part other than section 43C, means a person who provides, or operates facilities for, online services or network access and includes a person referred to in paragraph (a).

The above definition seems broad enough to encompass ISPs such as TMNet, P1, Maxis and the like, as well as any person who provides or operates facilities for online services or network access. Therefore, it seems possible for the operators of websites, such as Facebook and YouTube for instance, to fall within the definition of “service provider” for the purposes of the aforementioned provisions.

3.2 Notice and take down procedure

As far as the ISP liabilities are concerned, Sections 43B to 43I set out the responsibilities of ISPs to address issues relating to copyright infringement on the internet. Apparently, the Act encourages the active cooperation of ISPs with right holders to prevent the use of networks for the commission of infringing acts.
Section 43H significantly confers the right on the owner of a copyright which has been infringed to notify a service provider to remove or disable access to the electronic copy on the service provider's network. A service provider who has received a notification as aforesaid is required to remove or disable access to the infringing electronic copy on its network within 48 hours from the time of receipt of the notification. Otherwise, the service provider may be held liable for the infringing activity. The person whose electronic copy of the work was removed or to which access has been disabled may issue a counter-notification to the service provider, requiring the latter to restore the electronic copy or access to it. The service provider must promptly provide a copy of the counter-notification to the issuer of the notification and inform him that the removed material or access to such material will be restored in 10 business days.

The service provider must restore the removed material or access to it not less than 10 business days after its receipt of the counter-notification, unless it receives a further notification from the issuer of the notification that he has filed an action seeking a court order to restrain the issuer of the counter-notification from engaging in any infringing activity in relation to the material on the service provider's network. Section 43H also requires the owner of the copyright to compensate the service provider or any other person against any damages, loss or liability arising from the service provider's compliance with the notification. Besides, it also imposes a corresponding obligation on the issuer of a counter-notification. In addition, the section also renders it an offence for a person who issues a notice to make any statement which is false, which he knows to be false or does not believe to be true, and which touches on any point material to the object of the notice. For this purpose, a person who makes a statement outside Malaysia may be dealt with as if the offence was committed in Malaysia.

3.3 Exemption of liabilities

Sections 43C to 43E exempt a service provider from liability for copyright infringement by reason of the following activities; transmitting, routing or providing connections of an electronic copy of the work through its primary network or any transient storage of the electronic copy of the work in the course of the aforesaid activities (Section 43C); making any electronic copy (system caching) of the work from an electronic copy of
the work made available on an originating network, or through an automatic process, or in response to an action by a user of the service provider's primary network, or to facilitate efficient access to the work by a user (Section 43D); storing an electronic copy of the work at the direction of a user of the service provider's primary network or linking a user to an online location on an originating network at which an electronic copy of the work is made available by the use of an information tool such as a hyperlink or directory, or an information location service such as a search engine (Section 43E). A service provider must satisfy the various conditions set out in Sections 43C to 43E in order to obtain the benefit of the exemptions under the respective provisions.

It is therefore clear that under the current law, knowledge of the infringement only arises upon notification from copyright owners. Section 43E of the Act does not require the ISPs to remove or disable access to the infringing material even if they have knowledge of the infringement. The ISPs are only obliged to do so upon receipt of a notification from the copyright owners. At this junction, it is to be noted that with the new obligation under TPPA, ISPs are obliged to take action in certain situations even without notification from the copyright owners.

4. TPP's provisions on ISP

Transpacific Partnership Agreement (TTP) has been hailed as the 21st century trade rules that has rewritten the rules for global trade. By creating a single set of trade and investment rules on trade areas, TPP promises to provide greater certainty and predictability for business by creating harmonisation of standards enabling parties to compete on a more level playing field. TPP is quite comprehensive in its coverage, extending on traditional trade issues such as market access, technical barriers to trade, sanitary and phytosanitary measures to non traditional trade issues such as labour standards and capacity building. The harmonisation of intellectual property rules is established through the intellectual property chapter, one of the biggest chapters in the TPP.
ISP's liabilities is one of the binding commitments under the TPP. These provisions are far from being non-contentious as they integrate US style safe harbor provisions as a platform for regional integration. This paper outlines the ISP's obligations under the IP chapter with the aim of ....

4.1 Who is an ISP?

Under the Agreement, the term ISP has been given a broad meaning. Under Article 18.81 Internet Service Provider has been defined to mean:

(a) a provider of online services for the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, undertaking the function in Article 18.82.2(a) (Legal Remedies and Safe Harbours); or

(b) a provider of online services undertaking the functions in Article 18.82.2(c) or Article 18.82.2(d) (Legal Remedies and Safe Harbours).

For greater certainty, Internet Service Provider includes a provider of the services listed above that engages in caching carried out through an automated process.

From the above definition, it is clear that the term ISP will catch not only the companies that provide telecommunication services but also content services, data storage, domain hosting, cache and other related services related to the Internet.

4.2 'Incentives'

TPP creates a form of legal incentives for ISPs to participate in controlling the traffic of copyright infringing materials in return for some form of security against possible adverse action by internet users known as safe harbour. As the provision explicitly use words such as legal incentives, it presupposes that other forms of incentive beside safe harbor can also be introduced to encourage cooperation from the ISPs. Further, the action taken can go beyond notice and take down procedure as TTP allows ISPs to take other action as long as they are
targeted towards the unauthorised storage and transmission of copyrighted materials\(^1\). To that effect, it has been questioned whether the termination of licence or service could be considered as a valid action for purposes of TPP. It is further made clear in footnote 152 that storage can include the act of hosting content such as blogs, web page, portals and the like.

In return, the ISPs get exemption from monetary relief for their actions. The reason why they are excluded is that they were not involved in the infringing action. These activities are beyond their control, not initiated and originated from them; though they take place through the systems that they controlled.

### 4.3 Limitations

The binding commitments on ISPs, however, do not extend to those who serve only as conduits in the whole process. The categories of services which are considered as mere conduits are routing, mere transmission and connections, intermediate and transient storage, cache, storage, linking and directories. Footnote 153 further clarifies that the storage of material may include e-mails and their attachments stored in the Internet Service Provider’s server and web pages residing on the Internet Service Provider’s server.

### 4.4 Red Flag vs Wilful Ignorance

ISPs are required to take action upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent. The language of the provision entails that ISPs action does not depend on actual knowledge. If it comes to the ISP's knowledge that certain suspicious activities are taking place, they can take action. . The red flag obligation originates from the US Digital Millennium Copyright Act 2000. Mableson (2013) highlights some of the important factors that should be considered in assessing 'awareness' here. Factors such as whether there are blatant indicators or signs that raises alarm such as the employment of the terms 'pirate' or 'bootleg' in their URL or header. The standard of awareness has been judicially considered in Viacom Int'l, Inc., et al\(^2\)., The Second Circuit in that case propounded that the standard to be referred here is 'wilful blindness' or involves in 'conscious avoidance' which implicates

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1. 149 of TPPA. For greater certainty, the Parties understand that implementation of the obligations in paragraph 1(a) on 'legal incentives' may take different forms.
2. 676 f.3d 19 (2d Cir. 2012)
deliberate closing of one's eyes to a blatant infringing activity. This goes further than the system that Malaysia is currently practising which is that ISP can only take action if there is specific notice by the copyright owner. The rationale is that ISPs must turn a blind eye to certain red flag activities on the basis that the copyright owner fails to submit the notice required under the law.

Countries that practice the notice and take down procedure will normally outlines the requirement of the notice, in order for them to be valid. TPP has a more relaxed requirements for the contents of a takedown notice. The applicant do not need to state his or her good faith belief that the material identified in the notice is being used unlawfully. As long as there is enough information about the identity and the location of the infringing materials, ISP must take action (Annemarie Bridy..) What TPP requires in the footnote is that such notice must contain information that:

(a) is reasonably sufficient to enable the Internet Service Provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement; and
(b) has a sufficient indicia of reliability with respect to the authority of the person sending the notice.

The Agreement envisages the position that some member countries have yet to have a notice and take down procedure. It accepts an alternative system which 'effective and consistent' which does not The speed of which the take down process take place must not be hampered by processes which does not impair the timeliness of the process provided in paragraphs 3 and 4, and does not entail advance government review of each individual notice³. As made clear from, an alternative way of complying with the obligations is by establishing of

(a) there is a stakeholder organisation that includes representatives of both Internet Service Providers and right holders, established with government involvement;

³ 154 of TPPA.
(b) that stakeholder organisation develops and maintains effective, efficient and timely procedures for entities certified by the stakeholder organisation to verify, without undue delay, the validity of each notice of alleged copyright infringement by confirming that the notice is not the result of mistake or misidentification, before forwarding the verified notice to the relevant Internet Service Provider;
(c) there are appropriate guidelines for Internet Service Providers to follow in order to qualify for the limitation described in paragraph 1(b), including requiring that the Internet Service Provider promptly removes or disables access to the identified materials upon receipt of a verified notice; and be exempted from liability for having done so in good faith in accordance with those guidelines; and
(d) there are appropriate measures that provide for liability in cases in which an Internet Service Provider has actual knowledge of the infringement or awareness of facts or circumstances from which the infringement is apparent.

4.5 Counter notification process

If a system for counter-notices is provided under a Party’s law, and if material has been removed or access has been disabled in accordance with paragraph 3, that Party shall require that the Internet Service Provider restores the material subject to a counter-notice, unless the person giving the original notice seeks judicial relief within a reasonable period of time.

4.6 Monetary incentives for abuse of the system

Article 18.82.4 further provides for monetary compensation for knowing material misrepresentation in a notice or counter notice that cause injury to any interested party. However, the term ‘interested party’ here is may be confined to only ‘those with legal interest recognised under the member countries’ law. The provision of such penalty is a testimony that some form of balance has been provided for in the Agreement In the US for example, monetary remedies for material misrepresentation in take down notices (Annemarie Bridy). In addition, the DMCA provides for the recovery of attorney's fees and costs, to reduce the

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4 154 of TPPA
5 footnote 158 of TPPA
prospect of abusive takedowns. More fundamentally, TTP talks of the impacts of right-holders and IPS, but not impacts on internet users. This is a clear testimony that TPP plays little regards to the internet users.

4.7 The flaws with the incentive system

Critics raised a number of arguments against the private notice system. It has been said that legal incentives for self-regulation might lead to privately created systems of easy and presumably illegal takedown of content, or establishing abusive rules towards consumers. It was feared that such private notice might lead to surveillance of contents or deep packet inspection, in order to fulfill the intended 'cooperation' with copyright holders. As reported, Google for example has received 77 million copyright takedowns in past month. This leads to the fear that the overzealous removal of material may raise concerns of censorship.

The lack of requirement that right holders must state that to the use of their content is unauthorised further compounds this fear. Under current DMCA, Australian and Peru law, the right holders must attest the private notice with a statement that they have good faith belief that the use of their content is not authorized by the rights holder. In Japan, the right holder must justify why he believes that an infringement has taken place. New Zealand and Candian law goes further than that by providing that even the date of the infringement that have alleged to have occurred must be notified.

The TPP notice and take down procedure extends the intermediary liability of ISPs for enabling infringement. Legally, ISPs should only be liable if they are involved in the infringement by enabling or authorising the infringing activities to take place. Furthermore, certain uses have been accepted as 'permitted use' under the copyright limitations and exceptions. ISP's intermediary liability should also be subjected to those limitations and exceptions.

The choice of a private notice system over other existing system currently practised in the world raises the issue as to what is the optimal form of controlling copyright infringing traffic on the internet. The UK for example allows the tampering of the Net traffic by way of an injunction from the court. The UK Copyright and Related Rights Regulations 2003 allows
the grant of an injunction against a service provider only in instances where the service provider has “actual knowledge” of another person using their service to infringe copyright. What amounts to actual knowledge?

This is clarified in s 97A(2), as inserted by the 2003 Regulations:

In determining whether a service provider has actual knowledge for the purpose of this section, a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to –

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c) of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013);

and

(b) the extent to which any notice includes:

(i) the full name and address of the sender of the notice;

(ii) details of the infringement in question.

Canada practises the notice and notice procedures. The system requires the copyright owner to file a notice to the ISP who is then duty-bound to notify the alleged infringer. The notice is mandated to be kept for 6 months in ordinary circumstances. If there is legal proceedings initiated against the owner of the web site, such notice is to be kept for a longer period, i.e. 12 months. The notice and notice procedures main aim is to assist copyright owners to build their case against the infringer and not to take down the material. It allows the copyright owner to retain the notice as evidentiary tool or proof of willful infringement if the web site owner was not to take any action after receiving the notice. It enables the copyright owner to claim additional damages for such willful infringement.

Chile also practices a notice and take down procedure that is mediated through court proceedings\(^6\). The system which was introduced in April 2010, right-holders are required to obtain judicial orders to take down or block access to infringing content. Although the system was introduced after the signing of the US-Chile Free Trade Agreement, it differs from the US Digital Millennium Copyright Act (DCMA) safe harbor system in many critical areas.

\(^6\) https://cdt.org/files/pdfs/Chile-notice-takedown.pdf
Chile opted for judicial mediated notice and take down procedure due to overriding concerns over the protection of Internet users’ constitutional rights. Commentators highlighted that such system provides more balance to conflicting interest between the copyright owners for reducing illegal online content and internet users’ want for freedom of expression. By requiring a judicial order, it enables an evaluation of the legitimacy of the copyright owners claim as opposed to a simple private notice action. In turn, the likelihood of false and abusive notices would be reduced tremendously. There will also no overzealousness of taking down materials as the claim has to be evaluated through a judicial process first before an action can be taken. More fundamentally, ISP's are only duty bound to take action when they have “actual knowledge” of infringing activity. This could remove the possible discretionary effect of removal of content solely based on red flags.

Another major concern is that TPP does not give recognition to the whole list of accepted uses and exceptions recognised under the copyright law. Such exceptions play a major role in the context of the context of user-generated content. For example, the exceptions include use for satire and parody and the use of clips for criticism and teaching (with attribution). By not acknowledging such rights, the notice and take down procedure under TPP is so skewed in favour of the copyright owner. In the US, the applicability of fair use defence in notice and take down procedure has been considered in Lenz v. Universal Music Corp, 7 The Court in that case decided that copyright holders must determine first whether the use of their materials is somehow not covered under the fair use exceptions for it to be 'unauthorized' use in the first place. On this Kathleen O'Donnell, was of the opinion that this fair use determination is to ensure that the interests of the users are not unnecessarily impeded by the notice and take down procedure.

Counter notices is only discretionary under the TPP. This underscores the importance of providing the affected party the avenue to raise their objection against action taken under the notice and take down procedure. Counter notices is mandatory in Malaysia.

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7 572 F. Supp.2d 1150, 1151 (N.D. Cal. 2008)
5. Conclusion

Although the practical effects and implication of the TPP on Malaysia is yet to be seen, it definitely aims for stronger IP protection in striking the right balance by incentivizing service providers and creators to cooperate in detecting and deterring online infringement. Despite the uncertainty, on a positive side, the rights of copyright owner, be it individual or corporation, would be strengthened though heavier obligation is imposed on ISP to take proactive measures in removing and taking down the infringing materials on the internet.

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SUSTAINABLE DEVELOPMENT OF THE COMMUNITY VIA BUSINESS ENTITY; SPECIAL REFERENCE TO THE COMMUNITY INTEREST COMPANY

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Abstract

Social entrepreneurship is one of the mechanisms to overcome social or community’s economic issues and to achieve sustainable development of a country. In the Southeast region, the use of business entities is mainly focus on private commercial gains. Only charitable based business entities and foundations are used to cater the economic issues of the community.

In the United Kingdom, an interesting business entity known as community interest company (CIC) was introduced in 2005 to inculcate and promote social entrepreneurship among the people. CIC was introduced to address lack of vehicle to carry out non-charitable social enterprises. Generally, CICs are normal limited companies. However, different from the objectives of commercial companies, the objective of CIC is to benefit the community rather than private shareholders. In CIC, the company’s assets are “locked” and could only be used for its social objectives. It is apparent that as people in all Southeast Asia’s countries are mainly family-knit and close-community, having a business entity which is established for the purpose of the community interest would be a good and appropriate alternative business vehicle. The objective of this paper is to explore the possibility of introducing a business entity in Malaysia which could be used by the people to carry out business activities and gain profit but with a clear purpose that profits of the business shall be used for the public interest. This paper adopted the statutory analysis methodology to see how the UK’s CIC model could be applied in Malaysia.

Keyword: Social Entrepreneurship, Sustainable Development, Public Interest Entity

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“Whenever society is stuck or has opportunity to seize an opportunity, it needs an entrepreneur to see the opportunity and then to turn that vision into realistic idea and then, indeed, the new pattern all across society...This is the work of social entrepreneurs”

- Bill Drayton, Founder of Ashoka: Innovators for the Public

1. Introduction

A rapid growth of global economy has given a significant impact to the society. Such implications does not only bring wealth but also invite to the economic unbalance among the society which lead to many social problem, like poverty, unemployment, inequalities in the access to health care and social services (Catford, 1998), poverty, crime and social exclusion (Blackburn & Ram, 2006). Social enterprise was actually introduced as an alternative way to combat these social problems.

This paper is divided into four parts. The first part will discuss briefly on the concept of social entrepreneurship. The second part explains the role of social entrepreneurship to combat social problem: experiences from various countries. This followed by a brief concept of Community Interest Company (CIC) in United Kingdom and social entrepreneurship in Malaysia. Final section proposes possibility of introducing Public Interest Entity as business vehicle for social entrepreneur in Malaysia.

2. Social Entrepreneurship

According to Dees (1998), Alvord, Brown and Lett (2002), Barendsen & Gardner (2004), Okpara and Halkias (2011), social entrepreneurship generally refers to practices that employ entrepreneurial capacities to relieve social problems. William (2007), highlighted that social entrepreneurship is a community enterprise which is founded by local people with the purpose to overcome the economic problems of the people. According to Paton (2003), social enterprise as a generic term, encompasses many and different sorts of organization where people conduct business but do not partake the money. Defourny and Nyssens (2006), explained the concept of social enterprises as a democratically controlled
organizations with explicit aim to benefit the community and profit distribution to external investor is limited and such definition has been supported by.

Social entrepreneurship is also describe as an innovative approaches to solve social problems as well as an entrepreneurial action that serves a social objective (Austin, Stevenson & Wei-Skillern, 2006; Roberts & Woods, 2005; Peredo & McLean, 2006; Peredo & Chrisman, 2006) and a consequence of a pressure to relieve modern societies from social illnesses (Thompson, Alvy & Lees, 2000).

The unique characteristics of social enterprise have received special attentions from many jurisdictions by conferring statutory definition on it. In United Kingdom, social enterprise is explained as businesses with mainly social objectives whose surpluses are principally reinvested for that purpose in the business or in community (Community Interest Company Act 2005) and in Thailand, the Regulation of National Promotion of Social Enterprise 2011 defines social enterprise as an act of private sector, which is a person, group of person or community, operating or carrying out businesses with initially express purpose of addressing problem and developing community, society or environment, and generating revenue by selling good or providing service not with primary object of maximizing profit for its shareholders. It is observed that the statutory definitions have given significant impact to social enterprise as it entails it a valid entity with rights and legal attributes.

3. **Roles of Social Entrepreneurship**

For a long times, social entrepreneurship is being recognize as playing important role to the sustainability of economy and community’s life (Christie & Honig, 2006; Dees, 1998; Harding, 2004; Nicholls & Young, 2008). Many studies show that to a certain extent some of the social entrepreneurship practices have succeeded in transforming the community to have better life and social well-being (Alvord et al., 2002). In United Kingdom, social entrepreneurs have played major contributions in transforming the society, as for instances, it was reported that, almost a million people have been employed by social enterprise and been contributing more than 5% to UK’s GDP (MaGic 2015). Social enterprises had succeeded to assist the Finland’s Government to cater unemployment rate during economic crisis in 1999. It also was reported that, the social enterprise in Thailand has succeed contributing to reverse migration (urban – rural) and not only that, it also succeeded to transfer a number of
farmers to become financially self-sustainable and debt free (Courtney & Jirathanapiwat, 2014).

4. Social Entrepreneurship in Malaysia

In Malaysia, the concept of social entrepreneurship is commonly associated to voluntary based business activities taken by some government agencies and non-governmental organization (NGOs) to overcome social problem, especially related to poverty (Farok, 2011). Some of these organizations are registered and governed by various legislations, such as the Companies Act 1965, Trustees (Incorporation) Act 1952 and Society Act 1966.

In promoting social entrepreneurship, the Malaysian Government introduced several incentives to promote the business activities such as tax exemption and initial funds for the operation (MaGic, 2015). Nonetheless, this kind of organizations faced several challenges such as lack of regulatory agencies to support and coordinate their activities, lack of legal recognition, and awareness as well as negative perception and recognition by public (MaGic, 2015).

The situation became worse when the funds substantially finished and this raised the issue of the sustainability of the social entrepreneurship (Kadir, M. A. B. A., Sarif, S. M. 2013). Accordingly, to continue their objectives, many of these organizations shifted to become a social entrepreneur as to ensure their sustainability. However, in the absence of suitable business entity such as CICs in the United Kingdom, the Malaysian ‘s social entrepreneurs have difficulties of running their business to generate income and at the same time providing benefits to the community/public.

5. UK Community Interest Company CIC

In the United Kingdom, an interesting business entity known as Community Interest Company (CIC) was introduced in 2005 to inculcate and promote social entrepreneurship among the people. CIC was introduced to address lack of vehicle to carry out non-charitable social enterprises, Defourny, J., & Nyssens, M. (2008). CIC is used as a business solution to achieve public good and to create sustainable and socially inclusive economy. The range of
businesses conducted by CICs is diverse. They include community enterprises, social firms, co-operatives, and company operating in all over the world.

As regards to the business model, CICs could be carried on via companies limited by guarantee or companies limited by shares and as registered charities, either industrial or provident societies. A charity may own a CIC, in which case the CIC would be permitted to pass assets to the charity. CICs are more lightly regulated than charities but do not have the benefit of charitable status, even if their objects are entirely charitable in nature.

In order to be recognized as CIC, the CIC regulator will apply a special test known as community interest test, as mechanism to determine whether such application meets the standards and criteria. If satisfied, the regulator advises the registrar in Companies House to issue a certificate of incorporation as a CIC (CIC, Regulator 2006) People who set up a CIC are expected to be humanitarian entrepreneurs who want to do good in charity. This is because the CICs are specifically identified with social enterprises and members of the board of a charity may only be paid where the constitution contains such a power and it can be considered to be in the best interests of the charity. It means that, in general, the founder of a social enterprise who wishes to be paid cannot be on the board and must give up strategic control of the organization to a volunteer board, which is often unacceptable. This limitation does not apply to CICs. CICs allow the businessmen to work for community benefit with the relative freedom of the non-charitable company. Not only that, CICs is allowed to pay the dividends to their shareholders under capped conditions of maximum dividend per share 5% above the Bank of England base rate up to a maximum of 35% of their distribution profit. Besides that, as part of corporate governance practice, CICs are also required to make a community interest statement for public record (CIC, Regulator, 2009). As a corporate legal entity, CICs entitle to hold their assets independently, and the asset must locked for the charity purpose only.

6. Proposal for Malaysia Public Interest Entity (PIE)

In Malaysia, social entrepreneurship exist in all kinds of business entities and governed by various legal frameworks. Accordingly, the Malaysian legal framework for social enterprise shall cross the boundaries of legal and organizations, enabling all foundations, corporations and organizations obtain a legal brand of social enterprise.
However, Kelly (2009) suggested that social entrepreneurs need an appropriate business entity and legal framework to promote their development and sustainability. He further explained that, an out-of-date law, and in appropriate legal entities become a major obstacle to transformative plan.

Looking at the practices of social entrepreneurship in Malaysia, it would be good if there is a specific legislation which legalizes the social entrepreneurship entity. Similar to UK CIC, Malaysia, PIE could be conducted in any forms of business vehicles; sole proprietorships, partnerships or companies but as PIE; it shall have its own legal entity and attributes similar to companies which enables it to conduct business activities with least restrictions.

The tax status of PIE must also be clear as a charitable entity which entitles it to be tax exempted. Specific provisions must be drafted in the tax legislations/regulations for PIE to ensure that it fulfilled all the requirement of charitable entity for the purpose of tax exemption. In these ways, PIE would be able to conduct business activities in a bigger scope, minimize operating cost and produces maximum benefit to the community/public.

Such entity could be legally introduced by invoking the doctrine of juridical person and legal principles of separate legal entity. In addition the principle of fiduciary relationship must also be emphasized in PIE as to impose prioritization of social good rather than for profit maximization.

7. Legal Framework of PIE

**Public Interest Entity Act**

- **STATUS AS LEGAL PERSON – DOCTRINE OF JUDICIAL PERSON/BODY CORPORATE**
- **TAX STATUS - CHARITABLE ORGANIZATION – TAX EXEMPTION**
8. Conclusion

With the recent economic downturn, it is high time for the Malaysian government to focus on social entrepreneurship as one of the measures to assist the public. By introducing PIE, not only the Government spent less on the public spending but enable the community to create and sustain its own revenue generating entity. With the suggested legal framework, PIE could exist independently and perpetually, as to ensure sustainability of the structure. PIE would also strengthen the spirit of community- hood as the running of PIE requires teamwork and cooperation within the community itself and substantially independent from the Government. PIE is indeed a business entity of the people by the people and for the people.

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HUMAN RIGHTS: DISCRIMINATION AGAINST WOMEN IN WORKFORCE AND WAY FORWARD

Seyapalan, P.S.D.¹, Shakri, A.K.² & Ramachandran, J.³

Abstract

Gender equality is a vital right of all human being. There have been attempts to remove discrimination against women in Malaysia. However, its success or progress is a different story. Women are often placed under a second class status, hence affecting their rights in other areas, to name a few; their citizenship, education, employment, parental rights and inheritance. Gender equality is guaranteed under Article 8 of the Malaysian Federal Constitution and Malaysia has also ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This Convention spells out the rights of women and the states’ obligation in ensuring the rights under this treaty is respected. Despite, Malaysia’s ratification, the recent gender discrimination landmark case of Noorfadilla Ahmad Saikin has been rather disappointing as the High Court reduced the amount of award granted by 90%. Hence, there is a need for improvement to ensure women’s rights will not continue to be affected.

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1. Introduction

Employment Discrimination Whereby Employees Are Treated Differently Based On Gender May Also Be Referrred To As Gender Discrimination, Genderbias, Or The Less Popular Term, Sexual Discrimination (Kelsey C.L, 2015). While It May Seem As If, Women Are Moving Forward With The Coming Of International Treaties, Women Continue To Suffer Gender Biased In Workforce.

2. Challenges Faced By Women In Workforce

Despite being a significant contributor in workforce, there are many challenges faced by women. Firstly, there is a distinct struggle for equal opportunity and treatment. This is evident from a survey conducted by the Department of Statistics in 2015, in which it was found that the average pay of female employees is lesser than the male. It was also pointed out that there was less number of women holding high positions, are usually placed at a lower ranking positions with lower pay and struggle with promotion opportunities despite the fact that they may have equal education (Othman Z.,2015). Cases such as Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia and Ors [2005] 3 MLJ 681 and Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and Ors [2012] 1 CLJ 769 are also instances which show that women are discriminated in workforce simply on the grounds of pregnancy. Next, the Court of Appeal in March 2012 upheld the right of an employer, Guppy Plastics Industries Sdn Bhd, to enforce the retirement of female employees at an earlier age than male employees.

3. Case Analysis

The right of women in Malaysia with regard to employment has been rather unstable and this is evident form the case of Beatrice Fernandez, in which the applicant who is a stewardesses was forced resign on becoming pregnant and in the event she fails to resign, the first respondent shall have the right to terminate her services. In this case, the court had to deliberate on the issue as to whether there was a violation of Article 8(2) of the Federal Constitution which provides against discrimination of employment on the grounds of gender
and CEDAW. The Court later ruled that Article 8(2) is inapplicable because, Article 8(2) is applicable solely for public officers and in this case, the applicant was clearly not a public officer. Unfortunately, the issue as to whether it was in violation of CEDAW has failed be discussed by the court in this case.

Next, the Malaysia seemed to have progressed, moving away from discrimination against women in workforce in the case of Noorfadilla bt Ahmad Saikin v Chayed bin Basirun and Ors [2012] 1 MLJ 832, when the High Court delivered a decision which deserves much applause when it was held that the refusal to employ a woman on the grounds of pregnancy alone is a form of gender discrimination. But, what seemed like a giant leap, did not last long when the Shah Alam High Court, judicial commissioner reduced the amount of award by 90% as the judicial commissioner stated that Norfadilla failed to disclose her pregnancy. it clearly stated that Under Article 11(2) of CEDAW that state parties shall take appropriate measures to prevent discrimination against women on the maternity. Therefore, to suggest that there is a requirement to disclose if one were pregnant is contradictory to Article 11(2) and is indeed discriminatory. Being a member state to CEDAW, Malaysia ought to act in the spirit of the treaty and not to undermine the obligations under CEDAW. Further, it has been highlighted in the case of Attorney General Of Trinidad And Tobago v Ramanoop [2005] UKPC 15, the amount of award should reflect the seriousness of the breach, and grave importance ought to be given if it were a violation of the constitution. Norfadilla was a public officer and she should be protected under Article 8(2) of the Federal Constitution, the reward should not have been reduced as the violation was serious and against Article 8(2). The award should serve as an example to others and to help deter any constitutional breach.

In the case of Guppy Plastic Industries Sdn. Bhd. v. Gan Soh Eng and 8 others (R1-25-238-2008), eight women were forced to resign when a new employment handbook was introduced because among the regulations was that woman must retire at the age at 50 while men at 55. This is clearly in breach of Article 1 of CEDAW which defines discrimination as:

"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women,
of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Unfortunately, in 2010 the High Court overturned the Industrial Court’s decision, finding in favour of the company. The women appealed the 2010 High Court decision but in March 2012, the Court of Appeal dismissed the women’s appeal.

The abovementioned cases show that discrimination against women exists and something must be done fast to ensure that women’s rights will not continue to be violated.

4. Way Forward?

CEDAW was ratified by Malaysia in 1995. Article 11 of CEDAW focuses on the elimination of discrimination against women in workforce and spells out that states Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

As it has been stated, Malaysia has ratified the convention and Article 11 requires state party to the take appropriate measures to eliminate discrimination against women. Malaysia has been rather slow in taking measures to eliminate gender-bias and this is evident from the cases analysed in the earlier section. Malaysia must come up with a domestic legislation against gender-discrimination in workforce. This would help give the courts a clearer guideline in tackling issues involving gender-bias. The domestic legislation should also incorporate the definition of gender discrimination as it would help the courts in interpreting and determining if a situation is indeed discriminatory. Next, it is pertinent for Malaysia to have a domestic legislation to help resolve the issue as to whether CEDAW should be applied in Malaysia or not. Of course, Malaysia must be applauded for taking a step in ratifying CEDAW, but it is also important to acknowledge the obligation therein.

Given the struggles that women are facing in both private and public sectors, Article 8(2) should be amended. Article 8(2) of the Federal Constitution reads:

“Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.”

Hence, Article 8(2) is only applicable to public servants or officers. There is no need in limiting the application of Article 8(2) to public officers only, as it is clear that gender-bias happen in both public and private employment. To restrict the application of Article 8(2) to public officers only is to allow private employers to come up with unfair terms which may be discriminatory against women.

These two steps suggested would be beneficial to help lessen discrimination on the grounds of gender and to help women progress in workforce without the fear of being discriminated upon.
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The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
FACTORS GOVERNING ENFORCEMENT OF ENVIRONMENTAL LAW

Ansari, A.H. & Ishan Jan, N.

Abstract

In spite of existence of several hundred treaties and state legislations, for enforcing them and original, for abatement and control of degradation of the environment and conservation of the biodiversity, a significant component of it, the condition of the environment around the world became bad to worst. Because of that, people are suffering and the environment is degrading. The laws at both the levels are being amended from time to time with a prime object for reversing the situation. But they have utterly failed even to stabilize the situation. To make a viable law is one thing, but to make it work requires its proper enforcement with the help of preventive and punitive measures. In environmental matters, as penalty does not always work, exploring factors, including low penalty, responsible for creating impediments in enforcement have to be properly investigated and discussed. The paper investigates into possible reasons for weakening of enforcement of environmental laws, discusses them and offers suggestions for proper enforcement.

Keywords: Enforcement of law, punitive measures, preventive measures, extralegal measures.

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1. Introduction

Conservation of environment and safeguarding it from further degradation is crucial for attaining the sustainable development in all countries, developed, developing and least developed. Although this could not be a reality because the laws enacted for environmental protection are duly and effectively enforced; rather, the condition is not even stabilized. An effective enforcement of the environmental laws, international and national, is a must as it is one of the reliable ways in which governments utilize their resources, human and material, to prevent illegal activities leading to violation of environmental laws, thereby alleviating their negative and excessive onslaught on the environment, especially the biodiversity, including the human mass. With putting the effective environmental enforcement and compliance of environmental laws culture in place capable of ensuring abatement an control on further degradation of the environment for improving the condition of the environment and ensuring health economic development.

The world community is now visualizing that proper enforcement of international laws via national commitments to enforce them will play a vital role in solving global environmental problem, specifically global warming problem by cutting on emissions of greenhouse gases, and marine pollution problem by competent surveillance and taking swift and appropriate action against perpetrator actions. This has been emphasised time and again at international environmental law conferences, where legal experts and technocrats have been offering their valuable suggestions. To this end, the paper examines and analyses the factors governing environmental enforcement with making special reference of some developing jurisdictions because they wish to develop fast and for that they need enough resources, especially financial and technological resources, trained personnel and training. Trained personnel and training of law enforcement official is a crucial tool along with financial assistance and technology for monitoring. The paper will offer certain viable suggestions for efficient of enforcement of environmental laws.


2Ibid
2. Factors Governing Enforcement Of Environmental Law

2.1 General

First and foremost, the term “enforcement” is an English word derived from Anglo-Saxon Law traditions, which was later translated into several languages in the world. For instance, in reference to the Spanish language, the term “enforcement” was translated to mean “observance of the law”. In order to alleviate the persisting environmental problems threatening the environment in general and human health in specific, states are resorting to useful preventive and punitive measures, including some extralegal measures. In relation to the definition of the term “Enforcement”, the following terms are pertinent and supportive, namely: inspection, negotiations (developing mutually agreed schedule and approaches for achieving compliance), legal action, compliance mechanism (such as developing environmental consciousness among all stakeholders), and incentives on machinery and plants. To understand the meaning of the term better, one should look at it beyond its literal connotation. The term should always be considered broadly along with other components in order to have a clear picture about its technical meaning. The components of an efficient enforcement comprises of: identifying the means and ways; identifying priorities, identifying stakeholders and extending them all possible help to them for compliance; encouraging general public to swiftly inform enforcement officials about the violation of the law; providing training to enforcement officials and reminding them about their duties for ensuring good governance; and bracing the about their accountability on connivance or failure. It is important to note that in defining the term “enforcement”, legal diversity and the territorial jurisdiction of every country has to be considered. Various jurisdictions may use appropriate language and local dialects, use folklores in order to communicate with their people. However, the concept of enforcement in relation to this paper, can properly be defined and considered within the purview and design of Multilateral Environmental Agreements (MEAs) in a particular jurisdiction to which the country is a Party.

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6George Lubega Matove, “The Challenges in monitoring and enforcement of Environmental Laws in Uganda,” paper presented at a training workshop to strengthen and enhance the capacity of police investigators and state prosecutors to enforce environmental laws, March 2006, at 2  
6See Ibid, at 2-3  
enforcement in this context protects public health and environmental quality, it creates and reinforces the credibility of regulatory and enforcement authorities and their just decisions; and ensures fair and impartial treatment among all, without undue favour or deprivation. In the most basic sense, the term enforcement can be defined as an act of compelling compliance with a law. In the past, enforcement of the environmental laws was considered as a self-help system and not to be enforced through governmental machinery. However, in the contemporary society, various institutions and enforcement mechanisms have been put in place to ensure its smooth and effectiveness. And they are being enforced to the best of their abilities, but the slackness exists in developing and least developed countries because of limited resources, financial, technological and human resources. Some say they poor enforcement in these countries are there because of insufficient political will on their part. Here one thing should be clear that these countries have to develop with whatever limited resources they have. If they strive to have very high environmental standards to achieve, it will just be a mockery not a reality. It is for this reason that at international level one of the basic principles with respect to cut on greenhouse gases for them is, “first develop, then accept any cut on carbon emissions”. It goes true to other conservation of other components of the environment. Perhaps for this reasons, the Paris Declaration under the UNFCCC has provided all countries to set their achievable goals and strive hard to achieve that; subject to reviews after five years.

2.2 Preventive and Punitive measures

The major concern of environmental enforcement focuses on preventive and punitive measures. The two measures consist of various aspects such as good governance and rule of law, deterrence to the perpetrator and other people, safeguarding compliance by various preventive measures, and application of the follow the law only when they think that penalty will super code their benefits, or they follow the law because they think for various reasons that fairness demands that a rational law, which is good for all, should be followed. It has also

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Between Practitioners and Academia (2005); see also (2005) Environmental Law Network International Review 3-13]; at 9-17


^Jutta Brunnee, at 3

^Ibid
been understood that the role of NGOs in mobilizing public opinion and filing public interest litigations where the requirement of *locus standi* is relaxed in public interest, and proactive public participation constitute an important component of popular preventive measures. Moreover, extending *pro bono* services to the public, by making them to be well-enlightened about the possible impacts of environmental degrading activities, access to justice via public interest lawyering or litigation, are popular and well-implemented measures which have played vital roles in enforcement of environmental laws in addition to public participation in the environmental decision-making.\(^{10}\) The Convention on Access to Information, Public Participation in decision-Making and Access to Justice in Environmental Matters, Aarhus 1998. This convention aptly entails the three pillars of enforcement of environmental legislations – access to information, public participation and access to justice – have widely been appreciated and internalized by European states and other countries, as these pillars are cardinal for proper enforcement compliance of environmental laws in all jurisdictions.

Be that as it may, it is important to know that factors governing environmental law enforcement varies from one country to another and from one legal system to another. In some countries the enforcement depends on the nature and functions of environmental legislation.\(^{11}\) To this end, there are different measures to be taken in order to have effective environmental law enforcement. Among such measures include reflection by the legislature on the most appropriate particular policies and schemes for achieving the desired goals. Government should establish the viable institutional machinery for enforcement of the environmental laws.\(^{12}\) Other measures to be taken include the empowering of the related institutions and partners to function efficiently within the framework of policy parameters. This latter measure shall be taken only in countries where institutions and enforcement machineries are already well in place. The establishment of legislative techniques and regulatory approaches, such as command and control regimes which emphasise deterrence and punishment, economic incentives and land use planning and zoning; and provision of adequate financial resources and trained human resources.\(^{13}\) That is to say, when a


\(^{11}\) Sylvia Bankoebza, at 17-20

\(^{12}\) Ibid

\(^{13}\) Ibid
government establishes a detailed and an effective inspection and enforcement scheme, the sanctions of the command and control regulation have to “deter” other violations to effectively protect the environment. Similarly, financial incentives assists in controlling environmental behaviour based on the sanctions to be imposed in cases of probable environmental polluting activities. This may include pollution charges such as the emission charges, user charges, product charges, administrative charges, and tax differentiation. They can best be exemplified by an appropriate carbon tax. Regarding the land use planning and zoning, it is the duty of governments to ensure any activity that might cause environmental pollution or nuisance such as manufacturing industries, airports, railways and road transport, power generation plants, and other facilities in cities are located away from human settlements. This prevents nuisance, environmental pollution such as air, water, soil and waste management disposal; of course, it can also pave a way for environmental protection.14

An effective enforcement of environmental legislation squarely depends on the availability of adequate trained staff and financial resources, the administrative and political will on the part of the state and its enforcement agencies and the level of awareness of environmental laws among the people which could be affected by errant activities.15 Having comprehensive and effective legislations, policies, system of control and mechanism to enforce law are also very important. The legislation and policies should be coordinated and implemented thereby facilitating international cooperation to build national capacity.16 Coordination that takes place at the international level requires consultation between bodies with international legal personality. International cooperation, in contrast, involves the provision of assistance by one party to another. The developed and resourceful countries are bound based on ‘polluter pays’ principle to provide financial resources, transfer technology, provide training and expertise to their developing and least developed counterpart.17

It is not all about making laws or policies, but about achieving the objectives upon which the laws or policies are set out. As part of the environmental law enforcement, there should be a need to have an effective environmental management that can effectively manage

14 Ibid
16 Ibid
17 Ibid
the smooth and successful enforcement of the laws. The significance of having an effective environmental management is to support and enhance the enforcement of the law. For instance, in respect of forestry managers, it is rightly said that it is their duties to make sure that forest reserves are located far from growing human settlements. In this regard, it is therefore required to strengthening institutional regimes for environmental management in terms of building capacity of human resources and infrastructure to be well informed when managing different aspects of the environment. It is also important to ensure that there is an adequate coordination(s) of different relevant and related sectors or government agencies handling environmental issues in the planning and management of various environmental resources. National legislations should have provisions for facilitating and streamlining such coordination(s). It should even go beyond by linking with other players such as NGOs, environmental activists in particular and general public, especially those who could be affected developmental or other activities deleterious to the environment.18 The important example for these is the Bt. Brinjal episode of India and Broga mega incineration project in Malaysia. Because of proactive public participation, including NGOs and Scientists, in several Indian states, the Indian Government had to send Bt. Brinjal for further lab and field testing for ensuring its safety aspects.19 The Bruga mega incineration project had to be abandoned because of sceptical public sentiments which culminated into protests and a court case.20

2.3 Role of the Judiciary

Importantly, one of the institutions in every legal system that plays a vital role in environmental enforcement is its judiciary and it is therefore needed to be strengthened and enhanced by having a good number of judges well-versed in environmental problems and laws made to meet challenges posed by them.21 That is to say, in enforcing the environmental laws, not only the technical issues related to environmental programme is required to be considered, but also the modalities and mechanisms on how to enhance and strengthen the

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19 See
20 See
21 See supra note 18.
judicial system. Even though, the technical support may be needed to accomplish both the legal and other matters related to the environmental enforcement. This technical support may include the cooperation requirements such as legal information, advisory services, specialized training and institutional capacity building. To order to have an effective environmental law enforcement, there is a need to have good number of competent judges, and enough efficient and trained enforcement officials supported with appropriate policy and legal framework. Furthermore, many scholars have made series of suggestions for the purpose of realisation of this objective (an effective environmental enforcement). The suggestions, as noted by Dina L. Shelton and Patricia Roberts, *inter alia* include: “the improvement of the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law, such as judges, prosecutors, legislators and others, to carry out their functions on a well-informed basis, equipped with the necessary skills, information and material; the improvement in the level of public participation in environmental decision-making, access to justice for the settlement of environmental disputes and the defence and enforcement of environmental rights, and public access to relevant information; the strengthening of sub-regional, regional and global collaboration for the mutual benefit of all peoples of the world and exchange of information among national judiciaries with a view to benefiting from each other’s knowledge, experience and expertise; the strengthening of environmental law education in schools and universities, including research and analysis as essential to realizing sustainable development; the achievement of sustained improvement in compliance with and enforcement and development of environmental law; and the strengthening of the capacity of organizations and initiatives, including the media, which seek to enable the public to fully engage on a well-informed basis, in focusing attention on issues relating to environmental protection and sustainable development.” Among these, the role of the court is central. A competent judiciary can certainly play a vital role in pressing environment problems, and also developing environmental jurisprudence in the country. The best example of this is the Indian Supreme Court. It is only because of the judicial activism there could solve a large number of environmental issues through public interest litigations. In fact the major part of the

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22 Ibid
23 Prof. Dinah L. Shelton, Patricia Roberts Harris Professor of Law, George Washington University Law School and Sylvia Bankobeza, (Legal Officer, Division of Policy Development and Law), UNEP, “Training Manual on International Environmental”, UNEP, at 79-88
development of environmental jurisprudence in the country is the result of judicial activism in favour of protection of the environment and conservation of the biodiversity. The process of its further developing it is still continued. Now, the National Green Tribunal of the country has joined hands with the Supreme Court; and with the result of that the contribution of the judiciary in abatement and control of environmental degradation is doubled.\(^{24}\) The Land and Environment Court of New South Wales, Australia has similar impact there. It is worth mentioning here that judicial activism prompts judges to hand down punishments towards higher side. On the contrary, resourceful perpetrators will continue flouting laws because low penalties will not exert enough deterrence to them. If law provides for fine or imprisonment or both, which is generally the case, courts should resort to imprisonment also. In order to enforce this idea, in Malaysia for illegal logging, there is mandatory jail for one year.\(^{25}\)

Dine and Patricia further state that, “the future strategy to promote effective enforcement of environmental law in Indonesia may involve strengthening its institutional capacity to manage and enforce environmental law, with foreign help, improving the legal and regulatory environmental framework and increasing public awareness and participation. Unlike Australia, New Zealand and India in Indonesia, there is no specialized environmental law courts that specifically entertain environmental cases. All environmental cases in that country are heard by the general and administrative courts as well as the Supreme Court on appeal. A relatively small number of environmental cases reach the courts. When they do, the plaintiffs are often faced with powerful and resourceful business interests. Through the IASTP Environmental Law and Enforcement Training, both in Indonesia and in Australia, approximately 1000 Indonesian judges have been equipped with enhanced knowledge of the complex environmental legislative and regulatory framework, relevant legal concepts such as strict liability, standing and class action, and environmental law principles such as environmental sustainable development (ESD), the precautionary principle, the polluter pays principle, and intergenerational equity. This on-going training of the judges in environmental law is essential to ensure a fair hearing of prosecuted cases, to promote enforcement, deter environmental violations and encourage compliance.”\(^{26}\) All these could be possible with active help extended to the country by Japan and Australia, the two strategic partners of the

\(^{24}\) See
\(^{25}\) See
\(^{26}\) Law and Enforcement, in Australia Course, September 19- December 10, 2005, IDLO, Issue 6 (2008), at 6-9
country. On the same vein, Hans Nicholas Jong states that “...In a bid to combat the rampant forest fires on the Island of Sumatra and Kalimantan, the government is planning to strengthen its law enforcement through: Closely monitoring all government units; the working unit and the police would also try to punish agro-forestry companies that had caused rampant forest fires by implementing a “multi-door system” (a system seeking the harshest punishment possible by all legal means; working together with other neighboring countries will help in the enforcement of the environmental law, especially the regional treaties; Issuance of proper penalties and amendment of existing laws to reflect the realities the day; the role of the judiciary in the enforcement of the law; and enhancing cooperation with ASEAN partners.”

In order to enforce the environmental laws, improvement in judicial approach needs to be made. The courts and enforcement agencies have no option but to be more proactive. Shedding their private law notions about the subject and throwing open their doors to all citizens in the cause of a clean, wholesome and sustainable environment. The courts should not rely too much on traditional limits and technicalities such as the issue of locus standi so that people seeking environmental justice will not lose confidence in the courts. Government should show commitments from its own side in embarking on some activities that may have direct or indirect ecological impacts or paves a way for the proper enforcement of the environmental law; such as town planning and constructions of dams, power projects and roads. However, looking at the current realities, litigation should not be and is not the best way of enforcing environmental law. But in some cases other alternatives dispute resolution mechanism mainly arbitration and mediation have proven to be useful. This may make justice chap and less time consuming. The employment of appropriate and alternative dispute resolution processes also increases the likelihood of delivering justice quicker and cheaper to the public. Importantly, supporting and enhancing judiciary for the purpose of environmental enforcement does not centre only on improving the courts and their personnel, but also centres on establishing a specialist environmental courts and sentencing

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This can go far in attaining an effective environmental enforcement. This is to ensure that judges have the expertise and resources necessary to consider environmental cases. For example, the Supreme Court of India has established specialised High Court benches known as “Green Benches” to deal specifically with environmental management issues. Often, these courts are combined with specialist administrative bodies, such as an environmental tribunal. The quasi administrative body can hear the cases at only first instance and, for some offences, apply administrative sanctions. Specialized environmental courts with some technical experts at the bench, working parallel to High Courts can give fast and least expensive but amicable solutions environment matters. They can work under direct supervision of the Apex Court of the country; appeals from them may lie to that Court. The Indian National Green Tribunal is the best example.\(^\text{30}\) In matters relation to this, the Supreme Court Judge of Pakistan (Justice Dost Mohammad Khan) had this to say while addressing district judges during a training course: “Judges of the district judiciary should fearlessly implement and enforce applicable International and national laws to provide a healthy environment to the people of Pakistan.”\(^\text{31}\) He further said: “ The deplorable state of the environment in our country requires the judiciary, as the guardian of the rule of law, to implement all existing environmental and municipal laws in letter and spirit to keep our country clean”.\(^\text{32}\) He said lack of exposure to environmental law by the members of judiciary hinders the enforcement. Therefore they need to have special training. Society also has role to play in protecting environment.\(^\text{33}\) To this end, countries like Australia and New Zealand have promulgated laws that strengthen the environmental courts. The land and Environment Court, Australia exercises a combinatorial appellate jurisdiction under planning and production statutes and ‘a reviewing and enforcement jurisdiction’ in relation to environmental and planning statutes.\(^\text{34}\) In Australia, the doors of the court are open to anyone complaining of

\(^{30}\) Gregory L Rose, “Gaps in the Implementation of Environmental Law at the National, Regional and Global Level”, UNEP, First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability 12 - 13 October 2011 - Kuala Lumpur, Malaysia, at 24-29
\(^{31}\) “Environmental laws: SC judge stresses strict enforcement”, THE EXPRESS TRIBUNE WITH THE INTERNATIONAL NEW YORK TIMES, published 21/09/2014
\(^{32}\) Ibid
\(^{33}\) Ibid
\(^{34}\) Raghav Sharma, “Green Courts in India: Strengthening Environmental Governance”, Law Environmental and Development (LEAD) Journal, Vol. 4: No. 1
violation of the relevant statute. The law empowers court to all remedies of all nature, conditionally or unconditionally.  

Similarly, the New Zealand Environment Court exercises a wide spectrum of powers over environmental issues which include powers to make declarations of law. The Court also has power to enforce duties under the RMA through civil and criminal proceedings.

2.4 Role of the Government Agencies

As stated above, enforcement of environmental laws is one of the significant aspects of environmental protection that facilitates; actually a way towards achieving a healthful environment. Thus, it works to maximize compliance and reduce threats to public health of the environment. In this perspective the role of government agencies becomes crucial. In fact, a proactive governmental agency enhances and develops enforcement programs, through adoption of stringent laws; collaboration of enforcement bodies with local communities and states; setting up innovative strategies that combine compliance assistance, incentives, monitoring and enforcement tools; institution of civil actions against violators by setting up a formal administrative enforcement; criminal enforcement which enables the agency to pursue criminal proceedings and refer for prosecution; and notification and deterrent effect through medias, i.e. publicizing their enforcement to deter future violations. To this end, enforcement efforts can take different dimensions, which may include education, technical assistance, voluntary compliance programmes, subsidies and other forms of financial assistance, or incentives, administrative enforcement, civil judicial enforcement and criminal enforcement. In doing that, there should be a need to move from the traditional confrontational mechanisms of environmental enforcement to new mechanisms that can help parties better comply with their contractual obligations. The environmental enforcement requires the enforcement capacity and strengthening of compliance agencies by the responsible authorities, especially when some of the environmental problems are very

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35 Section 22
36 See Section 310-313 of the New Zealand Resource Management Act, RMA 1991
37 Section 314-321 RMA, 1991
39 Prof. Kilaparti Ramakrishna, (Deputy Director, Woods Hole Research Center) and Sylvia Bankobeza, (Legal Officer, Division of Policy Development and Law), UNEP, “Training Manual on International Environmental”, UNEP, at 39-47
technical and sometimes hard for some people to understand. This situation points out the importance of training, public awareness and sensitization of all who are responsible for enforcement of the law. To the larger extent, countries need to cooperate with one another in trans-boundary matters to enhance enforcement of the environmental laws and sometimes to address issues that have a bearing in one country but are caused by issues beyond one country’s jurisdiction.\textsuperscript{40} One such issue is the transboundary haze problem in ASEAN countries, especially Malaysia and Singapore, which is being dealt with a regional agreement named ASEAN Agreement on Transboundary Haze Pollution. In this regards, the Lusaka Agreement on Cooperative Enforcement of Wildlife is one of the good examples of countries coming together to enhance enforcement efforts in a cooperative manner.\textsuperscript{41}

As mentioned earlier, the enforcement mechanisms for environmental law, e.g. the mechanisms like information, public participation, and access to justice, are paramount to environmental enforcement, as they are very important mechanisms for enhancing by making them more effective the traditional environmental enforcement.\textsuperscript{42} These are as well, tools set forth by Principle 10 of the Rio Declaration on Environment and Development, 1992 and the Aarhus Convention, 1998.\textsuperscript{43} Even though, things like freedom of information, democratic participation in governance,\textsuperscript{44} and judicial guarantees are equally enshrined under international, regional and domestic human rights instruments.\textsuperscript{45} The term “access to information” provided for in the Declaration indicates the significance of making information related to the environment available to the public in a manner accessible to them. This may also include the information about hazardous materials and activities in communities, as well

\textsuperscript{40} Ibid
\textsuperscript{41} Ibid
\textsuperscript{42} Prof. Dinah L. Shelton, Patricia Roberts Harris Professor of Law, George Washington University Law School and Sylvia Bankoeba, (Legal Officer, Division of Policy Development and Law), UNEP, “Training Manual on International Environmental”, UNEP, at 79-88
\textsuperscript{43} Principle 10 of the Rio Declaration, 1992, the Principle provides: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”
\textsuperscript{44} See for instance article 25 of the 1966 United Nations International Covenant on Civil and Political Rights enshrines the right to participate “in the conduct of public affairs, directly or through freely chosen representatives” and guarantees related rights, such as article 19 which provides for the freedom of expression, article 21 provides for the freedom of assembly and article 22 provides for the freedom of association.
\textsuperscript{45} Prof. Dinah L. Shelton, at 79-88
as the mechanisms by which public authorities provide environmental information. Similarly, the term “Public Participation” means the availability of opportunities for individuals, groups and organizations to provide input in the making of decisions which have, or are likely to have, an impact on the environment, including in the enactment of laws, the enforcement of national laws, policies, and guidelines, and Environmental Impact Assessments. In short, the responsible administrative authorities, e.g. Director General in of the Ministry of Natural Resources and Environment and Forest in Malaysia and Director of the Environment Protection Agency of the USA have to provide access to information and ampoule time for the people to make comments. They should issue an appropriate and viable mechanism for access to information and public participation. It is appropriate if compendium of guidelines is issued to this effect. Moreover, in certain matters, public participation be made mandatory, e.g. preparation and approval of environment impact assessment under environmental laws and town and country planning laws.

In the same manner, the term “Access to Justice” refers to fast, effective and least money consuming judicial and administrative remedial procedures available to a person, natural or legal, who is aggrieved or likely to be aggrieved of environmental related harm. The term includes not only the procedural right of appearing before an appropriate body but also the substantive right of redress for harm committed. Thus, the thrust areas to be examined in determining the effectiveness of access to environmental information, public participation in decision-making and access to justice in environmental matters include: the way in which countries handle environmental issues at different levels and the extent to which concerned citizens participate in handling them at the relevant level; the extent to which governmental authorities at all levels acquire and hold relevant information concerning the environment and threats to it, including information about private sector activities; the efforts made by states to facilitate and encourage public awareness and participation by making information available regarding legislation, regulations, activities, policies and programmes; and the extent to which the public in environmental matters is ensured of access to effective judicial and administrative proceedings, including redress and remedy.46

46 Ibid
Enforcement of environmental laws depends on a well designed policy and legal framework, having sufficient provisions for preventive and punitive measures to be taken with minimum of time, enforced by enough competent enforcement officials will certainly work as deterrence and will then alleviate the soaring environmental problems. They have to be supported with a research and development wing for developing newer enforcement and compliance strategies. On the top of it, political will for enforcing the law is *sine qua non*. For political will of states has been emphasised by a number of treaties. G. L. Rose writes, “Environmental treaties often articulate specific obligations that are negotiated without a clear plan for their national implementation, due to the difficulty of making concrete assessments of the financial, human, technical and social requirements of implementation of the treaty norms by enacting suitable local legislations supported with appropriate infrastructures for their effective enforcement.” Thus, enforcement is the set of actions that government or other stakeholders take to achieve compliance of laws within the related communities in order to revert or stabilize situations causing danger to the environment or public health or both. This warrants enough political will on the part of the state and commitment and support of the people to comply with the legal rules. All the same, there is a pressing need to have an adequate and necessary measures adopted by enforcement authorities towards enhancing and promoting the enforcement. Amongst such measures, according to Zephaniah Osuyi Edo, are: “authorities associated to environment enforcement agencies should be empowered to inspect regulated facilities and have access to their records and equipment to determine if they are in conformity with standards prescribed by various activities; and to require that the regulated community monitors its own level of compliance, keeps records of its compliance activities and status and also report about that the relevant information periodically to the appropriate enforcement authority and make the relevant information available for inspection.” It is also expected that authorities should be empowered to take legal action against non-complying facilities, including power to arrest and prosecute independently or with through Attorney General of any other such authority.

49 Ibid
There is also a need for a competent institutional framework, which will specify in clearer terms who and who is responsible for which functions. There should be regular meeting of related department so that preventive measures adopted for abatement and control of degradation of the environment and its processes could be integrated. Lack of such an institutional framework will certainly make it difficult to establish who is responsible for ensuring compliance and enforcement. In addition, different reasons have also been advanced for the lack of an effective environmental enforcement in the society. One of the reasons often cited is the overarching corruption of public officials responsible for enforcing the law. For instance, in some developing countries corruption is a major problem and that has pervaded almost all sectors development, keeping aside the clean environment imperatives. For instance, in Nigeria, which is the African largest producer of Petroleum and Gas, the major problem facing the environmental protection has to do with the transparency and effectiveness of the agency responsible for enforcing and compliance of the law. In some circumstances, the enforcement officials were alleged to have been connived and compromised their responsibilities towards the multinational corporations (oil companies).

Because of high degree of corruption, there is inadequate enforcement of environment related laws. Many other African states have similar scenario. The issue of corruption that bedevils the enforcement of environmental laws does not stop only on the multinational corporations, but also includes diversion of ecological funds to other use possibly of lesser significant to environmental enforcement in the country.

Similarly, corruption has been one of the impediments in enforcing environmental laws in almost all developing and least developed countries. IDLO notes that “…Powerful business interests have the resources to ‘persuade’ the police, other government officials and judges to overlook environmental law violations, to deter witnesses from testifying and to influence the outcome of court cases. In the last few years, the Government of Indonesia has demonstrated its political will in a big way to promote good governance and combat corruption with the adoption of fair practice. Towards this end, the country has established the Corruption Eradication Commission (KPK), which has vast power to curb corrupt practices at all levels.”

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50 Ibid
51 Ibid, at 269
52 Ibid
53 International Development Law Organization (IDLO),“Strengthening Environmental Law Compliance and Enforcement in Indonesia, Towards Improved Environmental Stringency and Environmental Performance”,

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factors governing environmental enforcement. According to Transparency International, “this can be done by ensuring that a strict open tender process is carried out especially at the state authority level. Corruptions in forestry happen from the initial stage, i.e. from obtaining concessions, to declaring harvests; sometimes, the process itself provides opportunities for flouting laws and promoting corrupt practices.” In view of this, the Malaysian Anti-Corruption Commission (MACC) has been determined to fight against the menace caused by corrupt practices. It receives complaints pertaining to environmental issues from various sources almost on monthly basis. Corruption contributes to illegal logging and smuggling of animals classified as endangered species by the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES) and Convention on Biological Diversity 1992 (CBD). Biodiversity rich countries are striving hard to curb illegal logging and conserve their biological diversities, e.g. Malaysia has a stringent penalty under the National Forestry Act 1984 for illegal logging and making all possible efforts to conserve its biodiversity under the National Biodiversity Policy 1998 and the Wildlife Conservation Act 2010. But in developing and least developed countries, there are not enough trained enforcement personnel and corruption in the rife resulting an impediment in enforcement of environmental laws.

Without corruption to grease the way, illegal timber would seldom flow. Strong enforcement of laws and piercing eyes of anti-corruption agencies ensure that corruption does not go unpunished, and therefore constitutes a major deterrent. Stake holders reported high risks in this area, such as bribes to law enforcers to fail to investigate cases or to provide weak sanctions. In china, Indonesia and peninsular Malaysia, inadequate monitoring on enforcement and the limited capacity of the law-enforcers were major causes of corruption going unpunished. Forestry and timber trade are technical areas, and law enforcers are not always trained to deal with them. Gathering evidence is an additional big challenge that makes it even more difficult to identify corruption. The best example is illegal logging. Perpetrators often operate in nights, at the sight there are poor workers ignorant of their


55 Ibid
bosses and the nature of activities, forest ecosystem is complex and because of that monitoring is poor. Such problems are also there with respect to conservation of endangered species. Provisions to have experienced public prosecutors supported with whistle blower system has assisted the enforcement of such laws in Malaysia. It serves as a means to gather evidence and sanction corruption. The cooperation between the forestry department, the police and the Malaysian Anti-Corruption Commission is essential in improving laws enforcement.\(^{56}\) In this regard therefore, several legislations were promulgated. The National Forestry Act 1984, one of them, was initial formulated as law dealing with land matters in the Peninsular Malaysia. It prescribed penalty for illegal logging. But the penalty utterly failed to control illegal logging. In order to supply enough deterrence to the penal provisions, the law in 19893 was amended to increase the penalty to 500000 or 20 years imprisonment or both with a mandatory jail for 1 year.\(^{57}\) It has equally been identified that apart from the corruption, lack of good governance is also another obstacle bedevilling environmental enforcement in developing countries.\(^{58}\) Positions in some other developing countries is almost the same, e.g. South Africa.\(^{59}\) But South Africa has developed a strategy of sharing profits from wildlife tourism and trade with forest inhabitants, which has proven to be a successful measure as illegal activities now fast reported by them and enforcement officials swiftly act to take actions against perpetrators. Moreover, they appear in the courts as witness. The authors are of the opinion that this unique strategy should be emulated by other biodiversity rich countries.

Good Governance has a strong nexus with the environmental law enforcement in terms of “commonly shared goal on accountability, transparency, participation, rule of law, predictability, responsiveness, consensus, equity, effectiveness and efficiency, and strategic vision”.\(^{60}\) Good Governance is a prerequisite to strengthening enforcement of environmental

\(^{56}\) Ibid

\(^{57}\)


law. This is based on the fact that environmental enforcement is directly or indirectly dealing with the following components and products: securing compliance with applicable standards and requirements; hence securing particular environmental objectives; maintaining credibility of regulatory system; features of enforcement regimes formal; administrative notices, penalties; civil judicial remedies (often used in US); criminal differing range of sentencing powers (e.g. Australia); specialist courts (e.g. Australia, China); explicitly tiered approach (e.g. US, UK, Australia). As stated above, lack of good administration affects the environmental enforcement and this is one of the reasons for the call of the Environmental ombudsman, whose primary role may be to enquire into particular complaints as to administration by the executive wing of the State. Persons with the title of Environmental Ombudsman may carry out a variety of enquiries and reviews into the quality of environmental administration. These always include investigations made in response to private complaints. In addition, it is usual for the ombudsman's office to be empowered to initiate investigations of its own accord. Such investigations as are initiated by the ombudsman office itself usually relate to more systemic administrative problems and may be undertaken in response to concerns raised by a concentration of private complaints, or as part of a cyclical review. However, in view of the original jurisdiction of the higher courts, in many countries, judges can take suomoto cognizance against any errant government officials and agencies, even not taking actions against perpetrators may be actionable. Moreover, via public interest litigations, any person or group of persons, who have suffered from environmental polluting activities, or any representative of them, e.g. NGOs may directly file suit in the Supreme Court or a High Court. They are possible due to judicial activism. India is the best example of it. Now, these powers can also be exercised now by the National Green Tribunal.

Different approaches and strategies practiced by various states have proven to be good restraint on flouting laws and their successful enforcement by government officials and compliance by wrongdoers. Some of such approaches include: compliance by co-operative and persuasive strategies and deterrence by prescribing appropriate sanctions. There are

61 Ibid
62 Ibid
63 Gregory L Rose, “Gaps in the Implementation of Environmental Law at the National, Regional and Global Level”, UNEP, First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability 12 - 13 October 2011 - Kuala Lumpur, Malaysia, at 24-29
responsive factors influencing these approaches to and effectiveness of enforcement, such as quality and scope of laws views of regulatory crime capacity and independence of regulatory institutions; relationships between regulators and regulated; expertise and capacity of prosecutors; knowledge and expertise of judges.\textsuperscript{64} Similarly, there is also Alternative or Complementary Approaches. This includes: NGO/private citizen enforcement; participation measures; private prosecution; judicial review; use of economic instruments.\textsuperscript{65} Key issues to be considered for their effective enforcement include: clarity in legal framework; relatively independent regulators; reasonable level of enforcement activity in relation to pollution incidents – more research needed on this; appropriate range of penalties which will punish and deter; more research into impact of enforcement activity and penalties on the regulated; proportionate well-publicised penalties; and supplementary measures to ensure accountability.\textsuperscript{66}

\textbf{2.4 International and Malaysian Scenario}

Apart from the domestic and other measures for environmental enforcement through government agencies, there are still some measures need to be taken internationally and regionally in order to ensure an effective environmental enforcement. This may include the application of international and regional enforcement cooperation mechanisms familiar to environmental protection gaps in the implementation of environmental treaty norms, such as the usage of databases, blacklists, hot pursuits or environmental monitoring technologies like emissions gauges, remote earth sensing, digitally stamped products, international auditing, labelling of logs and certification of safety of GMOs as well as to lay serious focus on organised transnational environmental crime, e.g. smuggling of hazardous wastes, smuggling of genetic materials, smuggling of endangered plant and animal species, and transboundary illegal logging and poaching activities.\textsuperscript{67} This requires a competent kind of transnational enforcement cooperation, a kind of generic international mechanisms to be put in place to facilitate general cross border police and judicial cooperation in law enforcement. This can prove to be a very effective tool if carried out at regional basis. In this regard for instance, 

\textsuperscript{64} Professor Mark Poustie,” Comparative Perspectives on the Enforcement of Environmental Law”, University of Strathclyde Glasgow, Shanghai University, March 2014
\textsuperscript{65} International Development Law Organization (IDLO),
\textsuperscript{66} Ibid
\textsuperscript{67} Gregory L Rose, at 13-14
“the United Nations General Assembly, on the recommendation of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, has adopted and passed among others the following resolutions: a Model Treaty on Extradition (UNGA resolutions 45/116, annex, and 52/88, annex), a Model Treaty on Mutual Assistance in Criminal Matters (UNGA resolutions 45/117, annex, and 53/112, annex I), a Model Treaty on the Transfer of Proceedings in Criminal Matters (resolution 45/118, annex) and a Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released (UNGA resolution 45/119, annex)’.68 Also, there are a good number of regional treaties on marine pollution prevention, specially regional conventions of dumping of wastes into the sea; and there are host of ASEAN agreements, especially on transboundary air pollution and conservation of biodiversity of the region.

In the same vein, mechanisms for deeper cooperation in law enforcement might also be fostered at regional levels to address the specific circumstances of regional law enforcement cooperation. This might include cooperative mechanisms to create common environmental law enforcement data bases, pursuit zones, and to designate joint investigative teams. For example, the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora can be considered as an agreement to implement the CITES. The Lusaka Agreement was adopted on the 9th September, 1994 under UNEP and became operative on the 10th December, 1996. It is open to all African states, although not all the states have been able to ratify the Agreement. The principal function of the Agreement is to establish the Lusaka Agreement Task Force, comprised of wildlife law enforcement officers seconded from relevant national security agencies, such as police, customs, national parks and army. Thus, each of the member states to the Lusaka Agreement commits to seconding at least one officer to the Lusaka Agreement Task Force, which is to conduct cross-border investigations into illegal wildlife trade.69

Worthy to note also is that the responsibility and the engagement for enforcement of the environmental law should not be confined or restricted only to governmental agencies, but should also engage and co-opt some stakeholders, including neighbouring countries, e.g. transboundary haze pollution in the ASEAN region, forests spreading over more than one country (Borneo forests), river bordering or flowing through more than one country (Nile and

68 Ibid at 20-22
69 Ibid
Ganges rivers) and the nongovernmental sectors (NGOs). That is to say, a comprehensive approach at national and collective international approach to implement environmental laws will involve a wide range of related countries, especially if the problem is regional. Rose is of the opinion that, “the mechanisms for involving such stakeholders and sectors, within the state and outside, include common ad hoc consultations, appointment to advisory councils, and involvement in community project programs.” Meetings of all stakeholders, has proven to be necessary on a situational basis; and it can offer an efficient and effective way to brief environmental law, policy and administration in relation to particular programmes and projects.

As stated above, Public Participation is one of the core concepts of good governance critical to the effective enforcement of environmental law. Many countries have recognized and acknowledged it as one of the fundamental factors governing the environmental enforcement. For instance, in Indonesia, the environmental legislation formally acknowledges public participation as an important factor. Under Chapter III “Community rights, obligations and role,” of the EMA, “Every person has the right to environmental information which is related to environmental management roles.” The Act further says: “Every person has the right to play a role in the scheme of environmental management in accordance with applicable laws and regulations.”

In Malaysia, several factors are considered vital in enforcement of environmental law such as having effective environmental enforcement bodies such as Department of Environment (DOE) and enforcement of law on environmental impact assessment (EIA) by it with the required public participation. Encouraging the public to come forward fearlessly and report about illegal activities against environment as well as having number of trained enforcement officers are also among the factors assisting the environmental enforcement. By virtue of the Malaysian Federal Constitution, the management of forest and related matters are vests in the jurisdiction and powers of the state governments. The Constitution vests the law and natural resources in the hands of the state, with the exception of few

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70 Ibid, at 24-29
71 Ibid, at 24-29
72 Article 5 of the EMA
73 Art.5 (2) of the EMA
75 Art.72 (2) of the Malaysian Federal Constitution
hundred thousand hectares reserved for the plantation of commercial tree-crop. However, Verifor demonstrates that, “the National Forestry Council (NFC) has to facilitate coordination between the federal and state governments in the formulation and implementation of policies and programs on the conservation, development and sustainable management of the nation’s forest. Establishing or enhancing mobile enforcement unit and remote sensing unit. Specialized units may also be deployed in response to information of the environmental law.” Several factors have been identified as obstacles to environmental enforcement in Malaysia such as the illegal commercial logging, agricultural development, dams and resettlement. It was reported that since 2000, the cases of illegal logging keeps on rising. The Illegal acts also include: “unauthorized occupation of public and private public forestland; harvesting protected species of trees, woodland arson, wildlife poaching, unlawful transport of wood and other forest products; and violation of environment regulations and bribing government officials.” Other obstacles that previously hindered the effective enforcement of environmental law in Malaysia include lack of enabling environment and public participation. According to the report in Keratan Akhbar, introduction of the Comprehensive Environmental Quality (Amendment) Act 2012, which allows the ordinary man in the street to be part of the environment watch group and report cases ranging from open burning to toxic waste disposal is one of the factors that shifted the Malaysian 54th position in 2010 to 25th position in 2012. That is to say, environmental enforcement is not only the government affair or concern, but also the entire public. Public can play a whistle blower’s role in order to assist the smooth enforcement of environmental law. Whistle-blowers always play a significant role to the enforcement of environmental law so long as they are given the required support and incentives. Thus, the Act was amended to provide anonymity and protection to whistle-blowers in Malaysia. This has indeed assists so much to the enforcement of the law. In fact, not only that, the amended Environmental Quality

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77 Verifor, “systems for verification of legality in the forest sector, Malaysia: Domestic timber production and timber imports”, country’s case study 8, February 2008
80 Ibid
Assessment 1974 also provides for the Attorney General, the power to issue stop-work orders on projects that damage environment, which was previously not under his powers. Similarly, the amendment provides for the officers in the Environmental department powers to arrest those who commit environmental offences and hand them over to a police station.\textsuperscript{82} To this end, Datuk Seri Douglas Embas, the Malaysian Minister of Environment and Natural Resources, said that, it was important to have sufficient number of enforcement officers because lack of such officers had in the past restricted the Ministry from getting enough evidence to prosecute environmental offenders.\textsuperscript{83}

In tackling the above problems, the Malaysian forest laws empower both forest and police officers to conduct search without warrant, seize forest produce and equipment, and arrest suspected offenders where they are unlikely to appear on summons or refuse to identify themselves correctly. However, forest officers yet to have to be equal to police officers for testifying statements made by perpetrators.\textsuperscript{84} Another obstacle in relation to that is the size of forest, which always affects the function of the security agents. That is to say, the size and area of forest should influence the probability of arrest. According to the New Straits Time (On Line), 23 February 2016, in 2016, there are 100 over cases of illegal logging are waiting in Sarawak to be prosecuted by the Federal Attorney General (AG), which might take some time. In view of this, the Chief Minister of the state to handover the power to prosecute to the State AG. The authors support the idea, as it will expedite the prosecution process that will enhance deterrent. Same goes with poaching activities also. In the vein, Rosli Mohd notes: “The bigger the forest area, the more time needed for inspection and patrol, and the lower will be the chances for detection of forest offenders. Therefore, this should be inversely related with the occurrence of forest offences. The number of forest offences will be correlated with the sale price of logs, the size of forest area and number of enforcement officers in the state forestry department.”\textsuperscript{85}

\textsuperscript{82} Ibid
\textsuperscript{83} Ibid
\textsuperscript{84} "Many guilty offenders but not prosecuted‖ Business Times, http://w1.nst.com.my/img/nst/new.straits.times.gif,
\textsuperscript{85} "Illegal Forest activities in Malaysia Environmental Sciences Essay,” available at www.ukessays.com/essays/environmental-sciences/illegal-forest-activities-in-malaysia
\textsuperscript{85} Rusli Mohd, “Factors influencing the occurrence of Forest offenses in a peninsular Malaysia state”, Pertanika, J. soc. Science and Humanity 7 (2) 91-95 (1999), at 93
The punishment against the violators must be adequate in line with the current situations and realities. With the amendment of National Forestry Act in 1993, the penalties that imposed to the illegal occupiers or any person who break the law is very high compared to the previous time. For example, people who take any forest produce from a permanent reserved forest or a state land according to the Act is fine not exceeding RM500,000 and to imprisonment for a term which shall not be less than one year but shall not exceed 20 years.\(^86\) This is much more higher than the previous penalty which was prescribed as ten thousand ringgit (RM 10,000) or to imprisonment for a term not exceeding 3 years or to both.\(^87\) Penalties in the Environmental Quality Act 1974 have also been considerably increased. In view of this, Mohideen Abdul Kader, the Vice President Consumer Association of Penang (CAP), while lamenting on Batu Ferringhi\(^88\) pollution problem, says “Prosecuting and punishing offenders is one of the factors that will enhance the enforcement of the environmental law in the area.”\(^89\) To this effect also, the polluters may be subjected to other embargos due to their likely consequence of their actions based on the principle called “Polluter Pays Principle.”\(^90\)

Government political will to enforce environmental law is also one of the factors governing enforcement of environmental law.\(^91\) There is a need for the government to strengthening the special enforcement agencies such as forest, environment and water management. In addition, for the purpose of the effective enforcement, there is also a need to harmonize and consolidate the environmental legal framework, such as the National Forestry Act 1984 (amended 1993), Forest Ordinance 1988 Sarawak, Forest Enactment 1968 Sabah, Land Conservation Act 1960, Environmental Quality Act 1974, National Land Code 1965 and others.\(^92\) Similarly, stakeholders also play an important role in preventing illegal logging

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\(^86\) Section 15 of the National Forestry Amendment Act 1993
\(^87\) “Illegal Forest activities in Malaysia Environmental Sciences Essay,” available at www.ukessays.com/essays/environmental-sciences/illegal-forest-activities-in-Malaysia
\(^88\) This is Beach location at the island in the state of Penang
\(^92\) Ibid
in Malaysia.\textsuperscript{93} As stated above, this can be achieved by proper training of the enforcement officials, providing them arms and logistic support, having sophisticated surveillance equipment, e.g. remote sensing and use of satellite, providing them guns and power to arrest and record statements, taking forest inhabitants in confidence so that they could work as informers and appear in the courts as witness.\textsuperscript{94} In China, Zhou Shengxian, the then Minister of environmental protection, says: the environmental law enforcement shall always be achieved by fulfillment of social responsibilities by companies against the emotion of pollutions; protections measures to be taken by some governments such as local authorities, which are deeply influenced by the mind set of GDP growth worship; and by provision of the sufficient and effective environmental authorities.\textsuperscript{95}

In some African countries, strategies have been developed for an effective environmental enforcement. George Lubega Matove has stated it in these words: “In Uganda for instance, development of management strategies by the government to prevent or control pollution have been identified \textit{inter alia}: to change human behavior so that environmental requirements are complies with. This can be done by promoting compliance through education and incentives; and by identifying and taking action to bring violation into compliance.”\textsuperscript{96} “Other strategies include: developing laws and regulations that can be enforced; identifying the regulated community. This include clearly understanding who is required to meet assigned requirements; setting priority based on degree of environmental consequences; promoting compliance; dissemination of information and building public awareness and support; publicizing success stories; providing economic incentives and facilitating access to financial resources; permitting and licensing. It requires the development of permit application procedures, processing of application, issuing in coordination with other lead agencies; monitoring compliance; timely responding to violations: This may involve taking administrative, civil and criminal actions; equipping of environmental inspectors; using the existing structures in the enforcement and technical assistance; such as local

\textsuperscript{93} Ibid
\textsuperscript{94} Ibid
\textsuperscript{95} Zhou Shengxian, China to strengthen environmental law enforcements CRI English.com 06/03/2014. The new Minister is, Chen Jining.
\textsuperscript{96} George Lubega Matove, ‘The Challenges in monitoring and enforcement of Environmental Laws in Uganda,’’ paper presented at a training workshop to strengthen and enhance the capacity of police investigators and state prosecutors to enforce environmental laws, March 2006
government; Government departments and police; development of technical tools for the implementation of the laws and regulations: such as manual, and guideline."\(^97\) "In developing the above strategies, the following enforcement mechanisms and implementation tools are required: the precautionary principles, such as environmental planning; environmental monitoring and impact assessments; environmental audit; environment standard, setting and licensing; public awareness and participation; environmental easements; and the use of economic and social incentives."\(^98\) "Another enforcement mechanism and implementation tool is the "polluter pays principle": this includes performance bonds; environment restoration orders; records keeping and inspections; the use of criminal law; and community service order."\(^99\)

During the conference held in Morocco, Mohammad El Yazzghi, the Moroccan Minister of Territory Planning Water and the Environment, in his keynote address aptly spelt out some obstacles for environmental enforcement: Lack of taking sufficient consideration into administrative and or social conditions for implementing environmental laws. Enforcement of environmental law requires a behavioral change of both the individual and community; deficiency of implementing tools: lack of viable structures and lack of coherence and cooperation between those structures; lack of human capacity building in the implementation of the environmental law. There should be a need to have people with both legal and technical training for the enforcement of the environmental law.\(^100\) It was also lifted from the conference that strengthening environmental enforcement of environmental laws requires renewal efforts by individuals and institutions. That is to say, government officials, particularly inspectors, investigators and prosecutors in order to properly enforce the environmental law have to uphold the fundamental idea of good governance to the best of their ability in ensuring the environment benefit of their countrymen; laws enacted by legislators must enough preventive and punitive measures and must also recognize extralegal means for compliance and enforcement of laws; there should be cogent support, especially technological and financial; support of other countries; NGOs should play proactive role in

\(^97\) Ibid
\(^98\) Ibid
\(^99\) Ibid
\(^100\) The 7\(^{th}\) International conference on environmental compliance and enforcement, 9-15 April, 2005 organized by international network for environmental compliance and enforcement (INECE), proceedings vol.2, at 6
ensuring environmental justice to people. In view of these, some of the recommendations of the conference include: Development of useful tools for enforcement and compliance by identifying, developing and using environmental enforcement indicators; such as developing trainings and adopting good models of environmental enforcement mechanisms from other jurisdictions; public awareness about the importance of environmental compliance; and capacity building of certain groups and professionals such as the judiciary and its need for better information on penalty calculation and other remedies. Similarly, in Tanzania, the Environmental Management Act was passed by the National Assembly in 2004. The Act repealed and replaced the National Environment Management Council Act, 1983. According to D. M. Pallangyo, “the Act includes provisions for; legal and institutional framework for sustainable management of environment; an outline principles for management, impact and risk assessments, prevention and control of pollution, waste management, environmental quality standards, public participation, compliance and enforcement; and the basis for implementation of international instruments on environment.”

Factors guaranteeing effective enforcement of environmental law in the West Europe deals with the enforceable legislation. This may include following considerations: principle of legally; information; role of licenses and agencies. Judicial review: include enforcement of legislation; testing the license. A combined use of sanctions: include- civil liability, administrative sanctions. Information and compliance. As countries differ regarding environmental legislation, they may also differ in respect of the enforcement of the law. In these countries, the Judiciary plays a vital role in environmental law enforcement. In developed European countries, the environmental laws and enforcement agencies are well trained and resourceful. They also get enough support from the their environmentally conscious and law abiding people. But the scenario in developing European countries is different. It is for this reason that their developed counterpart is making all efforts to uplift their enforcement levels. The recent example is the promise given to the before the Paris Declaration on Climate Change 2015, where they promised to extent all kinds of support,

101 Ibid at 255-256
102 Ibid at 19-20
including financial support, for enhancing their partnership in fighting against the phenomenon. As noted above, problems and challenges with environmental enforcement in developing countries are: lack of technical knowledge and fund; corruption; and law different effect of sanctions. The developed countries, especially European countries, USA, Japan and Australia should extend similar help to the, so that they could keep their carbon reduction commitments given to the United Nation. Among all, transfer of technology and financial resources are crucial.

3. Conclusion

After the Stockholm Declaration of 1972, all states, developed and developing started enacting laws for abatement and control of environmental degradation. Similar collective efforts were also made at international level resulting in one thousand over global and international treaties came into existence. Thus, the joint and several efforts are there into operation. But the condition of the environment and its processes kept on deteriorating. Such result is due to lack of political will on the parts of states, cooperation, sharing of information, training and capacity building. In the present scenario it is suggested that for enforcement of international and national environmental laws, close cooperation among developed and developing countries is a sine qua non. For instance, if developing countries do not get financial and technological support from their developed counterpart, enforcement of their laws will not so as it is warranted. The adverse impact of air pollution and river pollution, for example, are not limited to the polluting countries; it is transboundary and global in nature. It is for this reason that these problems have to be tackled by joint and concerted effort. In fact, it the duty of the developed countries if we look at it from the point of view of ‘polluter pays’ principle and ‘joint but differential’ liability. The reasons for poor enforcement of environmental laws in developing and least developed countries are still enduring. In order to successfully meet the challenges, these countries should have: enough trained enforcement personnel with clean honest propensity; they have to be supported with laws having enough preventive and punitive measures; there has to be compressive strategy of all relevant departments so that a viable approach is pushed through; they should have

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104 Gregory L. Rose, “Gaps in the implementation of Environmental law at the National, Regional and Global Level” First Preparatory Meeting of the World Congress on Justice, Governance and Law for environmental Sustainability, 12-13 Oct. 2011, Kuala Lumpur, Malaysia
support of sophisticated technology; and there should be enough financial resources to maintain them. The role of public participation based dissemination of information in environmental decision-making, environmental consciousness among the people so that they could take preventive measures and abide the law rather than flouting it, and access to justice also play positive role in enforcement of environmental law. If these suggestions are honestly adhered to, there will certainly be desirable results.
SOCIO LEGAL STUDY ON KNOWLEDGE OF RESPONDENTS IN MALAYSIA: AN EMPIRICAL EVIDENCE FROM THE REGISTRATION OF CROSS-BORDER MARRIAGE

Md Said, M.H¹, Md Hashim, N.², Abdul Hak, N.³, Wok, S⁴, & Che Soh Yusoff, R.⁵

Abstract

Cross-border marriage is a marriage without the permission from the marriage registrar in each state and the solemnisation is either contracted in Malaysia or outside Malaysia. This type of marriage violates the purpose of marriage which is to obtain peace and tranquillity. The purpose of this study is to examine and analyse the level of knowledge among the respondents towards the registration of cross-border marriage among Muslims in Malaysia. The sample consists of 400 respondents from four regions in Malaysia. Questionnaire survey was the main data collection method employed in this study and further supported by semi structured interview. Based on the findings, the respondents are already aware of the opportunity to register the marriage at the court. Despite their acknowledgement, new regulation and policy to control cross-border marriage should be implemented in order to curb the issue from worsening in the future.

Keywords: cross border marriage, knowledge, registration, court

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1. Introduction

Islam is a complete and comprehensive religion covering each and every aspect of human life. In order to strengthen the family institution, Islam has set up the perfect guidelines and rules to ensure the welfare and harmony state of a family. In legal perspective, Islamic law has detailed out the rules and regulations regarding marriages to protect its sanctity. The Shariah law that is practiced in Malaysia recognizes a lawful marriage as abiding to the pillars of marriage in Islam and complies with the requirements set out in the legal provisions enforced in each state in the country. Marriage is one of the Sunnah of Prophet Muhammad (p.b.u.h), but it has been violated to accomplish one’s wishes and desires; such as to get married without the families’ permission or because the female is already pregnant out of wedlock. Each of these ‘wishes and desires’ have led to new types of marriage contracts. One of these emerged contracts is eloping with future partners or popularly known among the Malaysians as kahwin lari. It may also be termed as cross-border marriage. Cross-border marriage is defined as a marriage without the consent of the authority such as the Islamic Religious Department in each state and the Syariah Court Judges (Noraini, 2012, 100). Cross-border marriage has raised many issues and major problems for Malaysian mainly among the Muslims and Malays, particularly in matters related to marriage registration.

1.1. Research Methodology

This article uses both the quantitative and qualitative approaches. A survey was conducted in selected states in Malaysia representing four regions namely the Northern, Central, East and South regions of Malaysia. Questionnaire was used to collect the data from 400 respondents. Semi structured interview was also conducted with the informants who have the knowledge and experience in cross-border marriage. The collected data were analysed using SPSS version 22.
1.2 Literature Review

1.2.1 Islamic Law Perspective

In Islam, cross-border marriage is not specifically mentioned. However the matter raises certain issues regarding the righteous guardian of the bride. Allah has mentioned in the Quran that a widow is entitled to choose a man if she wants to get married upon the completion of her ‘iddah period. Allah says;

If any of you die and leave widows behind, they shall wait concerning themselves for four months and ten days. When they have fulfilled their term, there is no blame on you if they dispose themselves in a just and reasonable manner. And Allah is well acquainted with what you do (Al Baqarah: 234).

There are a few hadith that narrate on the issue of guardianship in marriage:

Sufyan reported on the basis of the same chain of transmitters (and the right words are):

A woman who has been previously married (thayyib) has more right to her person than her guardian and the virgin father must ask her consent being her silence. At times he said: her silence is her affirmation (Imam Muslim,Sahih Muslim translated by Abdul Hamid, 1999).

‘A’ishah reported the Apostle of Allah (peace be upon him) as saying: The marriage of a woman who marries without the consent of her guardians is void. (He said these words three times). If there is cohabitation, she gets her dower for the intercourse her husband has had. If there is a dispute, the sultan is the guardian of one who has none (Sunan Abu Dawud translated by Ahmad Hasan, 1984).
1.2.2 Malaysian Legal Perspective

According to Section 19 of Islamic Family Law (Federal Territories) Act 1984, no marriage shall be solemnised without the permission to marry—

(a) by the Registrar under Section 17 or by the Syariah Judge under Section 18, where the marriage involves a female resident in the Federal Territory; or

(b) by the proper authority of a State, where the marriage involves a female resident in that State.

From this section, we can conclude that any marriage that was carried out without the permission of the marriage registrar will be charged and punished. The punishment is based on the Section 40(2) of Islamic Family Law Act (Federal Territories) 1984 which allocates fine of not more than one thousand Ringgit Malaysia and imprisonment of not more than 6 month or both for the misconduct.

According to Section 31(1) of the Islamic Family Law (Federal Territories) Act 1984, any person who is a resident of the Federal Territory has contracted a valid marriage according to Hukum Syarak abroad and not being in a marriage registered under the Section 24, the person shall, within six months after the date of the marriage, appear before the nearest or most conveniently available Registrar of Muslim Marriages, Divorces, and Ruju’ abroad in order to register the marriage. The marriage, upon being registered, shall be deemed to be registered under this Act.

The 52nd Conference of the Fatwa Committee of the National Council of Islamic Religious Affairs Malaysia held on 1st July, 2002, had discussed issues pertaining cross-border marriage in Southern Thailand. The Committee had decided that marriage outside of the country is valid provided that;

a) the marriage fulfils the essential validity of a marriage,

b) the distance is more than two marhalahs, there is no court decision preventing the woman from getting married on legal reason and,
c) such a marriage is solemnised by a wali that has been vested by the law in the country.

Thus, Fatwa Committee of the National Council of Islamic Religious Affairs Malaysia still consider such marriage as valid in Malaysia context, given the location exceeds two marhalahs and fulfils all conditions that have been prescribed by the laws and rulings.

In identifying issues related to Cross Border Marriages, a number of previous studies were used as reference by the researcher. However, this discussion will only focus on a few main writings related to the identification of potential literature reviews. To date, existing literatures on socio legal studies regarding cross border marriage are deemed as limited.

Noraini Md Hashim (2009) in her research entitled “Registration of Marriage in Malaysia: A Socio-Legal Study of Runaway Marriages among Muslims” has dealt specifically on cross border marriage by analysing the demographics profiles of those involved with cross border marriage. However, the data utilised in her research were only obtained through the applicants’ files in court and religious offices.

Raihanah (2007) in her writing “Polygamy without the Shariah Court’s Permission in Malaysia: A Socio-Legal Perspective” also covered the polygamy issue. She blamed the strict procedure in practicing polygamy has caused Muslim couples to commit cross border marriage. By employing the inferential statistical technique, the study tried to prove polygamy’s capability as the predictor of cross border marriage.

Cheng, Brenda, Rashidah (2012) in their writing claimed that foreigners especially the Indonesians often marry the Muslims in Malaysia in order to secure their economic positions and upgrade their social status. The authors interviewed both the Malaysian and Indonesian who are involved with such international marriages. However, their study did not conduct any quantitative research for data analysis purpose. Thus, the current study is believed to fill the gap by using quantitative research method in analysing the data
1.4 Research Objective

The specific aim of this research is to examine and analyse the differences between demographic information and respondents’ knowledge towards cross-border marriage.

2. Findings

2.1 Descriptive Analysis

Table 1.1 illustrates the respondents’ knowledge regarding the registration process of cross marriage in court. Overall, 79.5% of the respondents acknowledge the marriage registration at the court. Specifically, more than three-quarters of the respondents (77.6%) know that many Muslim married couples registered their marriage. 78.2% of the respondents know that it is compulsory to register marriage for all Muslim couples and 78.7% of the respondents know that the court gives an appropriate judgement to all Muslim couples. In term of perquisites, 79.9% of the respondents know that the court gives appropriate benefits to all Muslim couples. Majority of the respondents (80.8%) know that the court gives appropriate judgement to the children involved in such marriage and majority of the respondents (80.2%) deem registering the marriage will make the involved family to become happier. From the data in Table 5.8, it is apparent that the court puts much emphasis on the children’s welfare as well as the family itself.

79.5% of the respondents perceive Muslim couples who registered their marriage as adequately literate on the current law enforcement. Moreover, 78.1% of the respondents perceive Muslim couples who registered their marriage as abiding the law. In fact, majority of the respondents (82.6%) know that the authorities in Malaysia strongly encourage Muslim couples to register their marriage. From the religion context, 79.5% of the respondents perceive those who registered their marriage are obedient to the religion.
### Table 1.1: Respondents’ Knowledge on Marriage Registration at the Court

<table>
<thead>
<tr>
<th>No.</th>
<th>Knowledge towards Marriage</th>
<th>Level of Agreement</th>
<th>Mean*</th>
<th>SD</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>1</td>
<td>I know many Muslim married couples registered their marriage.</td>
<td>-</td>
<td>0.5</td>
<td>25.0</td>
<td>60.8</td>
</tr>
<tr>
<td>2</td>
<td>I know that it is compulsory to register marriage for all Muslim couples.</td>
<td>-</td>
<td>0.3</td>
<td>24.8</td>
<td>58.8</td>
</tr>
<tr>
<td>3</td>
<td>I know that the court gives appropriate judgement to all Muslim couples.</td>
<td>-</td>
<td>0.5</td>
<td>22.3</td>
<td>60.5</td>
</tr>
<tr>
<td>4</td>
<td>I know that the court gives appropriate benefit to all Muslim couples.</td>
<td>-</td>
<td>0.5</td>
<td>18.5</td>
<td>62.0</td>
</tr>
<tr>
<td>5</td>
<td>I know that the court gives appropriate benefit to all Muslim couples.</td>
<td>-</td>
<td>1.0</td>
<td>17.0</td>
<td>59.3</td>
</tr>
<tr>
<td>6</td>
<td>I feel that by registering the marriage, the family will be happier.</td>
<td>-</td>
<td>0.5</td>
<td>21.3</td>
<td>55.0</td>
</tr>
<tr>
<td>7</td>
<td>I perceive that Muslim couples who registered their marriage know the law.</td>
<td>-</td>
<td>1.0</td>
<td>27.8</td>
<td>44.0</td>
</tr>
<tr>
<td>8</td>
<td>I perceive that Muslim couples who registered their marriage are those who</td>
<td>-</td>
<td>1.0</td>
<td>27.8</td>
<td>44.0</td>
</tr>
<tr>
<td>9</td>
<td>I know that the authorities in Malaysia strongly encourage Muslim couples to</td>
<td>-</td>
<td>1.0</td>
<td>27.8</td>
<td>44.0</td>
</tr>
<tr>
<td>10</td>
<td>I perceive that those Muslim couples who registered their marriage are</td>
<td>-</td>
<td>1.0</td>
<td>27.8</td>
<td>44.0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*1=strongly disagree (1-20%), 2=disagree (21-40%), 3= somewhat agree (41-60%), 4=agree (61-80%), 5= strongly agree (81-100%)
2.2 Inferential Analysis

There are ten items in respondents’ knowledge that were analysed using the independent t-Test. The variable is tested according to the demographic information of the respondents. The purpose of the analysis is to differentiate between demographic information and respondents’ knowledge regarding the registration process of cross-border marriage at court.

For the independent t-test, respondents’ knowledge towards registration of cross-border marriage at court was tested according to gender (male-female), locality (rural-urban), and type of marriage (polygamy-monogamy) dichotomy.

2.2.1 Independent T-Test for Respondents’ Knowledge towards Registration of Cross Border Marriage at Court by Gender

Table 1.2 shows the t-test results of respondents’ knowledge by gender, in which no significant differences were found in the items. Overall, there are no significant differences between male and female in terms of respondents’ attitudes towards marriage registration at court, given the result for male respondents was (M=3.986, SD=0.488) and the result for the female respondents was (M=3.960, SD=0.467). Direct comparison between these two gender classes found that male respondents’ knowledge is slightly higher than female respondents in terms of acknowledging the registration process of the marriage at court. For overall gender, the t statistic value is 0.538 at 398 degrees of freedom and p value of .591.
Table 1.2: Independent t-Test for Respondents’ Knowledge by Gender

<table>
<thead>
<tr>
<th>Variable</th>
<th>Gender</th>
<th>N</th>
<th>Mean</th>
<th>SD</th>
<th>df</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>I know many Muslim married couples registered their marriage</td>
<td>Male</td>
<td>220</td>
<td>3.886</td>
<td>0.634</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>180</td>
<td>3.867</td>
<td>0.619</td>
<td></td>
<td></td>
</tr>
<tr>
<td>know that it is compulsory to register marriage for all Muslim couples</td>
<td>Male</td>
<td>220</td>
<td>3.909</td>
<td>0.642</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>180</td>
<td>3.911</td>
<td>0.645</td>
<td></td>
<td></td>
</tr>
<tr>
<td>know that the court gives an appropriate judgement to all Muslim couples.</td>
<td>Male</td>
<td>220</td>
<td>3.923</td>
<td>0.640</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>180</td>
<td>3.950</td>
<td>0.637</td>
<td></td>
<td></td>
</tr>
<tr>
<td>that the court gives an appropriate benefit to all Muslim couples.</td>
<td>Male</td>
<td>220</td>
<td>4.027</td>
<td>0.626</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>180</td>
<td>3.956</td>
<td>0.633</td>
<td></td>
<td></td>
</tr>
<tr>
<td>know that the court gives an appropriate judgement to the children</td>
<td>Male</td>
<td>220</td>
<td>4.073</td>
<td>0.651</td>
<td>1.179</td>
<td>.239</td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>180</td>
<td>3.994</td>
<td>0.673</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I feel that by registering the marriage, the family will be happier.</td>
<td>Male</td>
<td>220</td>
<td>4.041</td>
<td>0.685</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>180</td>
<td>3.972</td>
<td>0.680</td>
<td></td>
<td></td>
</tr>
<tr>
<td>see that Muslim couples who registered their marriage know the law.</td>
<td>Male</td>
<td>220</td>
<td>3.986</td>
<td>0.767</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>180</td>
<td>3.961</td>
<td>0.772</td>
<td>0.327</td>
<td>.744</td>
</tr>
<tr>
<td>see that Muslim couples who registered their marriage are those who</td>
<td>Male</td>
<td>220</td>
<td>3.932</td>
<td>0.734</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that the authorities in Malaysia strongly encourage Muslim couples</td>
<td>Male</td>
<td>220</td>
<td>4.109</td>
<td>0.757</td>
<td></td>
<td></td>
</tr>
<tr>
<td>to register their marriage.</td>
<td>Female</td>
<td>180</td>
<td>4.150</td>
<td>0.744</td>
<td>-0.542</td>
<td>.588</td>
</tr>
<tr>
<td>I perceive that those Muslim couples who registered their marriage are</td>
<td>Male</td>
<td>220</td>
<td>3.973</td>
<td>0.715</td>
<td></td>
<td></td>
</tr>
<tr>
<td>obedient to the religion.</td>
<td>Female</td>
<td>180</td>
<td>3.977</td>
<td>0.709</td>
<td>0.007</td>
<td>.994</td>
</tr>
<tr>
<td>Overall knowledge of the respondents</td>
<td>Male</td>
<td>220</td>
<td>3.986</td>
<td>0.488</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>180</td>
<td>3.956</td>
<td>0.488</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2.2.2 Independent T-Test for Knowledge of Respondents towards Registration of Marriage at Court by Locality

Data were further analysed on the differences of respondents’ attitudes (Table 1.3) in terms of locality (rural and urban). The number of respondents in the rural area was 118 whereas the respondents in urban area were 282. Within the items, there are two significant items. The first item which is the respondents’ perception towards the couples who registered their marriages as abiding the law was found as significant at (t=2.144, p=.033), while the second item which is the respondents’ perception of those Muslim couples who registered their marriage as obedient to the religion was
also found significant at (t=1.969, p=.050). In addition, the urban residences are found to be better informed than the rural people.

In overall, the mean value for the rural area respondents in rural area is 3.953 while the mean value for the respondents in urban area is 3.983. Meanwhile, the standard deviation for rural group is 0.425 and for urban group is 0.499. In this case, the t statistic is 0.564 at 398 degrees of freedom. The independent test p-value is .573 which is greater than .05. Thus, it shows that there is no statistically significant difference between the respondents in rural and urban areas in term of knowledge towards marriage registration at court even though the mean value for urban area is higher than that of the rural area.

Table 1.3: Independent t-Test for Respondents’ Knowledge by Locality

<table>
<thead>
<tr>
<th>Variable</th>
<th>Residence</th>
<th>N</th>
<th>Mean</th>
<th>SD</th>
<th>t</th>
<th>df</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>I know many Muslim married couples registered their marriage.</td>
<td>Urban</td>
<td>282</td>
<td>3.894</td>
<td>0.605</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Rural</td>
<td>118</td>
<td>3.840</td>
<td>0.679</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that it is compulsory to register marriage for all Muslim couples.</td>
<td>Urban</td>
<td>282</td>
<td>3.911</td>
<td>0.622</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Rural</td>
<td>118</td>
<td>3.907</td>
<td>0.692</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I feel that the court gives an appropriate judgement to all Muslim</td>
<td>Urban</td>
<td>282</td>
<td>3.904</td>
<td>0.644</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>couples.</td>
<td>Rural</td>
<td>118</td>
<td>4.010</td>
<td>0.620</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I feel that the court gives an appropriate benefit to all Muslim</td>
<td>Urban</td>
<td>282</td>
<td>3.965</td>
<td>0.653</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>couples.</td>
<td>Rural</td>
<td>118</td>
<td>4.068</td>
<td>0.566</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I feel that the court gives an appropriate judgement to the children</td>
<td>Urban</td>
<td>282</td>
<td>4.007</td>
<td>0.696</td>
<td>-1.424</td>
<td>398</td>
<td>.155</td>
</tr>
<tr>
<td></td>
<td>Rural</td>
<td>118</td>
<td>4.110</td>
<td>0.567</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I feel that by registering the marriage, the family will be happier.</td>
<td>Urban</td>
<td>282</td>
<td>4.004</td>
<td>0.703</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Rural</td>
<td>118</td>
<td>4.025</td>
<td>0.633</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I give that Muslim couples who registered their marriage know the</td>
<td>Urban</td>
<td>282</td>
<td>4.014</td>
<td>0.773</td>
<td>1.579</td>
<td>398</td>
<td>.115</td>
</tr>
<tr>
<td>marriage.</td>
<td>Rural</td>
<td>118</td>
<td>3.881</td>
<td>0.733</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I give that Muslim couples who registered their marriage are those</td>
<td>Urban</td>
<td>282</td>
<td>3.954</td>
<td>0.751</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that the authorities in Malaysia strongly encourage Muslim</td>
<td>Urban</td>
<td>282</td>
<td>4.100</td>
<td>0.754</td>
<td>2.144</td>
<td>398</td>
<td>.033</td>
</tr>
<tr>
<td>couples to register their marriage.</td>
<td>Rural</td>
<td>118</td>
<td>4.051</td>
<td>0.738</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I perceive that those Muslim couples who registered their marriage are</td>
<td>Urban</td>
<td>282</td>
<td>4.018</td>
<td>0.738</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>obedient to the religion.</td>
<td>Rural</td>
<td>118</td>
<td>3.780</td>
<td>0.718</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that the authorities in Malaysia strongly encourage Muslim</td>
<td>Urban</td>
<td>282</td>
<td>4.160</td>
<td>0.754</td>
<td>1.969</td>
<td>398</td>
<td>.050</td>
</tr>
<tr>
<td>couples to register their marriage.</td>
<td>Rural</td>
<td>118</td>
<td>4.051</td>
<td>0.738</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Overall knowledge of the respondents towards marriage registration at</td>
<td>Urban</td>
<td>282</td>
<td>3.983</td>
<td>0.499</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>court</td>
<td>Rural</td>
<td>118</td>
<td>3.953</td>
<td>0.425</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
2.2.3 Independent t-Test for Knowledge of Respondents towards Registration of Marriage at Court by Type of Marriage

Table 1.4 shows the results of the independent t-test on the respondents’ knowledge according to type of marriages, in which four items show statistically significant differences. Firstly, the respondents know that the court provides appropriate judgement to all Muslim couples. (t=-3.214, p=.001). For monogamous marriage, the mean is 3.832 and the standard deviation is 0.670. While the mean for polygamous marriage is 4.034 and the standard deviation is 0.590. The figures illustrate the lesser knowledge towards registration of cross-border marriage among respondents who practise monogamous marriage compared to those in polygamous marriage. Secondly, the respondents know that the court gives appropriate benefit to all Muslim couples (t=-2.042, p=.017). The mean value for respondents in monogamous marriage is 3.918 and the standard deviation is 0.602. Meanwhile, the mean value for those in polygamous marriage is 4.069 and the standard deviation is 0.647. From the figure, it can be concluded that the respondents who practise monogamous marriage are having less knowledge in regards to the benefits of registering cross-border marriage compared to respondents involved in polygamous marriage. Thirdly, the respondents know that the court gives appropriate judgement to the children involved in such marriage (t=-2.489, p=.013). The mean value for monogamous marriage 3.954 and the standard deviation is 0.651, while the mean value for polygamous marriage is 4.118 and the standard deviation is 0.663. With this, it shows that the respondents who practise monogamous marriage are less knowledgeable in terms of the appropriate judgement to the children involved with cross border marriage compared to respondents who practise polygamous marriage. Fourthly, it is found that the respondents know that the authorities in Malaysia strongly encourage Muslim couples to register their marriage (t=-2.142, p=.033). The mean value for monogamous marriage is 4.046 and the standard deviation is 0.767. Comparatively, the mean value for polygamous marriage is 4.206 and the standard deviation is 0.727, indicating respondents in monogamous marriage are having less knowledge with regards to the encouragement by the Malaysian Authorities for Muslim couples.
to register their marriage as compared to the respondents in polygamous marriage. In overall, there is significant difference between the respondents in monogamous marriage (M=3.921, SD=0.496) and polygamous marriage (M=4.025, SD=0.456) in terms of respondents’ knowledge on marriage registration at court with t-statistic value at -2.175 and p of .030 which is less than .05 acceptance threshold.

Table 1.4: Independent t-Test for Respondents’ knowledge by Type of Marriages

<table>
<thead>
<tr>
<th>Type of Marriages</th>
<th>Monogamy</th>
<th>Polygamy</th>
<th>t-value</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Know many Muslim married couples registered their marriage.</td>
<td>3.827</td>
<td>3.927</td>
<td>0.616</td>
<td>0.635</td>
</tr>
<tr>
<td>At it is compulsory to register marriage for all Muslim couples.</td>
<td>3.832</td>
<td>4.034</td>
<td>0.670</td>
<td>0.590</td>
</tr>
<tr>
<td>Know that the court gives an appropriate judgement to all Muslim couples.</td>
<td>3.918</td>
<td>4.069</td>
<td>0.602</td>
<td>0.647</td>
</tr>
<tr>
<td>Know that the court gives an appropriate benefit to all Muslim couples.</td>
<td>3.954</td>
<td>4.118</td>
<td>0.651</td>
<td>0.663</td>
</tr>
<tr>
<td>Feel that by registering the marriage, the family will be happier.</td>
<td>3.980</td>
<td>4.045</td>
<td>0.681</td>
<td>0.679</td>
</tr>
<tr>
<td>Believe that Muslim couples who registered their marriage know</td>
<td>3.959</td>
<td>3.990</td>
<td>0.794</td>
<td>0.794</td>
</tr>
<tr>
<td>I know that the authorities in Malaysia strongly encourage Muslim couples to register their marriage.</td>
<td>4.046</td>
<td>4.206</td>
<td>0.767</td>
<td>0.727</td>
</tr>
<tr>
<td>I perceive that those Muslim couples who registered their marriage are obedient to the religion.</td>
<td>3.980</td>
<td>4.025</td>
<td>0.709</td>
<td>0.456</td>
</tr>
<tr>
<td>Overall knowledge of the respondents</td>
<td>3.921</td>
<td>4.025</td>
<td>0.496</td>
<td>0.456</td>
</tr>
</tbody>
</table>
3. Discussion

With regards to the differences between demographic information and the respondents’ knowledge on cross-border marriage registration, there are several differences that can be listed. Generally, it is found that majority of the respondents agree with the overall knowledge towards marriage registration at the court. However, according to the independent t-test, respondents’ knowledge towards the registration of the cross-border marriage according to gender shows that female respondents are less knowledgeable than the male respondents in terms of the overall knowledge on marriage registration even though it is not statistically significant. The imbalance knowledge spread illustrates, the female respondents generally receive less information than the male respondents in terms of marriage registration. Furthermore, when a male informant from Johor was asked regarding his decision to opt for cross border marriage, he answered:

…..This marriage must be registered, if this marriage is unregistered, our life will be affected…. (Personal Communication with Informant No.1, on 23 October 2014, Songkhla)

The study also discovers statistically significant difference between the urban and rural residents in terms of perception on Muslim couples who registered their marriage are those who abide to the law. Therefore, this study recommends for wider circulation of the information on the importance of marriage registration especially among the community in the rural areas.

This study also finds that respondents who practice polygamous marriage receive more knowledge compared to those who practice monogamous cross-border marriage, either in terms of knowing that the court provides appropriate judgement to all Muslim couples or in regard to the knowledge that the court gives appropriate benefit to all Muslim couples.
4. Conclusion

Several recommendations can be suggested to curb this phenomenon as it affects the family institution. The recommendations are as follow:

1. Government agency such as the Legal Aid Department and Religious Office must have a one stop center or branch in every district as reference for the people in the rural area without having to travel to town.

2. To better promote the importance of marriage registration through mosque or seminar especially in rural area;

3. The government should amend the laws regarding cross-border marriage;

4. Legal education must be instilled since in school hood.

In conclusion, it has become a general knowledge that some previous studies show that the legal factors play an important roles in cross-border marriage. However, in this study, we discover that the respondents’ knowledge also plays an important factor in committing cross-border marriage. Therefore, it is proposed that more research must be done in order to prevent the cross-border marriage as it affects the family institution especially the future of the women and children involved.

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THE ROLE OF JUDICIAL REVIEW IN SYARIAH CRIMINAL OFFENCES ENFORCEMENT IN MALAYSIA: AN OVERVIEW

Abdul Rahman, N.*

Abstract

This paper seeks to examine the role of civil court’s judicial review pertaining to the enforcement of shariah criminal offences in Malaysia. Civil court under the Court Judicature Act 1964 has the necessary jurisdiction to review judicially the enforcements action by the government staffs and their subordinates in carrying out their duties. The review declaring whether they are validly carried out and whether the procedures have been adhered to. The civil court also has the jurisdiction to review the shariah enforcement actions. Recently, three cases which had been reviewed judicially by the Civil High Courts, namely, the seizure of book entitled Allah, Love and Liberty, the Muslim Transgender case in the state of Negeri Sembilan and the Kalimah Allah disputes, are worthy of discussion. For example, in the case of seizure of the book above, the High Court has declared that the enforcement of the provisions of the shariah offences as unconstitutional, as they infringed some fundamental principles enshrined under the Malaysian Constitution. The same decisions were handed down by the court in the other two cases. This study employs mainly library research and documentation. Therefore, among the objectives of this study is to examine whether the civil courts’ judicial review over enforcements of shariah offences is still relevant and valid. This aspect warrants some evaluations. Consequently, whether the civil trained judges have the necessary expertise to review the shariah or shariah related matters and jurisdictions and repercussions of these reviews to the position of Article 121(1A) of the Malaysian Federal Constitution.

Keywords: Role, Shariah Criminal Offences, Judicial Review, Enforcement in Malaysia

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1.0 Introduction

Superior courts have two types of jurisdiction over lower courts or inferior tribunals: (a) appellate jurisdiction and supervisory jurisdiction. In exercising its appellate jurisdiction, the superior courts in hearing appeals against the decision of a lower court can consider the case de novo, examine the evidence in the light of its own understanding and appreciation, and substitute its own judgment in the place of the judgment of the lower court.\(^1\)

In exercising its supervisory jurisdiction, it is not the function of the High Court to hear a dispute and decide on its merits; its role is limited to supervising the lower courts or tribunals to ensure that they properly exercise the power conferred on them by statute; in explaining what judicial review is Jemuri Serjan SCJ (as he then was) observed:

It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.\(^2\)

In real life, we are subjected to many administrative enforcements and decisions which are carried out by the administrative authorities. Occasionally, it resulted in some infringement of rights and thus remedial mechanism follows accordingly. When a person feels aggrieved at the hands of the administration because of the infringement of any of his rights, or deprivation of any of his interest, he wants a remedy against the administration for vindication of his rights and redressal of his grievances.\(^3\)

Judicial review as it is widely known and practiced, is the proper mechanism to redress the infringements. Judicial review concerned with the process of upholding the principle of legitimacy in public law, that the actions of administrative authorities must be based on legitimate foundation. It is the process by which the High

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\(^1\) V Anantaraman, “Judicial Review : The Malaysian Experience Part (1)” [1994] 1 MLJ xlix
\(^2\) ibid
Court ensures through its inherent jurisdiction that administrative authorities do comply with the relevant rules, principles and standards in order to act within the legal framework of their power.4

_Halsbury’s Laws of Malaysia_ concurs by defining judicial review as the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.5 Fordham speaks of “Judicial review is the central feature of administrative or public law. It represents the judiciary seizing the constitutional responsibility of curbing abuse of executive power. It is a special supervisory jurisdiction which the courts approach in a special way”.6

In Malaysia, the jurisdiction of the civil court (High Court) to judicial review stems from the Section 25(2) of the Court of Judicature Act 1964 which elucidates as follows:

“(1) Without prejudice to the legality of article 121 of the Constitution, the High Court shall on the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia day and such other powers as may be vested in it by any written law in force within its local jurisdiction

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating the same”

Relevant provision stated in Para 1 of Schedule 1 of the Court of Judicature Act 1964 highlights the jurisdiction of the High Court to “power to issue to any person or authority directions, orders or writs, including writs of the nature of _habeas corpus_,

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4 Wan Azlan Ahmad, Mohsin Hingun (1995), An Introduction to Administrative Law, First Publication Singapore Pte Ltd ; Singapore ; Pearson Professional at 31
5 Halsbury’s Laws of Malaysia, Vol 9, para [160.059]
mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part 11 of the Constitution, or any of them, or for any purpose”.

The application for judicial review is currently regulated by Order 53 of the Rules of Court 2012, which states as follows⁷:

Application for judicial review (O. 53, r. 1)

“ (1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950 [Act 137].”

The aggrieved party must have a valid grievance to be a successful applicant. Rules of the Court 2012 again reiterate that: “Any person who is adversely affected by the decision of any public authority shall be entitled to make an application for judicial review.⁸.

2.0 LIMITS OF COURT’S JUDICIAL REVIEW

De Smith, leading administrative scholar has highlighted the fact that there is almost no limits to judicial review, in the following phrases “that Judicial review has developed to the point where it is possible to say that no power whether statutory or under the prerogative is any longer inherently unreviewable. Courts are charged with responsibility of adjudicating upon the manner of the exercise of a public power, its scope and its substance.⁹.

Nevertheless, De Smith has pointed out to certain decisions which courts cannot or should not easily engage, mainly limitation of constitutional and institutional capacity. This position can be examined in several jurisdictions. England, for instance, with regard to constitutional perspective of separation of powers, matters of social and economic policy are vested upon the legislature and not judiciary. Therefore courts avoid

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⁷ Formerly regulated by Order 53 of the High Court Rules 1980
⁸ Order 53 Rule 3 Rules of Court 2012
interfering in official discretions in pursuits of policy enforcement.\textsuperscript{10} Similarly, it is not for judges to weigh utilitarian calculations of social, economic or political preference.\textsuperscript{11}

Regarding the institutional capacity, there are some decisions which courts are ill equipped to review or not amenable to the judicial process and better to be determined by other bodies, including Parliament, such as distribution of resources among competing claims, national security and local councils expenditure.\textsuperscript{12} Control of these functions is essentially a matter for administrative and political means.\textsuperscript{13}

Similarly, the limits are also being practiced in several other jurisdictions such as Australia, Canada, India, New Zealand and South Africa.\textsuperscript{14} Policy decisions, political contents which lack of explicit or manageable standards such as treaty making, budgetary or financial decisions and other government decisions normally exclude court judicial review. In fact in these jurisdictions, specific legislations clearly prevent courts from asserting their review on several decisions. For instance, the provisions of the Human Rights Act 1998 of England states that no public authority may interfere with the Convention rights. In Australia, the Administrative Decisions (Judicial Review) Act 1977 excludes prerogatives, decisions and conduct of the Governor General from being reviewed by courts.

Looking to the Malaysian perspective, decision relating to sports for instance, it is suggested that courts distant themselves from reviewing the sport governing bodies decisions. This is based on the non-intervention policy of the court towards private matters of sport governing bodies.\textsuperscript{15}

\textsuperscript{10} Lord Woolf, Jeffrey Jowell, Andrew Le Sueur, (2007) De Smith’s Judicial Review Sixth edition, London; Sweet and Maxwell at 16
\textsuperscript{11} Ibid.
\textsuperscript{12} Ibid. at 18
\textsuperscript{14} Lord Woolf, Jeffrey Jowell, Andrew Le Sueur, (2007) De Smith’s Judicial Review Sixth edition, London; Sweet and Maxwell at 25
\textsuperscript{15} Jady @ Zaidi Hassim, “Are the Decisions of the Sport Disciplinary Committee Amenable to Judicial Review? [2013] 2 MLJ i
3.0 JUDICIAL REVIEW OF SHARIAH CASES IN MALAYSIA IN PERSPECTIVE

Notably in Malaysia, the federal judiciary is vested in the High Court as specified under Article 121(1) of the Federal Constitution. The article reads as follows:

“121. (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine; (c) (Repealed).

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.”

As the High Court assumes federal status, the jurisdiction cover wide range of subject matters while Shariah Courts which assume state courts are vested with shariah cases and shariah related matters, as provided under Article 74 of the Federal Constitution. More often than not, jurisdictional conflict arise between Civil and Shariah court as jurisdictional matters overlap. Broadly, the jurisdictional conflict can be categorised into two periods, pre amendment of article 121 (1A) and post amendment of the article 121(1A). Period of pre- amendment of article 121(1A) is marked by many decisions handed down by the civil courts although they involved matters pertaining to Hukum Syarak such as Tengku Mariam Tengku Sri Wa Raja v Commissioner for Religious Affairs Terengganu\textsuperscript{16}, Myriam v Ariff\textsuperscript{17} ,Ainan bin Mahmud v Syed Abu Bakar\textsuperscript{18} and Nafsiah v Abdul Majid\textsuperscript{19}. Avoidance this prolonged issue, the

\textsuperscript{16} [1969] 1 MLJ 110; [1970] 1 MLJ 222
\textsuperscript{17} [1971] 1 MLJ 265
\textsuperscript{18} [1939] MLJ 209
\textsuperscript{19} [1969] 2 MLJ 174
Constitution in 1988, has amended article 121(1) by inserting additional clause 1A to the Article 20, in which the article currently reads as follows:

“(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”

The effect and implication of this amendment has been debated by legal scholars. Ahmad Ibrahim concluded that one important effect of the amendment is to avoid any conflict between the decisions of shariah courts and the civil court. Another legal scholar, Syed Jaafar Hussain concurred with Ahmad Ibrahim. In Syed Jaafar’s remarks: “article 121 of the Federal Constitution after its amendment in 1988 took away the jurisdiction of the civil courts in respect of any matter within the jurisdiction of the shariah courts. Before the amendment, the civil courts have asserted their power by claiming jurisdiction over matters relating to family law where the parties were Muslims and governed by their religious law even though these matters fell within jurisdiction of the shariah courts.”21

*Mohd Habibullah vs Faridah Dato Talib*22 is the immediate response whereby the Supreme Court insisted that the amendment’s objective is to avoid any interference of civil court over shariah cases. Both Plaintiff and Defendants are Muslims. In the words of the Harun Hashim, Supreme Court Judge, on the primary issue whether the Syariah Court has jurisdiction to hear the case so as to oust the jurisdiction of the High Court under article 121(1A), the following judgment is given by the court: “it is obvious that the intention of Parliament by article 121(1A) is to take away the jurisdiction of the High Court’s in respect of any matter within the jurisdiction of the Syariah Court”.

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20 Constitution (Amendment) Act 1988
22 [1992] 2 MLJ 793

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Andrew Harding, another legal scholar, on the contrary, is of the opinion that the amendment has not affected the power of civil court to review shariah cases. In his words “The amendment does not purport to oust the jurisdiction of the High Court to review decisions of the shariah courts. It merely says, in effect that the ordinary courts cannot exercise the shariah court’s jurisdiction, a position which, it should be noted, and applies to any inferior jurisdiction. For these reasons it seems that clause 1A was enacted for the avoidance of doubt”\(^{23}\).

Nevertheless, despite of the conflicting decisions and opinions regarding the implication of this amendment, generally, the amendment’s objective is to avoid any interference of civil courts over decisions of the shariah court. However, post-amendment period of the article has remarkably shown that the jurisdictional conflict still not resolved completely. Many decisions post amendment of article 121(1A), had been tried and decided by civil courts despite of the amendment. Worthy to mention here, few of them including Jamaluddin Othman [1989], Teoh Eng Huat[ 1990], Ng Wan Chan[ 1991], Tan Sung Mooi[1994] and Lim Chan Seng [1996] were also heard in the civil court and decided accordingly.

3.1 Recent Review of Shariah cases by Civil court

Recent review exercised by civil courts over shariah cases in Malaysia is demonstrated by three cases. The seizure of book entitled “Allah, Love and Liberty” which is written by a woman writer, Irshad Manji, the Muslim transgender case in the state of Negeri Sembilan and the “Kalimah Allah” case

3.1.1 Seizure of a Book, Entitled “Allah, Love and Liberty”

The case started in May, 23\(^{rd}\), 2012, when several enforcement officials of the Federal Territory of Islamic Religious Department seized several copies of book entitled, Allah, Liberty and Love written by Irshad Manji, a woman writer who is based in the United States. The book which was on sale in a bookstore, Borders, was regarded as contrary to Islamic teaching because it promoted pluralism, liberalism and fanciful

interpretation of the precepts and tenets of Islam\textsuperscript{24}. On May, 29\textsuperscript{th}, The Ministry of Home Affairs had declared that the book, both in English and Malay versions were banned in Malaysia\textsuperscript{25}. Subsequently, in June, 18\textsuperscript{th} 2012, The bookstore had filed a leave seeking a judicial review from the High Court in a bid to declare that the act of seizure by the officials was invalid and unconstitutional. Meanwhile, the store manager was charged in the Shariah Court for selling of the book which is contrary to Shariah Criminal Offences Act 1997 and upon conviction is liable to three thousand ringgit fine or imprisonment of up to two years or both\textsuperscript{26}.

Subsequently, in June, 25, the Bookstore and several others had successfully obtained a leave to challenge the validity of the seizure. They were granted a \textit{certiorari} to set aside the conviction by the Shariah Court on the sales manager previously. They had successfully been granted with an order to restraint the officials from further conducting the raid in the bookstore. On July, 30\textsuperscript{th} 2012, objection was raised by the officials that the restraint order issued by the High Court is akin to interference to the Shariah Court Order and there was no urgent and special situation for the court to grant such order. The High Court allowed the objection raised and instead, ordered the Bookstore to have the restraint order filed in the Shariah Court. The Bookstore subsequently filed an appeal against the High Court decision to the Court of Appeal and successfully obtained an interim \textit{Order} to defer further seizure by the officials.

Recently, on March, 22 2013, the High Court of Kuala Lumpur granted a \textit{certiorari} to invalidate the Officials act of raiding and seizing copies of the book. The Court of Appeal further made other declarations that the act can only be exercised had the Home Affairs Ministry duly declared that the book was undesirable publications in accordance to Printing, Presses and Publication Act 1984. In addition, the High Court had jurisdiction to hear the case in accordance to Article 121 of the Federal Constitution and

\textsuperscript{24} Berita Harian, \url{http://www.bharian.com.my/articles/BukuIrshadManjiharam/Article},
\textsuperscript{25} Sinar Harian, \url{http://www.sinarharian.com.my/nasional/kdn-keluar-warta-perintah-larangan-penerbitan-buku-irsyad–manji-1.56571}
\textsuperscript{26} Utusan Malaysia, \url{http://www.utusan.com.my/utusan/Mahkamah/2012061/ma_06/Jual-buku-Irshad-Manji:-Pengurus–stor-buku-didakwa}
had the power to interpret the application of the 1984 Act over the Islamic Criminal Offences Act 1997.\textsuperscript{27}

3.1.2 Muslim Transgender Case

The second case pertaining to the Muslim transgender case in the state of Negeri Sembilan. High Court of Seremban in \textit{Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors}\textsuperscript{28}, the plaintiffs had made an application to review the Shariah enforcement action in convicting them according to section 66 of the Shariah Criminal Enactment 1992 of Negeri Sembilan. The provision criminalizes Muslim men of cross dressing. They were applying a declaration that this provision is unconstitutional as it contradicted \textit{inter alia} to Article 5(1), 8(1), 9(2) and 10(1) (a) of the Federal Constitution which guarantee the citizen to freedom of life and liberty, equality before the law, freedom of movement and freedom of expression respectively. The Plaintiffs’ application for judicial review, however, was dismissed by the court on October 11, 2012. They subsequently filed an appeal to the Court of Appeal against the decision. The appeal was allowed as the following:

“We therefore, grant the declaration sought in prayer… that section 66 of the Syariah Criminal Enactment 1992 is void by reason of being inconsistent with the following articles of the Federal Constitution, namely:

\begin{itemize}
  \item [1)] Art 5(1); [2)] Art 8(1); [3)] Art 8(2);
  \item [4)] Art 9(2)and
  \item [5)] Art 10(1)(a)”
\end{itemize}

Dissatisfied with the decision, the State of Negeri Sembilan filed a further appeal to the Federal Court in another case of \textit{State Government of Negeri Sembilan & Ors v Muhamad Juzaili Mohd Khamis & Ors}\textsuperscript{29}. The Federal Court in allowing the appeal stated that the application for declarations sought by the respondents before the High Court by way of judicial review was in fact a challenge to the legislative powers of the State


\textsuperscript{28} [2015] MLJU 65 : CA

\textsuperscript{29} [2015] 8 CLJ 975
Legislature of Negeri Sembilan. What the respondents wanted to do was to limit the legislative powers of the State Legislature, by saying that despite the powers to legislate on matters on Islamic law having been given to the State Legislature by article 74 of the Federal Constitution read with List II in the Ninth Schedule thereof, that legislation must still comply with the provisions on fundamental liberties in arts. 5(1), 8(2), 9(2) and 10(1) of the Federal Constitution.

The Federal Court further held that the application for the declarations sought by the respondents was incompetent by reason of substantive procedural non-compliance with clauses (3) and (4) of article 4 of the Federal Constitution, and should have been dismissed by the High Court on the ground that the High Court had no jurisdiction to hear the matter.

3.1.3 Dispute Pertaining to “Kalimah Allah”

In the judicial review relating to “Kalimah Allah” in Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor\(^{30}\). In this case, The Titular Roman Catholic Archbishop of Kuala Lumpur as the applicant, was granted a publication permit by the first respondent, the Minister of Home Affairs to publish the 'Herald-the Catholic Weekly'. On 8 January 2009, the applicant received a letter dated 7 January 2009 from the first respondent approving the publication permit for the publication for the period 1 January 2009 until 31 December 2009 subject to the condition that the applicant was prohibited from using the word 'Allah' in the publication. This was the applicant's application under Order 53 rule 3(1) of the Rules of the High Court 1980 for judicial review of the impugned decision of the first respondent.

By way of this application the applicant sought leave for an order of certiorari to quash the impugned decision and for an order for stay of the impugned decision pending the court's determination of the matter, and for various declarations with costs in the cause. The applicant sought to challenge the impugned decision under the heads of illegality, unconstitutionality, 'Wednesbury unreasonableness' and ultra vires the Printing Presses and Publication Act 1984.

\(^{30}\) [2010] 2 MLJ 78
In support of its submission on illegality the appellant contended that the first respondent in the exercise of its discretion to impose further conditions in the publication permit had failed to take into account relevant considerations, such as the fact that the word 'Allah' is the correct Bahasa Malaysia word for 'God' and that in the Bahasa Malaysia translation of the Bible, 'God' is translated as 'Allah', but had instead taken into account one or more irrelevant considerations.

The applicant's grounds for the reliefs of certiorari and declaration are premised on the unconstitutional acts and conduct being inconsistent with arts 3(1), 10, 11 and 12 of the Federal Constitution, namely that the applicant's right to use the word 'Allah' stemmed from the applicant's constitutional rights to freedom of speech and expression and religion and in instructing and educating the Catholic congregation in the Christian religion.

In reply to this, the respondent submitted that the applicant had not demonstrated in its affidavit how it was unable to profess and practise its religion under article 3 and 11 of the Federal Constitution because it had been prohibited from using the word 'Allah' in its publication. The applicant further challenged the impugned decision under the head of irrationality or Wednesbury unreasonableness by contending that it was irrational on the part of the respondents on the one hand not to prohibit the congregation of the Catholic Church to use the word 'Allah' for worship and in the Bible and on the other hand to state that the word cannot be used in the publication.

In reply to this contention the first respondent replied that it was acting within the four corners of its jurisdiction and had taken into account relevant considerations such as the status of Islam under the Constitution, the various Enactments on control, government policy, public security and safety and religious sensitivity. The respondent also averred that the use of the word ‘Allah’ should be restricted to its use in the Bible as the Bible was not meant for Muslims but only found in the possession or use of Christians in churches. Basically the first respondent sought to justify its decision by submitting that by virtue of rule 3 of the Printing Presses and Publications (Licenses and Permits) Rules 1984 (‘the 1984 Rules’) read together with sections 6 and 26 of the Act it may attach any condition it deemed fit and that its decision was thus legal and in accordance with the law.
The High Court in a reported judgment in 31 December 2009, allowing the appeal stated that the first respondent in the exercise of its discretion to impose further conditions in the publication permit issued had not taken into account the relevant matters alluded to by the applicant, hence committing an error of law that warranted judicial interference. Further, there was no factual basis, in view of the uncontroverted historical evidence averred in the applicant's affidavit, for the first respondent to impose the condition under dispute in the publication permit.

The Court further held that pursuant to article 3(1) of the Federal Constitution, Islam is the official religion of the federation but other religions may be practised in peace and harmony in any part of the federation. As there is no doubt that Christianity is a religion, the question that had to be considered was whether the use of the word 'Allah' is a practice of the Christian religion. Whether a practice is or is not an integral part of the religion is not the only factor to be considered and there are other equally important factors. From the evidence it is apparent that the use of the word 'Allah' is an essential part of the worship and instruction in the faith of the Malay speaking community of the Catholic Church and is integral to the practice and propagation of their faith. Thus the imposition of the condition prohibiting the use of the word 'Allah' in the publication contravened the provision of articles 3(1), 11(1) and 11(3) of the Federal Constitution and was therefore unconstitutional. Further the imposition of the condition in dispute also amounted to an unreasonable restriction on the freedom of speech and expression under article 10(1)(c) and an unreasonable administrative act which impinges on the first limb of article 8(1) which demands fairness of any form of state action. Thus for all these reasons the condition imposed that the applicant was prohibited in using the word 'Allah' in its publication was illegal, null and void. Upon appeal to the Federal Court in Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors, the appeal was dismissed by the court.

31 See also related case pertaining to intervener application in Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor [2010] 2 MLJ 122
32 [2014] 6 CLJ 541, FC
4.0 Implications of Civil Court Judicial Review over Shariah Cases

It is submitted that judicial review exercised by the civil courts in these cases has certain repercussions to the Islamic law and the position of Shariah Court in Malaysia. Mainly it has reverted the status and position of Islamic law to its old status. The amendment of Article 121(1A) has been enacted not without its purpose. It takes away the jurisdiction of Civil Court over Shariah Courts in matters of Islamic law or Hukum Syarak as stated in the List 11 of the Federal Constitution. This has been affirmed by the Supreme Court in the decision of Faridah Dato Talib and several other decisions. The amendment is without doubt can be interpreted to include also the power of civil court from reviewing shariah decision whatsoever.

Secondly, Islamic Law has been reverted to the inferior provisions as its jurisdiction can be reviewed by the civil court. It is submitted that the approach in Mamat bin Daud should instead be adopted by the civil court. In this case, the Petitioners was charged for an offence under section 298A of the Penal Code for doing an act which is likely to prejudice unity among persons professing the Islamic religion. They were alleged to have acted as unauthorised Bilal, Khatib and Imam at a Friday prayer in Kuala Terengganu without being so appointed under the Terengganu Administration of Islamic Law Enactment 1955.

The issue was whether an amending Act 1983 ultra vires article 74(1) of the Federal Constitution, since the subject matter of the legislation is reserved for the State Legislatures and therefore beyond the legislative competency of Parliament. It was held by the Supreme Court that in the subject of religion, only states have power to legislate under Articles 74 and 77 of the Federal Constitution. Further, there must be a declaration that section 298A of the Penal Code is a law with respect to which Parliament has no power to make law and a declaration that section 298A of the Penal Code is invalid and therefore null and void and no effect. In addition, the power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

33 Full citation is Mamat Bin Daud & Ors v Government of Malaysia [1988]1 MLJ 119
Thirdly, the jurisdiction and powers of Islamic Enforcement Officials in enforcing shariah offences will be limited as shown in the case of seizure of the book *Allah, liberty and love* above. The interpretation by the Court that a fundamental prerequisite shall be fulfilled, i.e. that it must be declared as contrary to Islamic Law by the Ministry before the seizure be validly exercised, has limited the officer to enforce the Shariah law in total. It follows, had the Ministry fails to make such a declaration, the Shariah enforcement could not exercise their enforcement duties. It is submitted that, except in one state which make it a prerequisite, there is no such requirement under the other states shariah criminal offences, including in the 1997 Act.

Fourthly, as it has been elucidated in the case of *Mohd Juzaili Khamis* above that application for judicial review is akin to invalidate shariah criminal offences which are validly enacted by the state legislature. This is a serious implication to the shariah law.

Finally, the civil judges do not have the necessary expertise to determine matters pertaining to Islamic law. The dispute whether any book is contrary to Shariah or not to be vested in shariah judges as they have the expertise to determine such matter.

### 5.0 CONCLUSION

It is submitted that “judicial review is not solely based on the intention of the legislative, but it is secured and its ambit is determined by the rich set of constitutional principles, most notably the rule of law, the separation of powers and sovereignty of Parliament on which the Constitution
is founded”. It is in the interaction of those constitutional fundamentals and not the legislative commands of the sovereign 35.

Raja Azlan Shah, the Lord President (as he then was) in one of his remarkable decision, *Dato’ Menteri Othman Baginda & Anor vs Dato’ Ombi Syed Alwi bin Syed Idrus* 36 aptly put that “a constitution being a living piece of legislation, its provision must be construed broadly and not in a pedantic way with less rigidity and more generosity than other Acts”. Similarly, Lord Wilberforce in *Minister of Home Affairs vs Fisher* 37 upheld that “a Constitution is a legal instrument giving rise, amongst other things to individual rights capable of enforcement in the court of law. Respect must be paid to the language which has been used and to traditions and usages which have given meaning to that language”. In the light of this interpretation of the constitutional approach, it is submitted that the amendment to article 121(1A) has taken away not only the jurisdiction of civil court to determine shariah cases but also reviewing them. Therefore it is just proper for the civil court to recluse themselves from reviewing shariah related cases as though Islamic law occupies state status, but it assumes higher position in lieu to the special position of Islam as stipulated under the Constitution. In addition, the judicial review also has certain limits, as shown in the discussion above. It is further submitted that the relevant laws to be amended to restrain civil courts from exercising their judicial review over shariah related matters or alternatively, shariah court should be conferred the exclusive jurisdiction to exercise judicial review pertaining to shariah matters.

Finally, a special law similar to the Administrative Decisions (Judicial Review) Act 1977, Australia be enacted to exclude civil court from exercising judicial review on administrative and enforcement decisions of the Islamic authorities. A constitutional amendment similar to article 121(1A) to be incorporated in the Federal Constitution which will take away the power of the High Court to review shariah decisions.

36 [1981] 1 MLJ 29
37 [1979] 3 All ER 21
APOSTASY IN MALAYSIA: THE EXTENT OF RELIGIOUS FREEDOM
AND SUFFICIENCY OF THE STATE ENACTMENTS TO CURB THE
PROBLEM


ABSTRACT

Apostasy and religious freedom are two interrelated issues that always being the
highlights by the community. In Malaysian context, reference shall be made to Article
3 and Article 11 to see the extent of religious freedom intended by the law maker.
Other than these provisions, reference shall also be made to Shariah law in particular
the Shariah State Enactments, being the applicable law to Muslims on matters
concerning the religion, and to analyze the sufficiency of those enactments to combat
the apostasy problem in Malaysia.

Keywords: Apostasy, Codification, Shariah State Enactments.

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1. **Introduction: Apostasy in Islam**

Apostasy in its meaning is a conscious abandonment of Islam by a Muslim by word or deed that result to that person losing their *Aqidah*. The most common example of act amounting to apostasy is the act of a Muslim who was born in a Muslim family, converting to other religion.\(^1\) The act of apostasy however does not limited to renunciation of Islam and joining other religion but also includes the questioning or denying any fundamental tenet or creed of Islam such as the divinity of God, the Prophethood of Muhammad, Mocking God and believe in other than God.

Al-Quran, as the primary source in Islam stated in few verses about the prohibition of apostasy. One of the verses stated that “They wish that you should reject faith, as they do, and thus be the on the same footing as them: but take no friends from their ranks until they flee in the way of Allah. If they turn their backs, seize them and slay them wherever you find them.” This means that if someone (Muslim) had renounced the religion of Islam, the first step is to guide/ bring him to the right path , but if he or she refuse to repent, kill him or her.\(^2\) This authority is also supported by the Hadith of the Prophet “Whoever changes his religion, put him to death”.\(^3\)

Nevertheless it is important to note that the act of apostasy in Islam does not include act against Islam or conversion to another religion that is done involuntarily, forced or done as concealment out of fear of prosecution or during war.

2. **Freedom of Religion in Federal Constitution of Malaysia**

According to article 11 of the Federal Constitution of Malaysia, every person has full right to practice and to profess his or his religion and to propagate it. However, this article has restrict other religion to propagate their teachings to the Muslims or Muslims’ community. This provision impliedly shows that Islam possesses a special position above other religion being the official religion of the federation.

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\(^1\) [https://islamqa.info/en/20327](https://islamqa.info/en/20327)

\(^2\) Al-Quran verse 4:89

Among the issues raised is whether the so called special position of Islam religion means that it is totally protected from being defamed or insulted by its believers? Based on the abovementioned provision, it merely prohibits other religion to propagate their religion to the Muslims, but it does not stop the Muslims from converting to other religion in total. Having said so, there are many apostasy cases being reported in Malaysia where the apostates are only being punished with punishments imposed by the s (as stated earlier that matters concerning the religion falls under the jurisdiction of state government).

3. State Enactment as the Governing Law for Apostasy Cases

The matters involving apostasy in Malaysia is governed under the state law, by virtue of Federal Constitution of Malaysia under Ninth Schedule, List II which provides the jurisdiction shall be vested to the state and the Shariah Court to hear the matters (except in regard to matters included in the Federal List) for the offence committed by a person professing the religion of Islam.

The issue raised is as regard to limitation of punishment by the state enactment where it is stated in the Syariah Court (Criminal Jurisdiction) Act 1965 Revised 1988 (SCCJA):

“The Shariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law. Provided that such jurisdiction shall not be exercised in respect of any offences punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.”

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4 List II, 9th Schedule of Federal Constitution of Malaysia
5 Federal Constitution of Malaysia 1957
6 SSCJA 1965, Section 2
Based on the provision above, it is very clear that the punishments allowed to be imposed by the State Enactment are very limited. Despite the fact that apostasy is an offence punishable under Hudud (most serious offence in Islam), the limitation put up in this provision seems disproportionate to its level of seriousness. It is understood that several attempts has been made by State like Kelantan who intended to apply Hudud Law thus made some amendments to its Shariah Criminal Code and it is still not enforceable until now as it goes against the limitation imposed in 1965 Act, but to fully implement Hudud Law is not the main concern here. As said earlier that apostasy is a serious-leveled-offence in Islam, the punishment has to go at par with its level as the impact of its commission is high not only to the religion but also to the Muslim community, that will entail to the breakage of Muslims root when a person has renounced his or her actual religion.

4. Cases on Apostasy

There are several cases to be referred to show that how Muslims could possibly easy to change her or his religion. This has to be taken as a serious issue as it may jeopardize the dignity of Islam religion itself. As it is understood that freedom of religion is stated in Article 11 of Federal Constitution and there is no prohibition for a Muslim to renounce Islam found in this Act, it does not mean that it can be an easy excuse for those people to use it against the ruling of religion. Thus, this paper is intended to suggest some steps or ways to prevent and to decrease those cases to be happened in Muslim community.

The first case is the case of Kamariah Bte Ali v. Kerajaan Negeri Kelantan where the Department of Religious Affairs Terengganu had arrested the ‘Ayah Pin’ believers including the Plaintiff. Among the issues raised was whether the law and/or the act of any authority imposing the restriction on the right of a Muslim who has attained the age of majority to renounce his belief or faith is in contradict to provision of Article 11(1) of the Federal Constitution, and thus considered as void?

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The court held that Shariah Court Enactment does not prohibit Muslims from renouncing the religion as it may in contradict to Article 11 of the Federal Constitution. This enactment merely used to administer of determine his or her conversion but not as a prohibitory provision to the matter.

In the other case that indicates that the Enactment as well as the Shariah Court merely play the roles to determine the conversion is the case of Azalina Binti Jalani or Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Ors where the Muslim Plaintiff decided to convert to Christianity. She applied to National Registration Department (NRD) change her name and to remove the ‘Islam’ status on it. Her application was later dismissed as the court held that the conversion deemed incomplete without prior determination from the Shariah Court. This is a matter of formality to get such declaration from the Shariah Court but it would not stop her from renouncing.

5. Limitation and Insufficiency of the State Enactments Provisions to Overcome Apostasy Problems

As mentioned earlier, the apostasy offences are subject to punishment provided by the Shariah Enactments. The issue is whether those punishments are sufficient or adequate to curb the problem and most importantly to preserve the religion?

Section 7 of the Shariah Criminal Offence (Ta’zir) (Terengganu) Enactment 2001 stated that any Muslim who declares him/herself to be a Non-Muslim shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment not exceeding three years or both. The similar punishment is imposed in Perak by its Enactment.

Other state with different punishment is Pahang. In Section 185 of its Administration of the Religion of Islam and the Malay Custom Enactment of 1982 (Amended 1989), it is stated that any Muslim who has ceased to be a Muslim either orally, writing or by conduct, upon conviction, shall be liable to a fine not exceeding five thousand ringgit or to to imprisonment for a term not exceeding three years or to both and to whipping of not more

8 Shariah Criminal Offence (Ta’zir) (Terengganu) Enactment 2001
than six strokes. Beside that is the state of Melaka which impose lighter punishment for the offender with only a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or both.  

6. Suggestions

It is safe to say that the punishments imposed by the State Enactments are not sufficient to deter the Muslims who renounced Islam. As stated in the earlier paragraph, being the offence originally fall under Hadd crime, apostasy has to be treated as serious crime thus stricter punishment would be appropriate. However, the existence of 1965 Act has put a bar to it. Thus, it is suggested that this provision should be amended to allow a stricter punishment to be imposed which is more proportionate with the seriousness of the offence itself.

Other than that, the other alternative that should be considered is to provide rehabilitative services with a more compact religious module as an effort to bring back the person to the right path. As a matter of fact, not all Muslims have a good knowledge and religious background, and because of lack of those knowledge, it would be one of the factors leading him or her to the deviation from the right path. Thus, by having this service, there could still be hope or chance to guide them back to the religion. This rehabilitative programme shall also include the counseling, Aqidah reaffirmation as well as family and clan support. It is suggested also, that this service to be part of the procedure with certain period of time before an official declaration of apostasy is granted by the Shariah Court. This should be taken as an additional effort by the State to preserve the dignity of the religion of Islam.

7. Conclusion

As to conclude, there is a need to amend the 1965 Act to enable the state enactment to impose greater punishments and on top of the punishments, a standard procedure of rehabilitative process shall be introduced to solve the apostasy problem in Malaysia.

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9 Section 209 (1) of the Melaka Administration of Islamic Law Enactment of 1986
10 Abdul Halim El- Muhammady, Enakmen Kesalahan Jenayah Syariah di Malaysia: Satu Tinjauan Dari Sudut Perlaksanaan in Undang- Undang Malaysia: 50 Tahun Menrentasi Zaman, Anisah Che Ngah, Rohimi Hj Shapiee, Sakina Shaik Ahmad Yusoff, Rahmah Ismail and Shamsuddin Suhor (editor), Selangor, Fakulti Undang- Undang, Universiti Kebangsaan Malaysia, 2007, p.82.
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THE CHANGING LANDSCAPE IN ASSISTED REPRODUCTIVE TECHNOLOGIES: HOW MALAYSIA SHOULD RESPOND

Yaakob, H*

Abstract:

Assisted Reproductive Technology (ART) is rapidly advancing worldwide. Various technologies have emerged ranging from In Vitro Fertilisation (IVF), Preimplantation Genetic Diagnosis, 3-Parent IVF, Gene Therapy and many more. The advancement in ART does not leave Malaysia behind where this area is vastly growing in this country. While the advancement in reproductive technologies is applauded for the benefits they bring to society, their arrival is not free from legal, ethical and religious dilemmas. Individuals and society must, therefore, be protected from any untoward consequences arising from the use of these modern reproductive technologies. As the role of law is to protect society, a suitable legal mechanism must be put in place to regulate these technologies. In determining the appropriate legal framework that can be adopted in Malaysia, reference may be made to the notion of individual reproductive autonomy propounded by western scholars with appropriate modifications for application in Malaysia as a multi-racial society with Islam declared as the religion of the country under the Federal Constitution. This paper thus briefly identifies and explores the legal, ethical and moral concerns brought about by emerging reproductive technologies namely, 3-Parent IVF and Gene Therapy and argues for the adoption of the notion of individual reproductive autonomy subject to the limitations proposed herein.

Keywords: Bioethics; Three-Parent IVF; Gene Therapy

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1. INTRODUCTION

Assisted Reproductive Technology (ART) is rapidly advancing worldwide. Various technologies have emerged ranging from In Vitro Fertilisation, Artificial Insemination, surrogacy and many more. The advancement in ART does not leave Malaysia behind where this area is vastly growing in this country. Nonetheless, the development of law in this area is still stagnant where ART in Malaysia largely remains unregulated. Several guidelines intended to govern bioethical practices on reproductive technologies in government hospitals have, nevertheless, been introduced such as The Guideline of the Malaysian Medical Council on Assisted Reproduction and the Guideline of the Malaysian Medical Council on Medical Genetics and Genetic Services. In 2009, the government has announced that a law to be named, “Assisted Reproductive Technologies (ART) Act’ would be introduced (Florence, 2009). Todate, however, such law has yet to be passed. While Malaysia is still dwelling on this proposed law, more new technologies have emerged such as 3-Parent IVF and Gene Therapy. This paper, therefore, examines the legal and ethical/moral issues arising from new ART methods, namely on 3-Parent IVF and Gene Therapy. A suitable legal mechanism that can be adopted to regulate these technologies in Malaysia is then proposed by refering to the notion of individual reproductive autonomy advocated herein. First, however, the science of these technologies are briefly explained.

2. 3-PARENT IVF AND GENE THERAPY: THE STATE OF THE ART

3-Parent IVF and Gene Therapy are both reproductive technologies that are designed to assist parents to produce, not only a child, but a child free from genetic diseases. 3-Parent IVF is a form of assisted reproductive technology that can help prevent the transmission of serious genetic diseases to children. Scientifically known as Mitochondria Replacement IVF, the technique involves the removal of the nuclear material in a woman’s egg with faulty mitochondria and replacing this nuclear material into another woman’s egg with healthy mitochondria (Morley, 2014). This technique is used to prevent the risk of transmitting faulty mitochondria to future offspring that can lead to serious mitochondrial disease (Morley,
2014). All human cells contain mitochondria that supply energy to most cells. Mitochondria must be healthy for any cell to function properly. Mitochondrial disease which is a form of genetic disease may be the result of unhealthy or defective mitochondria (HFEA, 2013). At present, mitochondrial disease cannot be cured but experts believe that 3-parent IVF may serve as a viable preventive solution (Whiteman, 2015).

Similarly, gene therapy is also used to secure the birth of children free from devastating genetic diseases. Many diseases such as Hunting and Cystic Fibrosis are genetically caused. One way to cure these genetically related diseases is to treat or modify the genes causing the disease at the molecular stage (Sade et. al., 1998). Gene therapy is used to correct defective genes that are responsible for causing a disease and this can be done in several ways. First, somatic cell gene therapy is a technique that can correct defects in the somatic cells or body cells of human adult or children born with genetic diseases (Anderson, 1985). Another technique known as germ-line gene therapy targets human’s reproductive cells namely the ova and early embryos as a way to prevent the occurrence of genetic diseases not only to one’s offspring but extends to subsequent generations (Anderson, 1985). This technique can be performed when the ova is released, before or after fertilisation or when the ova is performing blastomere by inserting the corrective gene (Human Genome Project Information,2013).

It is undeniable that both technologies have the potential to offer huge benefits to individuals and society by creating the possibility of producing children free from genetic diseases. Speaking about 3-Parent IVF, Dr. Rappaport explains, “The benefit [of mitochondrial donation] is clear. It will give families affected by serious mitochondrial disease a chance of having healthy children free of a devastating and often life-limiting disease.” (Whiteman, 2015). In the same way, gene therapy has been hailed as “the only hope of finding cures for such (genetic) disorders.” (http://www.gtherapy.co.uk/pros-and-cons). Nonetheless, several concerns have also been raised over the use of these techniques that must be scrutinised before they can be offered to public.
3. **3-PARENT IVF AND GENE THERAPY: THE ISSUES**

The main ethical issue surrounding the use of 3-Parent IVF and Germ-Line Gene Therapy is its implications on subsequent generations. As explained earlier, 3-Parent IVF is performed using donated egg with healthy mitochondria that is fused with the nuclear material extracted from the egg with defective mitochondria. Thus, the third party genetic material is not only passed on to the child born but its effects will continue to future generation down the female line (Collins, 2013). Germ-Line Gene Therapy also entails the same risk as the modification of cells is performed on the reproductive cells, thereby resulting in changes that will continue for generations to come (Mauron, 2016). Mauron (2016) labels the techniques as an “open – ended” therapy as “its effects extend indefinitely into the future”. More alarming, future generations after the patient will have to endure changes to their lives as a result of the cell modification without their consent (Mauron, 2016).

Concerns have also been raised that both technologies bring society a step closer to creating ‘designer babies’, where children are born with specific engineered traits chosen their parents. The breakthrough in the science of genetics by the advent of a technique called “Crispr/C9 technology” puts the creation of designer babies on the horizon.” (Gallagher, 2015). Knoepler (2015) comments on the prospect of legalising 3-Parent IVF:

“I do believe that legalizing and using this technology in humans, which clearly would produce genetically modified humans, is a step closer to designer babies. That is not the intention of the proponents of this technology and they well even oppose anyone using their methods and techniques for such more extreme efforts, but once the line has been crosses and the technology is out there, who can control it? Who decides what is an appropriate or inappropriate use?”

In balancing between the risks and benefits of 3-Parent IVF and Gene-Therapy, law may serve as a useful tool to regulate these technologies in line with the role of the State to protect society (Yaakob, 2016). A question, however, further arises on the extent to which the State should be allowed to encroach upon individuals lives, particularly in the personal area of reproduction which has always been viewed as a personal and private
matter (Birke et. al., 1990). To solve this dilemma, this paper seeks to argue for the incorporation of the notion of individual reproductive autonomy subject, however, to several limitations advocated herein.

4. **3-PARENT IVF AND GENE THERAPY: APPLYING THE NOTION OF INDIVIDUAL REPRODUCTIVE AUTONOMY**

The notion of individual reproductive autonomy allows individuals the freedom to choose the courses of actions that they wish to embark on in their lives. Respect for autonomy, thus, requires the acknowledgment of individuals’ choices and preferences (Beauchamp et. al.,2009). The principle of autonomy has been extended to the realm of reproduction. Jackson, for example, argues that individuals’ freedom on their own reproductive issues should be respected without undue interference from others (Jackson, 2004). Nonetheless, respect for individuals’ autonomy is not without limits. This is rooted in Mill’s theory of harm which dictates that individuals’ decisions and action pertaining to their lives should always be respected and not interfered with by the state provided that such action does not harm others (Collin, 1989). Quoting Mill: “...the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. The only part of the conduct of any one, of which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.” (Collin, 1989)

Hence, respecting autonomy guarantees one’s freedom to make decisions on his/her own reproductive issues without intervention by others so long as the action does not harm others (Zeiler, 2004). In the context of ART namely 3-Parent IVF and Gene-Therapy, only proof of sufficient harm to others, be it individual or society, can sufficiently justify the prohibition of the technologies. This, in turn, requires careful evaluation on the ethical issues brought about by those technologies described earlier.

Additionally, in the Malaysian perspective where Islam has been declared as the religion of the federation under article 3 of the Federal Constitution, it has been argued that breach of religious tenets, particularly Islam should be viewed as a category of harm that
warrants State intervention in regulating ART (Yaakob, 2016; Yaakob, 2013). This is proven by the incorporation of Islamic values in several laws and policies adopted in Malaysia. For example, in the Malaysian Medical Council Guideline on Assisted Reproduction, Islamic values have been accepted in several provisions such as section 2 which only allows the offering of ART to married couples only. Further, the Guideline issued by the Ministry of Health on Stem Cell Research and Therapy has also featured Islamic fatwa issued by the National Fatwa Committee. Zawawi (2001) rightly argued that:

“In respect of Article 3 of the Federal Constitution which mentions that Islam is the official religion of the Federation, legislation regulating this area should adopt the Islamic moral and ethical standard which is more closely and better acceptable to all Malaysians.”

5. CONCLUSION

3-Parent IVF and Gene-Therapy demonstrate the rapid development in the field of assisted reproductive technologies. While applauded for the potential benefits they can offer, their arrival is not free from possible ramifications on individuals and society. These implications must, therefore, be carefully scrutinised before the use of these technologies can be approved.

This is premised upon the role of the State to protect society which can be achieved by using law as an appropriate tool to regulate the technologies. In determining the extent to which the law should interfere into individuals lives and choices in ART, this paper has argued for the incorporation of the notion of individual reproductive autonomy which guarantees respect for individuals choices in life so long as their action does not cause harm to others. Additionally, arguing the context of Malaysia where religion, particularly Islam, plays a role in making law, reference must be had to Islamic principles in order to ensure that the use of the technologies does not violate Islamic teachings.
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IDDAH MAINTENANCE: MANDATORY BUT OFTEN NEGLECTED


ABSTRACT

Al-Quran in surah At-Talaq verse 6 presents in a clear order that it is a mandatory obligation of the husbands to provide lodging, sustenance, and other things to their divorced wives during iddah period. However, husbands often neglect to bear this trust and responsibility, thus eventually forcing the wives to file petition for their right in Syariah Court. Nevertheless, cases have shown that very few women claimed maintenance after divorce for themselves. In most cases, these women did not even inform the court that their ex-husbands were refusing to pay as they simply did not know what to do or where to turn to. Even in cases where maintenance order were granted from the Syariah Court, the divorced wives would end up disappointed and fed up because they do not know how to serve it as they have no clue as to where their ex-husbands are. Consequently, unnecessary hardship were often caused to the ex-wives and children due to the act of these errant ex-husbands and inadequate enforcement of the maintenance order by the Syariah Court. Thus, the objective of this paper is to examine the concept, issues and methods of enforcement of iddah maintenance in the State of Terengganu, Malaysia. It also suggests the way foward to enhance the capacity of Syariah court in dealing with the isssue. The authors adopted qualitative research method to gather data in writing this paper. It is found that the weaknesses of the enforcement and execution of a court order can contribute to the non-compliance with court orders, especially with regard to maintenance orders.

Keywords: iddah maintenance, concept, issues, methods of enforcement.
1. INTRODUCTION

The public nowadays are often faced with divorce cases happening around the world, to the extent that divorce is now considered as a norm. Divorce does not only focus on certain people, it is now developing into a ‘cancer’ which attacks everyone, be it celebrities, artistes, well-known people and also the public. In 2010, the statistics from JAKIM (Malaysian Islamic Development Department) showed an increase in the number of divorces which was 28,000 compared with 13,000 in year 2001. This means that on average at least 60 to 80 divorce cases were filed every day. In addition, the increase of divorce cases also contributed to the increasing number of single mothers and abandoned children. Mohd Radzi Mohd Zin (2010) reported that according to the Deputy Director of JAKIM, Othman Mustapha, a research made by JAKIM in 2008 showed spouses in their first ten years of marriage would face great challenges which often end in divorce. Whereas the 2007 research showed that 3.2 percent of spouses in their first five years of marriage end up in divorce. Aside from that, 27.7 percent of divorce happens between the first six to ten years of marriage.

The family disputes among Muslim couples would not end at the pronunciation of talaq or divorce as wives and children have the right to claim certain reliefs from the now ex-husbands. These rights are provided in a number of Islamic Family Law Enactments throughout the country. One of these reliefs is iddah maintenance. In section 59(1) of Islamic Family Law (Federal Territories) Act 1984 for instance, it is provided that it shall be under the jurisdiction of the Syariah Court to order a Muslim man to pay maintenance to his wife or his ex-wife (equivalent to section 58 of the Administration of Islamic Family Law (Terengganu) Enactment 1985). Later in section 65(1) of the same Act provides that it is the right of a divorced wife to claim maintenance from her ex-husband during her period of iddah. Although the Islamic Family Law Enactments existing in our country provides the rights to ancillary claims after divorce for former spouses, it is apparent that most of the public are still unaware and unwilling to claim for these important rights. Cases have shown that many of the ex-husband are unwilling to pay maintenance based on several factors.
According to Mohd Ariff (n.d) among the factors are:

i. The husband has a new commitment, such as a new wife, or he could not see his children, or the husband has a long-standing problem with his wife (or ex-wife) and the wife is not cooperating.

ii. The ex-husband could be passing on his responsibility to a new husband of his ex-wife.

iii. The husband (or ex-husband) has no job and therefore has no source of income, and there are cases where the husbands know that a state syariah law is only confined to that particular state and not enforced in other states.

The court has imported a number of maintenance orders in view of ‘forcing’ the husband to pay maintenance to the wives. However, some of the ex-wives are unwilling to claim for these maintenance on several reasons. Among others is time consuming action, the ineffectiveness of the maintenance order, bias part of the legal officers and the fact that they are financially independent, thus they felt no need to depend on the ex-husbands for maintenance.

Therefore, the objective of this paper is to examine the concept, issues and methods of enforcement of *iddah* maintenance. The authors adopted qualitative research method to gather data by way of library research on reference such as al-Quran, Al-Hadith and text books, journal articles and other relevant materials. Reference is also made through the manuscript materials or brochures available in Syariah Court, Syariah Judiciary Department Malaysia (JKSM) and Social Welfare Department and Department of Family Development and Enforcement, Institut Sosial Malaysia (ISM), JAKIM and IKIM. Since this article focuses on the concept, issues and methods of enforcement of *iddah* maintenance in the Terengganu, special reference is made to the Administration of Islamic Family Law (Terengganu) Enactment 1985 and Syariah Court Civil Procedure (Terengganu) Enactment 2001 (SCCPT). It is found that the weaknesses of the enforcement and execution of a court order can contribute to the non-compliance with court orders, especially with regard to maintenance orders and therefore, this paper would also suggests the way forward to enhance the capacity of Syariah court in dealing with the issue.
2. THE CONCEPT OF IDDAH MAINTENANCE

The word nafkah comes from an Arabic word ‘infaq’ which means giving something. Literally, nafkah means ‘something that a man issued for his dependants’. Wahbah al-Zuhaili (1989) defines nafkah as ‘someone provided something to meet the needs of people under his responsibility in the form of food, clothing, and shelter’. Al-Jaziri (1969) defined it as ‘the spending of someone over something as expenses against the person who shall be maintained by him, consisting of bread, dishes, clothing, shelter, and the consequent price of water, fat, lamp and etc’. During the subsistence of marriage, the husband is regarded as the head of the family and thus, having the responsibility of providing maintenance for the wife and children. This is evident in the Al-Quran surah an-Nisaa, verse 34 where Allah says:

“Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth.” (An-Nisa’: 34)

The duty to provide iddah maintenance begins at the moment of pronunciation of talaq. Iddah literally means number or counting (Al-Jaziri, 1969). It is the waiting period of a divorced woman before she can engage into another marital relationship. In Al-Baqarah verse 228, Allah has provided that for divorced women, the waiting period should be three menstrual cycles and in the same surah verse 234, the waiting period for women who are separated due to the death of the husband shall be four months and ten days. A wife is entitled to a reasonable maintenance from her husband during the period of iddah as she would be entitled to the same during the subsistence of the marriage on the condition that she submits to her husband’s control with regard to her place of residence and her general behaviour. This is provided for in Surah al-Baqarah: 241 which states:

“And for divorced women is a provision according to what is acceptable - a duty upon the righteous”.

If the woman is pregnant, the husband will have to provide maintenance until the child is born as the iddah period extends until the wife delivers the baby. Moreover, the obligation to provide for the maintenance will continue up to another period of two years i.e the period of breast feeding and the period of suckling. Nevertheless the couple has the right
to determine the period of suckling by mutual consent and consideration (Al-Baqarah :233). Says Allah in the Qur'an:

"Let the women live (in Ḣadādah) in the same style as you live according to your means; annoy them not so as to restrict them. And if they carry (life in their wombs) then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring) give them their recompense: and take mutual counsel together according to what is just and reasonable. And if ye find yourselves in difficulties let another woman suckle (the child) on the (father's) behalf." (Al-Talaq: 6)

According to Syafie School, a wife who has been irrevocably divorced cannot claim for maintenance during her period of Ḣadādah from her husband unless she is pregnant. This is based on the hadith reported by Fatima binti Qais, where the Prophet s.a.w. says that there is no lodging and maintenance allowance for a woman who has been given irrevocable divorce (Sahih Muslim, 2007). However, the woman may claim a suitable lodging during that period. Maintenance is also not due to a woman whose marriage has been dissolved by her husband’s death or where her wrongful action has led to the divorce. The Syafie School provides that the wife’s maintenance is a debt due by the husband and arrears are recoverable by the wife. However the husband is not obliged to pay the monthly maintenance after the expiration of the Ḣadādah period. Muhammad Abu Zahrah (1957) says that all Muslim jurists agreed that the maintenance for the divorced wife during Ḣadādah rajī’ie is mandatory. Prophet Muhammad s.a.w. is reported to have said: “The maintenance and residence are only for women who can be referred to by her husband (ruju’)” (Reported by Ahmad and An-Nasa’i). Al-Jaziri (1969) explains: "Divorced wife with Ḣadādah rajī’ie must get the right of maintenance regardless of whether she is free, a slave, pregnant or not pregnant”. It is supported by hadith from Fatimah binti Qais that the Prophet s.a.w. said: “Woman is only entitled to alimony and the house of her former husband when the husband's right to refer to him (ruju’)” (Reported by Imam Ahmad and An-Nasa’i). The right to get place of living during Ḣadādah is stated in Surah At-Talaq verse 1 which states that:

“Prophet (SAW)! When you divorce women, divorce them at their Ḣadādah (prescribed periods), and count (accurately) their Ḣadādah (periods). And fear Allah your Lord (O Muslims), and turn them not out of their (husbands) homes, nor shall they (themselves) leave, except in
case they are guilty of some lewdness. And those are the set limits of Allah. And whosoever transgresses the set limits of Allah, then indeed he has wronged himself. You (the one who divorces his wife) know not, it may be that Allah will afterward bring some new thing to pass (i.e. to return her back to you if that was the first or second divorce”.

When a woman is divorced by *talaq bain* and is pregnant, she is also entitled to maintenance until the child is born. Allah has provided for this entitlement in Surah At-Talaq verse 6:

"If they get pregnant, concludes their maintenance until they deliver their children”.

The rights of the wife during *iddah* include the right for maintenance, place of living and the right to decide on reconciliation. In deciding the amount of maintenance to be given to the wife, there are certain considerations that need to be taken into account. Those considerations are the earning capacity of the husband and the financial needs of the wife. A wife’s right to maintenance may cease when the wife dies, the wife is disobedient (*nusyuz*) and when the wife remarries.

### 3. THE LAW ON IDDAH MAINTENANCE IN MALAYSIA

Section 58 of the Administration of Islamic Family Law (Terengganu) Enactment 1985 provides the court shall order a man to pay maintenance to his former wife unless if the wife is determined to be *nusyuz*, or unreasonably refuses to obey the lawful wishes or commands of her husband. Section 70 states that a divorced wife is entitled to reside in the home where she used to live when she was married. This is permitted as long as the husband is not able to find other suitable accommodation. The law is based on a Hadith of Zainab binti Ka’b bin Ujrah, where she narrated that Al-Furay’ah (or Faria’ah) binti Malik bin Sinan – sister of Abu Sa’eed Al-Khudri – informed her that she went to Allah’s Messenger s.a.w. to ask him if she could return to her family in Banu Khudrah. Her husband had gone out searching for his runaway slaves, and when he was in Taraf Al-Qadum, he caught up with them and they killed him. She said: So I asked Allah’s Messenger s.a.w. if I could return to my family since my husband had not left me a home that he owned nor any maintenance. She said: So Allah’s Messenger s.a.w. said ‘Yes’. Then I left. When I was in the courtyard, or in Masjid, Allah’s Messenger s.a.w. called me, or summoned for me to come back to him and said, “What did you say?” She said: So I repeated the story that I had mentioned to him about
the case of my husband. He said, “Stay in your house until what is written reaches its term.” She said: So I observed my iddah there for four months and ten (days). She said: During the time of Uthman (RA), he sent a message to me asking me about that, so I informed him. He followed it and judged accordingly. (Hadith No. 1204, Chapters on Divorce & Lian, Jami’ At-Tirmidhi, Vol. 2; Hadith No. 2031, Chapters on Divorce, Sunan Ibn Majah, Vol. 3).

In the case of Wan Alwi vs. Syarifah Sapoyah [1988] 6 JH 259, the learned Kadhi Sarawak when deciding the case in relation to the claim for maintenance during iddah stated that according to Islamic law a wife who has been divorced by her husband is entitled to maintenance if a wife is divorced by talaq raji’ie or is divorced while the wife is pregnant and she does not commit any act which can be considered as nusyuz. In Noor Bee vs. Ahmad Shanusi [1978] JH [1401H] 63, the learned Kadhi of Penang stated that the right of maintenance during iddah if not paid would become a debt due by the husband to his divorced wife. However, the right to residence if it is not claimed during the iddah period, the right shall elapse. He relied on the authority of the book Al-Akhyar kifayah Juz 2 page 85 which mentioned that: "...if part or all iddah time has passed and his wife (divorced) did not claim a right of residence, then the right ceased and not become a debt on the husband who divorced his wife". In another case of Piah bte Said v Che’ Lah bin Awang [1983] 3 JH 220, the divorced wife claimed for ‘iddah maintenance. After examining the facts of the case, the Chief Qadhi found that the wife had been guilty of nusyus. This was due to the fact that she left the matrimonial home without the permission of the husband and without reasonable cause. Therefore the court rejected her claim for maintenance.

In Zahrah v Saidon [1983] 3 JH 225, the wife who had been divorced by her husband claimed for the payment of the iddah maintenance. The court held that the husband must pay the iddah maintenance. The rate fixed by the court was RM5 a day for the period of iddah that he calculated, which is 63 days. The total amount was RM 315, and due to the fact he had made payment of RM250, the court ordered him to pay the balance amounting to RM65. In Rahaniah v Haji Ujang [1983] 4 JR 270, the divorced wife made a claim for the payment of the iddah maintenance calculated at RM300 a month for the period of 3 months and 10 days, which amounted to an overall amount of RM1000. The Qadhi made a reference to the al-Mughni al-Muhtaj that explicates: “it is incumbent to provide a woman who has been
divorced by a revocable divorce, maintenance for her expenses and garments”. The Qadhi assessed the amount of maintenance that was payable at RM6 a day. Thus the husband was ordered to pay RM600 for the iddah period of 100 days. In Rokiah bte Hj Abdul Jalil v Mohamed Idris bin Shamsuddin [1989] 3 MLJ ix, the wife who had been divorced claimed for the payment of the iddah maintenance. The Qadhi assessed the maintenance at the rate of RM 7 a day for RM630 for 3 months. Based on the evidence, the husband had paid RM100 and therefore the Court ordered him to pay the balance of RM530. In all the cases quoted above the stand of the court on iddah is clear, that it is a mandatory obligation on part of the husbands to pay to the ex-wives. The claim for iddah maintenance is only rejected in the situation where the wife has been nusyuz. As for the amount of iddah maintenance to be paid, the court will calculate it by taking into account few factors, such as the financial capacity of the husband.

4. MAINTENANCE ORDER AND ITS METHODS OF ENFORCEMENT

Enforcement for payment of money is a well-established method in the respective Syariah procedural law. In Terengganu, the Syariah Court Civil Procedure (Terengganu) Enactment 2001 covers the procedure for maintenance order in family law cases. Basically, the enforcement and execution of a maintenance order is made because the voluntary payment did not happen. However, when the implementation or enforcement application is made, a variety of reasons were put forward by the applicant in providing justification as to why such action should be made. Any weaknesses of the enforcement and execution of a court order can contribute to the non-compliance with court orders, especially with regard to maintenance orders (Mustaffa, 2007).

The enforcement mechanism and effective execution of the order depends on the ability of the parties to follow the right procedure and process. Based on Part XVIII Chapter 3 of the Syariah Court Civil Procedure (Terengganu) Enactment 2001, the types of enforcement and execution used by the judgment creditor can be made using the following methods: (i) Enforcement Order; (ii) Seizure and Sale Order; (iii) Ownership Order; (iv) Transfer of Ownership Order; (v) Hiwalah (Garnishment or, Transference of Liabilities); (vi) Proceeding; (vii) Judgment of Debtor Summon; (viii) Committal Proceeding; and Attachment of salary.
It is found that the determination of the method of payment will indeed expedite the process of implementation and enforcement of maintenance orders. Even though this action has no significant correlation to the non-compliance, but practically once the method of payment has been determined, the application would then be easier.

The most common ones are the followings:

**Judgment Debtor Summons**

Judgment debtor summon is one of the mode of execution of maintenance order whereby the judgment creditor is entitled to enforce the judgment debt against the judgment debtor. Section 176 of the Syariah Court Civil Procedure (Terengganu) Enactment 2001 provides that the judgment creditor who is entitled to enforce the judgment may require the judgment debtor liable under the judgment to appear in Court to be examined orally as to his capacity of paying or settling the judgment debt and to get any property which may be used for such payment. In theory, this mode of execution seems to suggest the best method that may be applied in ensuring that the judgment debtor can comply with the court’s order effectively. According to the provision, an inquisitorial examination will be conducted by the court on the judgment debtor or other witnesses on *iqrar*. Thie purpose of the examination is to determine the financial standing of the judgment debtor through his salary, expenses and his physical appearance. This is also an effective way to review from time to time the judgment debtor’s financial capacity to pay the judgment debt (Mohd Fauzi, 2007).

In practice however, most cases of enforcement and execution of a maintenance order faces difficulties in the service of the summons and notice of appearance especially if the address of the judgment debtor is not known. This frequently happens in *ex-parte* cases where the order is obtained without the judgment debtor’s appearance. It is common in most cases where the judgment debtor refuses to appear in court despite the summons and notice of appearance been served. The enactment further gives the right to the judgment creditor to apply for a judgment notice requesting the judgment debtor to appear in court to show cause as to why he should not be committed to prison for failure to comply with the summons (Section 179). When this order is also not obeyed, the court will resort to warrant of arrest as the last option to force appearance of judgment debtor in court (Section 178(2)). This option
works as an advantage as most people will feel threatened by an order of imprisonment and would rather pay the amount of the debt.

Despite the advantage it offers, warrant of arrest often creates another typical problem since it is not easy to get full cooperation from enforcement agencies such as the police and syariah enforcement officers. The judgment debtors’ action, by fleeing and keeping their whereabouts a secret also contributed to the problems. Consequently, this will lead to the judgment creditor voluntarily withdrawing from the case since the judgment debtor’s whereabouts cannot be detected. Cases have often been struck out or dismissed by the court due to the problem of debtor’s whereabouts are not known. Sometimes the court also dismissed cases when the judgment creditor fails to appear before the court without any particular reason.

**Attachment of Earnings and Other Periodic Payments**

Another type of enforcement of *iddah* maintenance is payment by way of attachment of earnings order. This method works by allocating money from the defendant’s wages to pay a debt. The enforcement of this method is provided in the (Married Women and Children (Enforcement of Maintenance) Act 1968, which applies to all states in Peninsular Malaysia (Section 2 MWCEMA). Where an attachment of earnings order is made, the person to whom the order in question is directed, i.e. the defendant’s employer shall be required to make out of the earnings falling to be paid to the defendant payments in satisfaction of the order (Section 5 MWCEMA). After taking into account the resources and needs of the defendant as well as the needs of persons for whom he should provide, the court will determine the reasonable amount to be attached. Section 7 of MWCEMA 1968 directs that the defendant and his employer are duty bound to comply with an order of attachment earnings once it has been made. Any failure to comply with the attachment of earnings order shall be penalized by the court, to the extent that the defendant or his employer may be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand ringgit or both (Section 12 MWCEMA).

Nevertheless, this execution of attachment of earning will only work if defendant is employed. In cases of self-employed defendant, Section 13 MWCEMA provides that the court can make order for the payment of money directly to the court. In the event of non-
compliance of the order, the court may call upon the defendant to show cause. If he still fails to show sufficient reason and the sum of money under the order is still not being paid, the court may proceed to the last resort, by issuing a warrant for the attachment and sale of the property belonging to the defendant. However, if this still fails, the next step for the court is to direct the defendant to imprisonment for a term not exceeding one month for every such neglect or failure to comply with the order.

The SCCPT also provides on attachment of earnings order, where it lists down the following actions under order of execution to be taken by the bailiffs, one of which is to attach the income of the judgment debtor (Section 159 SCCPT). The enactment is however silent as to the nature and enforcement of attachment.

Seizure and Sale

When a debtor refuses to pay his debts even though he is capable to do so, the judge may order the debtor to sell his property and pay the debts. Section 159 (1) (a) of the SCCPT provides that an order for execution may direct the bailiff to recover any sum payable by seizing and selling the movable property of the judgment debtor. In executing seizure and sale, the judge may seize the debtor’s property and sell it. Aside from money and movable properties, other properties such as shares, stocks, debentures, and bonds can also be seized to execute the court’s order of seizure and sale (Section 160 SCCPT).

Hiwalah

Hiwalah or transfer of rights or debt is another method of enforcement and execution of court order, which is used in the case of a claim of property or financial rights. Section 161 (1) of the SCCPT define property which can be the subject matter of hiwalah as to include debt due to the judgment debtor. The civil courts have decided that Employee Provident Fund (EPF) can be used for the claim of financial rights though it is acquired by the sole effort of one party. Thus, in deciding the proportion of the claim, the acquirer will get a greater portion (Lim Kuen Kuen v Hiew Kim Fook & Anor [1994] 2 MLJ 693; Ching Seng Woah v. Lim Shook Lin [1997] 1 MLJ 109). Section 53A of the Employees Provident Fund 1991 provides that when an order is issued by a court that part of the sums of money standing to the credit of a member of the Fund is matrimonial asset, the Board may, after being served with the sealed order, transfer the sum of money as ordered by the court from the account of a
member of the Fund into the account of the receiver named in the order subject to any terms and conditions as prescribed by the Board.

Committal order and Contempt of Court

Section 147 of the SCCPT provides that any person who is directed by any judgment of the court to comply with the order without demand and when there is a failure to comply, the person may be deemed to be a contempt of court. The law provides for a protection for the ex-wife to enforce maintenance order for the payment of money whereby section 229 provides that the court shall have the jurisdiction to commence proceedings against the ex-husband for contempt of Court and may, in such proceedings, make an order of committal for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit. The court is empowered either to impose fines or to convict the person with imprisonment by way of committal when the husband willfully fails or intentionally disregards to comply with the order of maintenance (Section 182 of SCCT and Form 46 of the Third Schedule).

THE WAY FORWARD

The Family Support Division (BSK) of the Syariah Judiciary Department Malaysia (JKSM) has adopted several measures in ensuring that the ex-husband complies with the maintenance order issued by the court. It is however suggested that the ex-wives to take speedy action to apply for the maintenance order upon divorce as some cases can take a while before it could be finalized by the court. The BSK in collaboration with JKSM’s Information Technology Division, has established ‘E-Maintenance’ option whereby once a Syariah court order is issued, the order is automatically incorporated into BSK’s databank. The databank would give access to the officer in charge to follow up with the respective claimant and enquire as to whether the husband (or e-husband) has made the payment. This mechanism is adopted not only to ensure only that the husband pays the maintenance, but also to prevent the maintenance accumulating into arrears, making it difficult for the husband to settle the amount. In addition to that, the BSK is now providing for trust fund to provide for interim maintenance based on the amount of maintenance decided by the Syariah Court. This interim
payment is only available for six months but the BSK has the jurisdiction to extend the assistance based on approval by the Trust Fund Committee. This trust fund is deemed as debt owed by the husband (Mohd Arif, n.d).

The role of the Family Support Division that exists within the Syariah system should be highlighted in helping divorced women fight for their rights. One good example would be the success of Selangor Syariah Court’s Family Support Division in ensuring compliance with the order of maintenance issued by the court. The division was set up in 2008 when it was found that an astounding 12,300 ex-husbands and fathers had refused to comply with the maintenance order issued by the Syariah Court, thereby causing hardship for their ex-wives and children (The Star, 2015). The division was set up to help these women track down errant ex-husbands and fathers and make them pay the amount determined in the maintenance order. According to Dr. Naim Mokhtar, Chief Syarie Judge of the Department of Syariah Judiciary Selangor, the Syariah Court clearly works in a different way from the Civil Court because with the Civil Court, the court’s duty is over once the judgment has been issued. The court does not monitor or enforce the judgment. But when it comes to the Syariah Court, the duty is not absolved unless there is effort to ensure the judgment is actually enforced, executed and translated into actual money.

The Family Support Division’s officers are legally trained because one of their key roles is to provide legal advice to divorced women and children for free. The division also set up an Enforcement and Implementation of Order Unit in the division that works towards enforcing the maintenance order and getting the ex-husbands and fathers to pay up, including those who have gone missing for years. In order to track the missing ex-husbands, the Division has a strong networking with most of the government agencies, which would have the data of these ex-husbands and fathers including the EPF, the Road Transport Department (JPJ), the Home Ministry, the Malaysian Administrative Modernisation and Management Planning Unit (MAMPU). When the Division has traced the whereabouts of the ex-husband and father, it would file a notice and summons to get him to comply with the court judgment and pay the arrears owed to the ex-wife and children. This method has achieved almost 60% success rate ever since it has been applied. In cases where defiant ex-husbands and fathers who simply refuse to pay even after they have been given a stern warning, the enforcement
unit would push for an execution order from the court which will take about six months. Furthermore, in some cases the Division also filed applications to have the ex-husband’s assets auctioned off to pay for the maintenance and support.

During the six months wait, the Division set up a Fund Management Unit with a revolving fund, which role is to give an advance to the ex-wife and children so that they will have the money to survive while waiting for the process to be completed. Once the property of the ex-husband has been auctioned, the amount of money given out as advance will be recovered and put back into the fund to be used by other women and children. Aside from that, the division has also set up a Transit Unit to support the ex-wife or children coming from other states to the Syariah Court in Kuala Lumpur or Putrajaya to pursue their maintenance order but who have financial difficulties in making the trip. The unit has converted some government quarters into a transit centre for the women to stay temporarily while the court proceedings are going on. The unit also takes care of all their meals during their stay and pays for the return bus fare from the state to KL or Putrajaya and for the taxi fare from the transit accommodation to the court and back. This Unit is created to help the divorced women so that they can continue their fight and not use financial constraint as an excuse to discontinue.

5. CONCLUSION

Regardless of how comprehensive an act may be, it still cannot promise the efficiency of management in the court cases. One major reason which contributes to this would be the delay in compliance of the court order. As in any other family cases such as divorce cases, the major reason for delays in compliance of the court order came from the judgment creditor or the judgment debtor itself. (Siti Zubaidah, et al 2011). The wordings of the provision suggests that the order obtained should be based on mutual agreement between the parties, however it still does guarantee that the order will be complied with by the parties. In matters of enforcement and execution, namely the judgment debtor proceeding, another major reason for delays is also caused by problems in executing summons and warrant of arrest.
The fact that it is not easy to get full cooperation from enforcement agencies such as the police and syariah enforcement officers, the judgment debtor disappearing and keeping their whereabouts a secret, and orders obtained ex parte are a number of examples that contribute to this problem. Nevertheless, this type of proceeding offers great advantage if executed properly. For example, in conducting examination of judgment debtor, it is advisable that the judgment creditor can get some information regarding the properties of the judgment debtor with the relevant authorities such as the Land Office, Securities Commission, banks, and Department of Road Transportation, whenever appropriate. If the judgment debtor is a businessman, the judgment creditor should get information pertaining to his business activities, which can be considered by the court in order to determine the best method of debt settlement.

Each of the parties has their own roles in ensuring the success of the implementation and enforcement action of any order of the Syariah Court. Furthermore, the working of an effective mechanism cannot depend solely on the legal process, but it must be accompanied with legislative and administrative cooperation. To conclude, an order is useless if it cannot be enforced. Thus, the process of enforcement of *iddah* maintenance orders in the Syariah Court can be accelerated if all parties, especially the judgment debtor cooperate and comply with the existing mechanisms.

REFERENCES


THE IMPACTS OF INCOME TAX LAW COMPLEXITY ON THE COMPLIANCE COSTS AND BEHAVIOUR OF CORPORATE TAXPAYERS

Sapiei, N.S.*, Abdullah, M*. & Ismail Nawang N.*

Abstract

This study aims to examine the relationship between tax law complexity, compliance costs and behaviour of corporate taxpayers. To achieve this objective, a quantitative approach was adopted, whereby data was collected through a researcher-administered questionnaire survey method. Our research findings indicate that the complexity in the tax laws increase the compliance costs of the taxpayers and significantly influence all types of non-compliance behaviour, namely under-reporting of income, over-claiming of expenses and overall non-compliance. Findings from this study should initiate and lead to the progression of a more easily readable and understandable income tax act.

Keywords: Tax Law Complexity, Compliance Costs, Compliance Behaviour, Corporate Taxpayers.

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1. Introduction

Compliance requirements, rules and legislation on income taxation in Malaysia are stipulated in Income Tax Act 1967 (hereafter is referred as ITA 1967). All persons deriving income from Malaysia are required to comply with the rulings stated. Reforms and changes in tax laws may affect the level of complexity in the tax system and in Malaysia, the introduction of self-assessment system (SAS) imposes greater accountability in terms of computational, record-keeping and filing requirements upon taxpayers. As tax officials are no longer reviewing all returns filed under the SAS, more resources are available for audit activities to ensure greater tax compliance. If taxpayers do not have the ability to understand the income tax laws, they may have to seek external assistance to handle tax matters on their behalf and this action may result in extra compliance costs incurred. Slemrod (1989) suggested that high compliance costs, due to a complex tax system may have been a source of frustration and resentment about the tax legislation, thereby resulting in increased non-compliance. Tax experts have expressed concern over the relationship between the complexity of tax laws, compliance costs and level of compliance. High costs of compliance are the product of complex tax legislation (James, Sawyer & Wallschutzky, 1997); where compliance costs estimates reflect complexity in the tax system (McKerchar, 2002). Furthermore, when the tax legislation is complex, taxpayers usually have to resort to external agents, which with their superior knowledge of enforcement patterns, may have the ability to influence their clients’ compliance behaviour (Franzoni, 1998). Thus, there is a need to examine the issue of tax law complexity under the self-assessment regime.

In this study we argue that complex tax laws and complexity arising from frequent legislative changes is a major contributor to tax compliance costs burden of taxpayers and as a result fosters non-compliance. To the knowledge of researchers, these issues have not been investigated in any study so far. This study aims to contribute to the extant literature providing insights into the relationship between tax law complexity compliance costs and the non-compliance issues of corporate taxpayers. The following research question was addressed in this study: To what extent do the tax law complexity influence the compliance costs and behaviour of corporate income taxpayers? In addition, this study fills a gap in research by investigating tax complexity associated with corporations applying for tax incentives. In Malaysia tax incentives are large in quantity and are commonly utilised in
order to make a country an attractive investment destination. Thus, a significant share of tax compliance cost could also include costs incurred in relation to government incentives provided through the tax laws.

This section provides background information of the paper and the remaining sections are organised as follows: Section 2 provides a literature review concerning tax laws complexity (Section 2.1), tax compliance costs (Section 2.2), tax compliance behaviour (Section 2.3), and research model (Section 2.4). This is followed by research methodology in Section 3. Section 4 presents the findings and discussions and finally, Section 5 concludes the paper.

2. Review of Literature

This section presents a literature review of the three main areas of the study, namely tax complexity, compliance costs and compliance behaviour of corporate taxpayers.

2.1 Tax Law Complexity

The use of tax laws to achieve a wide range of fiscal and economic policy objectives of the government has resulted in increasing complexity in the tax system (McKerchar, 2002). Complexity of the Malaysian tax system should be considered in the context of SAS by which taxpayers are obligated by law to ascertain their chargeable income, compute their tax liability and submit their tax returns, based on existing tax legislations (Kasipillai, 2005). SAS for Malaysian companies has redefined the roles and responsibilities of corporate taxpayers as they are required to furnish estimates of taxes, make instalment payments, determine taxes payable, lodge tax returns and remit tax liability to the IRB. An estimate of tax payable must be filed with the IRB in a prescribed form (CP204) not later than 30 days before the beginning of the company’s basis period. Based on the estimation, tax payable must be remitted to the IRB on or before the 10th day of each month in equal monthly instalments, commencing from the second month in the basis period. Corporate taxpayers are then required to compute their income tax liability and furnish a tax return in a prescribed form (Form C) within seven months from the date following the close of the accounting period. The tax return furnished by the company is deemed to be the date on which the notice
If the estimated tax is less than the actual tax but is still within the 30% margin, the company is required to settle the difference within seven months after the closing of the accounts. Hence the adoption of SAS involves a substantial shift of accountability upon taxpayers in terms of their compliance obligations. In fulfilling these obligations, taxpayers must maintain appropriate records, understand the tax laws and exercise reasonable care in the reporting of matters affecting tax liability (Marshall, Smith & Armstrong, 1997).

The following are some of the impacts on taxpayer’s compliance burden resulting from the introduction of SAS:

- Taxpayers are presumed to possess the necessary knowledge and skills to comply with the tax laws, so they are indirectly forced to learn or obtain the knowledge in order to understand tax rules and regulations (Barr, James & Prest, 1977).
- A large number of taxpayers would employ external tax agents to prepare and submit tax returns on their behalf. In Australia, the percentage of taxpayers who sought professional assistance to prepare returns under the SAS rose from approximately 20% in 1980 to 72% in 1992 (Marshall et al., 1997).
- As the tax officials are relinquished from the tasks of assessment and review of tax returns filed under SAS, their emphasis has shifted to enforcement activities, mainly to tax audits and investigations. Public Ruling 7/2000 stipulates that reasonable facilities and assistance should be provided by taxpayers to enable IRB officials to gain access to buildings, books and documents.
- Record keeping practices - Section 82 of the ITA (1967) requires a taxpayer to keep sufficient records for at least seven years from the end of the year to which the income relates or the year in which the returns are furnished. In addition, the IRB has issued Public Rulings 4/2000, 5/2000 and 6/2000 pertaining to the keeping of sufficient records where Ariff and Pope (2002) argued that a taxpayer needs to keep more costly systematic records in the event of reviews or audits by the IRB.

Tax compliance requirements may be further complicated by various incentives built into the tax system by the policy makers. According to Wee (1997), the corporate tax law in Malaysia is relatively straightforward although several complications may arise from the

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1 Refer to the Malaysian ITA 1967 (amended in 1986), for further details on self-assessment for companies.
elaborate tax incentives system. Taxpayers have to be familiar with all rules and regulations underlying the tax incentives being offered or they may have to outsource the work to external professionals for their expertise. Furthermore, the use of tax incentives as socio-political tools in order to achieve certain economic goals is one of the sources of complexity in the tax system (Tran-Nam, 2000). In cases where companies can opt for alternative incentives, taxpayers have to spend time on acquiring and comparing information in order to make optimal use of these tax incentives. Malaysian incentives provided through the tax system are contained in the ITA 1967. Some of the most important forms of tax incentives available include the approved services projects, investment allowance, reinvestment allowance, operational headquarters companies and double deduction (Table 1).

Table 1 Tax Incentives under the ITA, 1967

<table>
<thead>
<tr>
<th>Incentive</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approved Services Projects (ASP)</td>
<td>The income of companies undertaking ASP is exempted at statutory level. The quantum of tax exemption on statutory income varies between 70% and 100% for a period of 5 to 10 years from the date the first income is generated.</td>
</tr>
<tr>
<td>Investment Allowance (IA)</td>
<td>IA is an alternative incentive for companies undertaking ASP. Under IA, the quantum of allowance available to companies undertaking ASP in respect of qualifying capital expenditure incurred within 5 years from the date the qualifying capital expenditure is first incurred varies from 60% to 100%.</td>
</tr>
<tr>
<td>Reinvestment Allowance (RA)</td>
<td>RA is given to manufacturing and agricultural companies producing essential food (rice, maize, vegetable, tubers, livestock farming, production of aquatic products and any other activities</td>
</tr>
</tbody>
</table>

2 One example is the alternative incentives between ASP and IA that are mutually exclusive, which means, company can only enjoy either one of the incentives and not both (see IRB website).

3 The full range of tax incentives are listed and described in the ITA, 1967 which is assessable through IRB website. There are also incentives specifically directed to the manufacturing sector contained in the Promotion of Investments Act (PIA), 1986. Investment incentives available are listed and described in the Malaysian Industrial Development Authority (MIDA) website and “Investors’ Guide” of the Economic Report. Some of the main incentives available under the PIA 1986 are the investment tax allowance for companies producing ‘promoted products’ and pioneer status for investments in agriculture, industrial and hotel.
approved by the Minister of Finance) undertaking expansion, modernisation, diversification and automation activities.

Operation Headquarters Company (OHQ) An OHQ generally refers to a company that provides support services to its offices or related companies regionally and globally. An approved OHQ company is eligible for income tax exemption for a period of 10 years for income derived from business, interest and royalties.

Double Deduction (DD) Expenses incurred on selected activities can be set off twice against company’s taxable profits. Examples are expenses on promotion of exports, employee training programs and freight charges.


A government may also use tax incentives as an avenue to channel investment capital into favoured activities (Sassi, 2002). According to Wee (1997), Malaysia expended its income tax incentives as part of the overall strategy to generate increased industrial activities and attract foreign direct investment (FDI). Tax incentives reduce the effective tax rates, which in turn, lower the taxes paid by corporate taxpayers. Examples of these incentives include tax holidays, regional investment and special enterprise zones.

2.2 Tax Compliance costs

Tax Compliance costs for corporate taxpayers are costs incurred as a result of their obligations to the relevant tax laws in force in a country. Sandford et al. (1989) segregated tax compliance costs of corporate taxpayers into time, external and psychic costs. The time costs are for employing of internal staff to handle the company’s tax affairs, the external costs are payments to tax professionals from outside a company and any incidental costs incurred in relation to the tax work, while psychic costs are negative experiences of taxpayers, such as anxiety and frustration in dealing with the requirements of tax laws and legislations (Sandford et al., 1989). Tax compliance costs can also be categorised into computational
costs arise from mandatory compliance requirements by the tax laws, while planning costs, involve efforts to legally avoid tax (Evans & Tran-Nam, 2001). Compliance costs can be further divided into commencement transitional costs incurred due to a significant change made to an existing tax law and recurrent compliance costs incurred by taxpayers, who are already familiar with the new tax amendments that have been introduced (Sandford et al., 1989)

Adam Smith [1776 (1999 ed.)] in his famous work on the ‘Wealth of Nations’ suggested certainty as one of a principle for a good tax system. In the context of tax complexity, the lack of certainty in the income tax laws legislation and the inconvenience due to this ambiguity, would expose taxpayers to unnecessary hardship and difficulty, thereby increasing their compliance costs burden which in turn will affect their compliance requirement. In addition, a psychological burden in terms of stress and anxiety, may be imposed on taxpayers as legislation requires them to carry out complex obligations under the threat of legal penalty. Smith [1776 (1999 ed.), p. 418] in this connection, remarked:

“..... subjecting the people to the frequent visits and the odious examination of the tax-gatherers, it may expose them to much unnecessary trouble, vexation, and oppression; and though vexation is not, strictly speaking, expense, it is certainly equivalent to the expense at which every man would be willing to redeem himself from it”.

Musgrave, Musgrave and Bird (1987) added that where tax policy is used to achieve other objectives, such as to grant investment incentives, this should be done so as to minimize interference with the equity of the system. The tax system should permit fair and non-arbitrary administration and it should be understandable to taxpayer. These updated and extended canons of good tax practice emphasised more on the impact of tax compliance costs on taxpayers caused by the interferences and arbitrariness in the tax laws (pp. 207-208).

A study by KPMG in 1996 (as cited in Evans, 2003a) on UK listed corporations, for the period 1991-96, suggested a 33.6% increase in total tax compliance costs due to complex, ambiguous and badly drafted legislation. In the US, a study by Moody, Warcholik and Hodge (2005) examined the rising costs of complying with federal income tax regulations, utilising Inland Revenue Service (IRS) data, projected that by year 2015, the compliance costs will
grow to USD482.7 billion due to complexity in the tax laws. Ariff, Loh and Talib (1995) study’s furnished CIT tax compliance costs estimation of PLCs in Singapore for year of assessment 1994, found an average compliance costs of SGD78,396 per PLC, and similar estimate conducted a year later utilising 1995 data, discovered a significant decrease of tax compliance costs to SGD54,615 per PLC due to simplification in the tax system (Ariff, Ismail & Loh, 1997). In Canada, Erard (1997) examined the tax compliance costs of large companies for the 1995 tax year indicated average tax compliance costs of CAD507,000 per company and the companies in the mining, oil and gas sectors, as well as those with foreign operations, with a more complex tax laws incurred considerably higher tax compliance costs. The findings from these compliance costs estimation studies can be compared among countries to gauge the level of complexity of the tax laws. Australian estimates for example, were much higher in relation to a similar study in the UK due to a number of factors, including legal complexity, self-assessment environment, and the extent of tax planning activity (Tran-Nam et al., 2000). Chan et al. (1999) suggested tax compliance costs of Hong Kong PLCs were relatively high compared to those incurred in Singapore and Australia due to difficulties with territorial source basis, higher level of external compliance costs, as well as low tax administrative costs. Another reason is dissimilarity in the tax systems used by different tax jurisdictions for example on the scope of taxation. Countries like Malaysia, Singapore and Hong Kong adopt territorial basis, while other tax jurisdictions, like Australia and the US, adopt a more complex world income basis. The territorial scope of taxation was embraced by different countries in varying degrees (Kasipillai, 2010). Malaysia for example adopted a territorial and remittance scope of taxation for taxing income whereby income accruing in or derived from within Malaysia or received in Malaysia from abroad would be subject to tax (Section 3, ITA 1967). However, with effect from year of assessment 1995, foreign income remitted into Malaysia by resident companies investing overseas is exempted from tax (Section 3C, ITA 1967). In sum, findings of prior studies have indicates that the compliance costs of changes in the tax system tend to be high and the costs increase with complexity in the tax system. Compliance costs are influenced by the size of the companies measured in terms of sales turnover and regressive as there are economies of scale in complying with tax laws.
2.3 Tax Compliance Behaviour

Compliance with tax laws in the preparation of tax returns implies that companies provide an accurate reporting of income and claiming of expenses in accordance with the stipulated tax laws (Alm, 1991). The failure of corporations to report or pay CIT is considered as corporate non-compliance with tax laws (Slemrod, 2004). Two main approaches to tax compliance are the economic approach that is based on the concept of economic rationality and the behavioural approach which applies concepts from disciplines such as psychology and sociology. The financial self-interest model applied in the economic approach is built upon the work of Becker (1968), who analysed criminal behaviour using an economic framework known as economics-of-crime model and was first employed in the context of tax compliance study by Allingham and Sandmo in 1972. Slemrod (1989) broadened the model to include complexity in the tax system and hypothesised that complexity increases the cost of complying with tax laws and as a result, encourages non-compliance. Slemrod (2004) presumed that tax complexity led to non-compliance and focused on how the standard economic approach to tax evasion needs to be modified when applied to public corporations. Jenkins and Forlemu (1993) provided an overview of tax compliance determinants focusing on tax compliance costs and suggested that simplification of the tax system and enhanced taxpayer services would reduce compliance costs and correspondingly increase the level of voluntary compliance. Tran-Nam (2003) featured the role of tax law complexity, compliance costs, tax advisers and administrators towards taxpayers’ compliance. A review of literatures on factors affecting tax compliance behaviour indicates complexity as one of the determinants for non-compliance. For example, Abdul-Jabbar (2009) examines the compliance behaviour of corporate SMEs in Malaysia found that tax complexity significantly influenced non-compliance behaviour.

2.4 Research model and Hypotheses of this study

Based upon the theories of tax evasion as well as existing evidence from past empirical research, taxpayers’ compliance decisions may, to a certain degree, be caused by the complexity in the tax laws and tax compliance costs incurred. The increase in tax
compliance costs could result in a higher level of tax non-compliance decisions of both an intentional and unintentional nature. Taxpayers may intentionally opt not to comply with the tax regulations in order to reduce their tax compliance costs burden. Conversely, high compliance costs burden due to complexity in the tax law may result in unintentional non-compliant taxpayers.

**Figure 1** Relationship of Tax Complexity and Compliance Behaviour: A Model

<table>
<thead>
<tr>
<th>EXPECTED OUTCOM</th>
<th>CHANGE</th>
<th>ACTUAL</th>
</tr>
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<tbody>
<tr>
<td>Intentionally Compliant</td>
<td>Reduction in compliance costs (assuming that all other determinants of)</td>
<td>Intentionally Compliant</td>
</tr>
<tr>
<td>Unintentionally</td>
<td></td>
<td>Unintentionally Compliant</td>
</tr>
<tr>
<td>Unintentionally Compliant</td>
<td></td>
<td>Intentionally Non-compliant</td>
</tr>
<tr>
<td>Intentionally Non-compliant</td>
<td></td>
<td>Non-compliant</td>
</tr>
</tbody>
</table>

Source: McKerchar’s (2002, p. 31) Tax Complexity – Compliance Model

In this study, a research model depicting the relationships between tax complexity, compliance costs and compliance behaviour adapted from McKerchar’s (2002) Tax Complexity – Compliance Model (Figure 1) is utilised. Taxpayers who are expected to be unintentionally non-compliant would respond positively with reduction in tax complexity. A reduction in compliance costs would increase the level of compliance and its elimination would result in zero unintentional non-compliant taxpayers. Those who were expected to be intentionally non-compliant would remain the same but if tax compliance cost is the reason for their non-compliance, a positive response is anticipated.

This study examined the relationship between the complexity in the CIT laws, compliance costs and corporate non-compliance behaviour. With increasingly complex tax laws, complexity has been identified as a potential determinant for tax non-compliance.
Jackson & Milliron, 1986). Complex tax laws may add to the taxpayers’ compliance burden and encourage non-compliance behaviour. According to Long and Swingen (1988), tax complexity weakens taxpayers’ ability to comply by making the task more onerous and costly, and at the same time, reduces taxpayers’ willingness to comply by impairing the moral force of the law. Furthermore, Slemrod (2004) argued that tax complexity led to non-compliance because a more complex system would be more difficult to enforce which would reduce the probability of taxpayers being audited. Findings from the studies on compliance behaviour of individual taxpayers have shown that complexity of the tax system significantly impacts their compliance decisions. As such, the following hypothesis was formulated:

$$H_1: \text{There is a relationship between perceived tax complexity, compliance cost and non-compliance of corporate taxpayers.}$$

3. Research Methodology

The research method adopted is based on the experience of previous researchers with modifications to suit specific characteristics of Malaysian tax laws compliance requirements. The target population is corporate taxpayers registered with the IRB and the sample was drawn from the ‘Malaysian Top 500 Largest Listed Corporations 2008-2009’ published directory. Data collection for this study utilised a researcher-administered survey method as an effort to yield a higher response rate as well as to ensure a more reliable responses (Sandford, 1995b, Evans, 2003a). Personal distribution of questionnaire provides the opportunity for researchers to emphasise verbally on the importance of the study and the appreciation for the individuals’ collaboration. The researchers were also able to provide some clarifications and/or examples as required and the completed questionnaire was inserted into a sealed envelope by respondents to protect anonymity of response.

The measurement of tax compliance costs estimate applied most of the techniques employed by established researchers, to include all measurable components, namely internal, incidental and external costs for tax compliance activities. The managerial attitudes of respondents towards complexity of the tax law was measured in relation to three dimensions, comprising the complexity in income tax returns, income tax law and for different groups of
taxpayers, adapted from Christensen et al. (1994). Respondents were requested to indicate their agreement or disagreement with three statements using a six-point Likert scale ranging from strongly disagree to strongly agree. The higher level of scores would indicate a high perception of complexity in the CIT law and vice-versa. Tax compliance behaviour was measured by responses gathered from two hypothetical tax compliance scenarios to mitigate the sensitive nature of the questions involved so that respondents would be more likely to provide truthful responses (Kaplan, Reckers & Roark, 1988). According to Rice (1992), as most corporations would have strong incentives to avoid revealing their non-compliance decisions, any direct measures will invariably suffer from substantial measurement errors. As proposed by Joulfaian (2000), the managerial preferences concept was utilised in this study where the response of company executives is used as a proxy to measure corporate compliance behaviour.\(^4\) Non-compliance behaviour were divided into three components, namely under-reporting of income, over-claiming of expenses and the overall non-compliance.

4. Findings and Discussions

The findings is based on responses of finance and tax managers, accountants and chief financial officer of 98 PLCs from the services, manufacturing and property and construction industries. The highest response was from companies with annual sales turnover of between MYR100 and MYR500 million; followed by the annual sales turnover of less than MYR100 million and more than MYR500 million. The majority of companies had been in operation for at least 15 years and several had been in operation for more than 30 years, while only a few of companies were in the ‘Less than 15 years’ category, which signified that the sample respondent companies had adequate experience in dealing with tax related issues. As for the tax liability, 9% of companies had a nil tax liability, nearly one-half of companies estimated their tax liability to be less than MYR5 million and the balance with tax liability to be equal to and more than MYR5 million. The magnitude of costs incurred by Malaysian PLCs in complying with the income tax law is approximately MYR47,126 per company per year. The

\(^4\) Section 138 of the ITA 1967 lays out the confidentiality requirement surrounding tax data which is categorised as ‘classified material’. Thus, in Malaysia there is no data that is publicly available to measure compliance behaviour using tax auditing approach (see Kamdar, 1997; Rice, 1992) unless full cooperation from the IRB is obtained.
computational and planning ratio was 74 and 26%, which suggests that most tax compliance costs burden for Malaysian PLCs was related to routine income ‘tax returns’ work. With regards to tax complexity, an overall mean score of 3.53 demonstrated the presence of complexity in the Malaysian CIT system, while tax non-compliance behaviour with an overall mean of 2.30 is an indication of a compliant behaviour among corporate taxpayers. Analysis using ANOVA and t-test found that relatively higher complexity levels were observed for larger companies with higher turnover levels and estimated tax liability. Among possible explanations for the findings are that larger companies engage more in planning activities to minimise the amount of tax liability and/or reflect the complexity of commercial activity of these companies.

A correlation analysis was utilised to investigate the relationship between tax complexity aspects and taxpayer compliance costs burden. Tax complexity were found to be significantly correlated with the mean tax compliance costs estimates (+ 0.384) at the 1% level. A positive relationship between the perception of complexity in the tax system and compliance costs suggested that an increase in the complexity level will increase the compliance costs of taxpayers. A coefficient value of 0.384 indicated a medium correlation between the two variables. Correlation analyses were further utilised to explore the relationship between tax compliance costs and the likely tax non-compliance behaviour. The positive associations between these variables indicated that an increase in compliance costs would possibly lead to greater non-compliance behaviour among taxpayers. However, correlation coefficients of between 0.002 and 0.022 suggested a weak associations between these variables. Correlation analyses were further undertaken to examine the relationship between tax complexity and types of non-compliance behaviour. Complexity of the tax laws was positively correlated with all types of non-compliance, namely under-reporting of income (+0.145), over-claiming of expenses (+0.011) and the overall non-compliance (+0.080). Non-compliance increased with an increase in tax complexity although the strength of correlation was quite weak. Within the three correlation analyses performed, the findings indicated that tax complexity and compliance costs burden had an impact on the tax non-compliance behaviour for all types of non-compliance and thus $H_1$ is supported. The possibility of under-reporting of income, over-claiming of expenses and the overall non-
compliance increased with higher complexity in the tax laws and their compliance cost burden. Moreover, the values of correlation coefficients were medium to large and significant relationships were consistently found between all types of non-compliance behaviour and complexity in the tax systems.

The findings of this study are mostly consistent with existing Malaysian studies. A study conducted before the commencement of SAS by Hanefah (1996) on personal taxpayers suggested the presence of some degree of complexity in the Malaysian tax system. Hanefah et al. (2001) argued that, as a result of amendments to existing tax legislation and/or introduction of a new assessment system, the level of tax complexity evidenced an increasing trend. The findings of Abdul-Jabbar’s (2009) study focused on SMEs under the SAS environment further supported evidence on the existence of complexity in the Malaysian income tax laws. According to Kasipillai (2005, 2010), the difficulties faced by taxpayers in interpreting tax amendments are among the indicators of tax complexity. Hence, these similar perspectives supported the presence of complexity in the Malaysian income tax system.

There is some evidence from existing international studies on a relationship between the complexity in the tax law and taxpayer compliance. Cuccia and Carnes (2001) and McKerchar (2002) found a negative impact of complexity upon tax compliance in the context of individual taxpayers. Slemrod (2004) suggested tax complexity as one of the main obstacles for the US small businesses. Erard (1997) investigated the problem areas of tax compliance for large corporations and found that tax complexity is among the frequently cited compliance problems by businesses. Slemrod and Blumenthal (1996) and Slemrod and Venkatesh (2002) studied sources of complexity of the US large and medium corporations and found that the depreciation rules and the alternative minimum tax provisions were the most frequently cited areas that increased tax complexity and the compliance burden.

This study further investigated into the complexity of ITA 1967 in terms of tax incentives offered to corporate taxpayers. The mean compliance costs in relation to tax incentives was approximately MYR3,251 and represented no more than 7% of the tax compliance costs burden. The overall fraction of tax compliance activities associated with
government incentives provided through the tax system is relatively small portraying a low level of complexity in dealing with tax incentives. Type of respondents investigated in this study that is PLC taxpayers, might be the possible explanation for the low percentage of tax compliance costs estimates of the source of compliance burden. These incentives were predominantly offered to newly established companies and therefore, were not applicable to most respondents of this study, as more than 78% of them have been in operation for 15 years or more. It is also observed that the larger the company size, the lower the proportion of compliance costs incurred on tax incentives’ compliance costs.

Since almost 95% of the respondent companies employed tax agents to deal with their income tax matters, this study explore into qualitative information from a survey of external tax professionals. A few relevant measures are laid out from the perspective of reducing complexity, lowering compliance costs and non-compliance of taxpayers:

- Main suggestions pertained to the simplification of tax law and reporting requirements especially concerning continuity of tax rules, clarity of the tax laws, and transparencies on the implementations of tax legislation by reducing the ambiguity of the terminology in the ITA and by having a more transparent interpretation of the law. Apart from reducing ambiguous terminology in the tax legislations, they requested for more effective and logical public rulings, a better advanced rulings system, simpler tax returns and regular dialogue sessions between the IRB and tax practitioners. They suggested for the issuance of a lesser number of public rulings but instead furnish more examples in each public ruling issued in order to ensure clear and consistent applications of tax rules and regulations for taxpayers. Regarding the notion to improve transparency of tax laws and their implementation, the external tax professionals were desirous for IRB to issue fairer and more equitable legislation, together with greater transparency in interpretation of the law.

- With regards to advanced tax estimates, respondents requested for more flexibility or even abolishment of tax estimation requirement as it creates a lot of paperwork where a slight mistake will elicit inevitable penalty. Hence, they suggested a few measures such as to: (i) reduce frequency of tax estimate revision, (ii) eliminate the penalty on underestimation of tax instalment as it is difficult to get an accurate estimate and (iii) terminate the compound for late submission of CP204 (tax estimation form).
Suggestions were also made concerning the need for a convergence of tax laws with accounting standards and practices that would reduce discrepancy and tax adjustments. This could be achieved through the acceptance of audit documentation, as part of tax evidence, and/or by having the same treatment for accounting standards and tax laws.

One of the concerns among tax professionals were regarding the criteria to apply for tax incentives under the ITA, which in their opinion, were too detailed and restrictive which imposed an additional burden in terms of research and tax planning costs. They asserted that rules in relation to tax incentives should be straight forward through the abolition of certain incentives, reduction of the restrictions for qualifying for the incentives as well as the length of tax related forms, accompanying supporting documents and the number of mutually exclusive incentives offered.

Tax professionals have noticed that some of their clients were quite ignorant about the tax laws even on basic tax requirements. Further initiatives must be undertaken by IRB including establishing taxpayers’ education and awareness programmes that are designed to ensure that taxpayers are able to understand taxation laws and regulations, keep documents and activity records, complete tax returns and also aware of their rights and responsibilities without requiring the assistance of tax practitioners or agents.

5. Conclusion

This paper examines the issues of tax law complexity in Malaysia under the SAS environment by evaluating the taxation compliance costs incurred in complying with tax legislation and the compliance behaviour of corporate taxpayers. The high costs of compliance, indicating a complex tax system (Slemrod, 1992) and Kasipillai (2005, p. 26) highlighted that tax law should be systematically simplified in order to reduce tax compliance costs, and uncertainty faced by taxpayers due to tax complexity, along with enhancing voluntary compliance. It is evident from the findings of this study that a higher level of complexity surrounding the CIT laws increases the compliance burden of corporate taxpayers resulted in higher possibility of non-compliance behaviour.
The researchers acknowledged various tax simplification measures have been introduced under the SAS. The move from an imputation tax system to a single tier system is one example of income tax reform for companies which have reduced compliance requirements of corporate taxpayers. Under the single tier system, companies are no longer required to maintain Section 108 balances which previously imposed tremendous compliance burden for corporate taxpayers. Nevertheless, the Malaysian government tends to adopt an incremental approach as opposed to a package approach for the process of tax simplification. The former includes a sequence of small tax changes while the latter is a major change that could revolutionize a tax system (Kasipillai, 2007). The incremental approach is embraced as such a move does not involve drastic changes that may “upset” taxpayers. However, constant changes to the tax legislation and ad hoc simplification programmes may instead lead to further complexities in the tax system. A package approach, with comprehensive and well-conceived initiatives, is required for the simplification measures to be more effective (Sandford, 1993). Therefore, the issue of tax complexity and areas for consideration through income tax simplification for corporate PLCs need to be addressed in order to reduce compliance costs burden and improve voluntary tax compliance of corporate taxpayers. For example, in 2010, the Australian Taxation Office (ATO) published a booklet on ‘Large Business and Tax Compliance’ as an effort to provide practical certainty in complying with tax laws, supporting voluntary compliance and reducing compliance costs of large corporate taxpayers.

To conclude, the research into tax complexity, compliance costs and behaviour has played an important role in considering an impact assessment when there is a significant change in the tax system. As a result of the extensive studies of these issues in the developed countries, their governments normally produced an impact statement before introducing new tax laws. For instance, in the UK, all significant changes to the tax laws are accompanied by a published evaluation of compliance costs in complying with the tax laws (Sandford & Hasseldine, 1992). The results of this study therefore may enlighten the Malaysian tax authorities on the burden of corporate income taxpayer’s due to the complexity of the tax laws, for them to acknowledge these issues when making policy decisions with regards to income tax laws.
Findings from these study could be used as a base to measure large or significant changes in compliance costs which reflecting the level of complexity over time which may result from changes in taxation law. While studies on tax compliance costs estimation have been conducted in many countries, the linkage to the tax complexity tax compliance behaviour, appear to be very limited studies that bridge these three very important tax areas which offer potential for furthering knowledge in this field. Thus, this study covers the three important tax areas in a single study and the findings of this study will inform policymakers of the need to consider the importance of tax compliance costs, complexity level and its impact on compliance behaviour when planning to formulate future tax policies. This paper focuses on large corporations as number of studies have generally concluded that corporate taxes impose higher compliance costs than individual taxes as a result of more complex and extensive tax compliance requirements. Moreover, despite contributing a large portion of the IRB’s tax collection, prior tax research in Malaysia has largely ignored the compliance burden faced by the corporate sector and their tax compliance behaviour.

This study contributes to the body of knowledge especially when one takes into consideration the very limited tax studies in the emerging economies. The overall conclusions from this study’s research findings are broadly in line with existing studies in these areas. Thus, the findings of this study add to research evidence from countries in emerging economies, which according to Ariff and Pope (2002), have weaker tax policies and structures and less transparent tax system than those in the advanced economies. In addition, this study also this study fills the gap of compliance costs estimates associated with tax incentives in tax compliance cost research. Tax incentives have not been subjected to empirical testing due to the lack of incentives offered in other tax regimes worldwide (Abdul-Manaf, Hasseldine & Hodges, 2005). Since Malaysia has numerous incentives available under the income tax legislation, this distinction would be of particular importance to future studies. Practically, the findings arising from this study provide valuable information beneficial for policy makers in the area of taxation, as well as to the taxation profession and the management of companies. The issue of complexity of the tax laws, compliance burden of corporate taxpayers and their compliance behaviour can now be fully acknowledged and eventually be considered as essential features for improving the CIT laws.
The limitations of this study are acknowledged as the samples included only the use of ‘Malaysian Top 500 Largest Listed Corporations’ published directory and exclusion of companies in Eastern Malaysia, results in bias in findings towards large companies in the Peninsular Malaysia. Further, this study is based on researcher-administered questionnaire survey responses and only focused on from the large corporate taxpayers’ perspective. Any generalisation of the findings of this study must therefore be made with caution. Perhaps, the use of an experimental method is more appropriate where the impact of tax complexity is investigated through a controlled experiment (see Trivedi et al., 2005). Despite these limitations, the findings of this paper have made a valuable contribution to the relevant body of knowledge, as well as to the tax policy makers in devising specific measures to minimise taxpayers’ compliance costs burden by reducing the complexity in the tax laws and enhance their voluntary compliance.

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AN OVERVIEW ON MARRIAGE RECONCILIATION UNDER THE LAW REFORM (MARRIAGE & DIVORCE) ACT 1976

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Abstract

The number of divorce cases in Malaysia has increased despite that the law provides reconciliation process to re-unite the couple in dispute. According to the statistic from National Registration Department of Malaysia, the divorce rate for both non-Muslim and Muslim couples as compared to the rate of marriage has steadily increased especially beginning the year 2001 (Siti Farhanan Md Sam & Puzziawati Ab Ghani, 2015). Malaysian laws provide avenues for disputing couples to reconcile their broken relationships. There have been criticisms by legal and social scholars on the current legal framework for reconciliation. The objective of this writing is to provide an overview of the current legal framework and process for marriage reconciliation in Malaysia and to identify issues and obstacles of the current legal framework for marriage reconciliation process. This research is based on the hypothesis that the current legal framework for marriage reconciliation has not been able to achieve the objective of preserving the marital relationship and improvements of the legal framework is required. This study will be based on analysing theory, concept, published data and literature relating to the law, the framework and the processes of the marriage reconciliation in Malaysia. The study will apply thorough analysis on the process of conducting the reconciliation session especially the methods applied during the reconciliation session.

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1. INTRODUCTION

According to the statistic from National Registration Department of Malaysia shows that the divorce rate compared to the rate of marriage for non-Muslim and Muslim couples has increased steadily especially beginning the year 2001 (Siti Farhanan Md Sam & Puzziawati Ab Ghani, 2015). The total number of marriages for both Muslims and non-Muslims are more or less of the same rate every year, but the number of cases for divorce has increased (Siti Farhanan Md Sam & Puzziawati Ab Ghani, 2015). Divorce rate in Malaysia for both Muslims and non-Muslims had increased from 11.24% in 2001 to 18.67% in the year of 2010 (Siti Farhanan Md Sam & Puzziawati Ab Ghani, 2015). Fifth Malaysian Population and Family Survey 2014 shows that the main reason for divorce is because of irreconcilable differences. Many divorce applications under irreconcilable differences could meant only as a ‘cry for help’, which may not reflect a serious thought of divorce. Divorce is opted because only a small effort is done to assist and guide the couple in solving their marital problem. There is a study that shows significant numbers of divorced couples who regretted their choice and if given proper guidance, divorce may not be the option (Charles, 2011) (William & Leah, 2011). Restoring the marital relationship is not only important for the couple, but for their children as well. Many literatures have shown that in majority of divorce cases, the divorce effects are harmful to the children and affect them in terms of psychological, self-esteem or social relations (Solangel, 2013). Looking into these effects of divorce, family researchers propose that the state should develop and strengthen policies and laws that maximise reconciliation option and avoid divorce if possible and practical (Charles, 2011). Malaysia is among the countries where the law provides a platform for marriage reconciliation for marital breakdown. It is compulsory.

1 56.2% of divorcee men stated that divorce is because of irreconcilable differences and 38% divorcee women stated that divorce is because irreconcilable differences. See National Population and Family Development Board, Laporan Penemuan Utama: Kajian Penduduk Dan Keluarga Malaysia Kelima, (Kuala Lumpur: National Population and Family Development Board, 2016), at 24
under the law, unless otherwise stated, for any petition for divorce to show that the couple has undergone marriage reconciliation.

2. RECONCILIATION UNDER THE LAW REFORM (MARRIAGE & DIVORCE) ACT

Reconciliation, as defined in Black’s Law Dictionary 4th Edition, means “the renewal of amicable relations between two persons who had been at enmity”. Reconciliation process is referred to as series of actions or steps taken in order to restore the amicable relations of the marrying couple who are facing marital discord. In Malaysia, reconciliation of non-Muslim marital discord is governed under the Law Reform (Marriage and Divorce) Act 1976. Under the law, any non-Muslim divorce application is required to refer to a conciliatory body, unless otherwise stated by the law, for conciliation process. This is stated in section 106 of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter refer to as the “Law Reform Act”).

The law provides, section 106(1) of the Law Reform Act, that a couple may not apply for divorce until the matter has been referred to a conciliatory body. The objective of section 106 is to reduce divorce cases through conciliation process when there is reasonable probability to reconcile the relationship (C v A [1998] 6 MLJ). This section was introduced in 1971 by the then Royal Commission on Non-Muslim Marriages and Divorce which made recommendation that “… that attempts at reconciliation be made before the filing of any petition for divorce and that proceedings in court may be adjourned at any stage and for such period as the court thinks fit, to encourage reconciliation ….” (C v A [1998] 6 MLJ).

3. RECONCILIATION PROCESS

A conciliatory body under the Law Reform Act as stated in section 106(3) referred to a body from either (1) a marriage tribunal, (2) a council set up for the purposes of reconciliation by any appropriate religion, community, clan or association or (3) any other body approved as such by the Minister of Home Affairs.
Upon receiving the reconciliation application, the conciliatory body shall fix a series of
meeting with the couple to discuss and review the problems faced by the couple, with the
objective of looking for hope to restore the marriage. The conciliatory body as required
under section 106(5)(a) of the Law Reform Act shall be required to resolve the matrimonial
difficulty and reconcile the couple within the period of six (6) months. If the conciliatory
body, after the series of meetings, is satisfied that the couple could not be reconciled, a
certificate will be issued stating that the marriage has irretrievably broken down, as stated in
section 106(5)(b) of the Law Reform Act. Once the irretrievable certificate issued, only then
the couple can file for a divorce petition in the court. During the session, no solicitor is
allowed to appear on behalf of any of the party. However, section 106(5)(c) of the Law
Reform Act stated that the couple may be represented, subject to the approval of the
conciliatory body, by their own family members.

Law Reform Act provides active roles for the court in encouraging reconciliation. Section 55(1) of the Law Reform Act provides the court to require the couples to resort to
person or body for the purpose of reconciliation. The law, as stated in section 55(2) of the
Law Reform Act, further authorised the court to adjourn any proceeding for divorce if it
appears that there is possibility of reconciling the couples. The Law Reform Act does
provide options for the court to encourage reconciliation either before any application for
divorce and during the court proceeding. Section 55 (1) provides the court authority to direct
the couple for further reconciliation, if necessary, although the couple has gone through
reconciliation process under section 106 of the Law Reform Act.

4. EXCEPTION

Although the reconciliation is compulsory, the law does provide exceptions if a
petition for divorce falls under sections 51 or 52 of the Law Reform Act or when the
divorce application is listed under the exceptions stated in section 106 (1) itself. Section 51
provides divorce on the ground of conversion to the religion of Islam and Section 52
provides the law of divorce by mutual consent. Couples who were granted divorce hearing
under these two would not need to undergo any reconciliation process.
Section 106(1) of the Law Reform Act provides further exception to the general rule and this includes when the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable. There are two main elements that must be fulfilled under section 106(1)(vi) before the court may grant any exception to the general rule. Firstly, there must be exceptional circumstances that render reconciliation to be fruitless. Exceptional circumstances stated in section 106(1)(vi) are subjective. Court needs to look at case to case basis (P v S [2015] 9 MLJ). Secondly, there must be evidence that such special circumstances make reference to a marriage conciliatory body as impracticable (C v A [1998] 6 MLJ).

Among the circumstances that the court has exempted from resorting to conciliatory body is when the petitioner can prove that they have resorted to family members to reconcile their marriage before the petition for divorce is made. However, since the effort taken by the family members has not able to reconcile the couple, it may be futile to further resort to conciliatory body. In the case of C v A [1998] the court has granted the exception not to refer to conciliatory body under section 106(1)(vi) by applying section 55(1) of the Law Reform Act. Section 55(1) stated that petitioner for divorce must show that he/she has refer to any persons or bodies for the purpose of effecting a reconciliation. Family members may be included as “person” stated in this act. Therefore, if the petitioner has refer the problem to his/her family members and effort has been made to reconcile but to no avail, the court may apply their discretion to allow the divorce petition without the need to refer to the conciliatory body (C v A [1998] 6 MLJ).

5. **ISSUES UNDER THE CURRENT LAW**

There have been few literatures criticising on the current Malaysian marriage reconciliation process and program. Among the criticisms made is by Mimi Kamariah in her book *Family Law in Malaysia*. She stated that, although the intention behind the reconciliation requirement in the LRA (Law Reform Act 1976) is noble and worthy, there are issues related to this requirement. Firstly, she wrote that when a couple resorted to court for divorce, the decision is already made after going through several steps (Kamariah, 1999). In Malaysian society, where familial ties are strong, parties whose marriages are
facing difficulties would invariably seek help from members within the family circle to preserve their marriages. They would not go directly to the court to seek help. According to Mimi Kamariah, court will only be resorted if the family members fail to support and guide the couple towards preserving the marriage (Kamariah, 1999). Nora Abdul Hak further elaborate in her writing that it is the practice of traditional Malay, Chinese and Indian societies to refer to family members or elderly within their extended families if there are any marital disputes occur (Nora Abdul Hak, 2008). Mimi Kamariah claimed that as the couple already refers their marital dispute to their family members, the petition for divorce made is usually signals the absence of any likelihood of reconciliation. It is therefore argued that a reference to a conciliatory body is a waste of time and resources (Kamariah, 1999). Reference to family members alone might be the reason for the couple’s choice to divorce. There is no guarantee that family members will help the couple to work out saving their marital relationship. Family members would have the tendency to side their own member and they would be biased. Other study has shown that it is not correct to assume that once a petitioner file for divorce, it is already a final decision (William & Leah, 2011).

Mimi Kamariah also stated that conciliatory body consists of strangers to the couples and might be judgemental, prejudiced, biased or hostile (Kamariah, 1999). On top of that Mimi Kamariah and Nora claimed that there are frequent delays to the conciliatory hearings due to difficulties in securing attendance of all the parties involved (Kamariah, 1999) (Nora Abdul Hak, 2008). The issue of attendance may be solved if the reconciliation process is managed under the Malaysian court. Court order for reconciliation may able to “compel” the couple to attend the session. In some circumstances, couple may not comprehend the situation in order to differentiate what is good for them and what is not. Therefore, some compulsion may be needed to at least provide opportunity for reconciliation.

6. **SUGGESTIONS FOR IMPROVEMENTS**

There have been studies conducted in other countries on how to strengthen the legal process towards obtaining better chances of reconciling conflicted couples. One of the studies was done by Solangel Maldonado in 2013 (Solangel, 2013). She quoted other
literatures showing that prior for any reconciliation process, it is important to identify whether the reconciliation effort worth to be tried on the couple or not. The court policy should provide a filtering process to identify the type of discord that should or should not undergo the reconciliation process. Solangel suggested that, the law and policy should focus on couple with children as divorce often recorded to have a negative impact on the children’s lives (Solangel, 2013). Although the Law Reform Act does not stated about children as reason for reconciliation, Malaysian court has taken children into consideration whether or not to allow any exemption from reconciliation. The High Court of Ipoh in 2015 has rejected an application from a husband to be exempted from reconciliation on the basis of the interest of a child. The court stated that it is in the welfare of the child that the couple should give effort to settle their marital dispute (P v S [2015] 9 MLJ). There should be written policy or law to provide compulsory reconciliation if there is children involved.

Solangel further stated, supported by empirical study conducted by Paul Amato (Amato, 2002), the type of discord couple can be classified through the period of discord before the divorce which then has different effect on the children. She shows that in cases where the level of discord was low, the children’s well-being suffered the most and the negative effect seemed to follow them into adulthood (Solangel, 2013). A similar suggestion was also made by William J. Doherty and Leah Ward Sears in their proposal to reform the reconciliation process in the United States. Firstly, they suggested that the focus for reconciliation should be more on couples who have children and secondly, where it involves low period of discord between the couples (William & Leah, 2011).

Solangel Maldonado commented further in her article that it has been identified that during the reconciliation process in United States, respective policies fail to provide significant resources to facilitate reconciliation (Solangel, 2013). Many initiatives for reconciliation process conducted such as mediation and education activities have been skewed towards focusing on post-divorce effect instead of providing the couples assistance for reconciliation (Solangel, 2013). This has diluted the objective of the reconciliation process which is to save the marriage. Solangel identified that among the reasons why the marriage reconciliation process has not been given enough attention is because it is difficult to find programs that are likely to succeed (Solangel, 2013). In her study, she proposed
education program or intervention program which include the element of forgiveness. She mentioned in her article that many studies conducted shows forgiveness intervention or education program conducted were able to help reconciling the discord couples (Solangel, 2013). To implement the idea of having education intervention in Malaysia, a specific and dedicated unit is required to ensure that the couple can be given full attention to save the marriage. Different case may needed different approach and hence profiling of cases may helped to guide authority in deciding what kind of support require for future cases.

7. CONCLUSION

Law Reform (Marriage & Divorce) Act 1976 provides a platform for couples to reconsider their decision for divorce. It is one of the positive initiatives taken by the legislature to reduce unnecessary divorce. Although the law provides compulsory reconciliation for divorce petition, the law also provides room for exception when necessary. It is agreed that divorce may be necessary in certain situations, nonetheless it must be properly monitored so that unnecessary divorce may be avoided. The Court may play an important role to differentiate which cases should be given extra attention for reconciliation. Judgment from the High Court as discussed hereinabove has played quite an active role in interpreting the law for the benefit of the couple and the children. There are still room for improvements in the law to increase the success rate of reconciling discord couples. Among the improvements that can be studied further is the suggestion to have the reconciliation process under the jurisdiction and management of the court. Furthermore, study can further be conducted on the best method to be used for reconciliation. Mediation or counselling alone may not be sufficient. Interference from family members and even professional during conciliation and religions support may be required to guide the couple. Divorce education as conducted in few other countries may also be implemented to provide knowledge to the couples on the effect of divorce to their children and marital life. This may guide the couple to re-think on their decision to separate.
References


PERUBAHAN POLITIK TERENGGANU 1959-1961

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Abstrak


Kata Kunci: Perubahan, politik Terengganu, Umno – PAS, Ibrhim Fikri – Daud Samad

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1. Pendahuluan


Pada tahun 1951, pemimpin PKMM Terengganu, Ibrahim Fikri turut menyertai UMNO. Dengan kemasukan beliau ke dalam UMNO, parti tersebut mulai menjadi sebuah parti politik yang berpengaruh di Terengganu. Berikut dengan kejayaan UMNO dalam menggagalkan pelaksanaan Malayan Union, parti itu dianggap sebagai benteng orang Melayu menghadapi penjajah British.


PMIP atau PAS merupakan parti politik yang berpengaruh di negeri-negeri Pantai Timur terutamanya di Kelantan dan Terengganu. Parti yang memperjuangkan sebuah pemerintahan Islam dan hak bangsa Melayu itu merupakan saingan utama kepada parti UMNO untuk menjadi parti yang dominan di negeri-negeri Pantai Timur. Oleh kerana parti PAS adalah sebuah parti yang meletakkan Islam sebagai dasar maka ia telah mendapat sokongan dari orang ramai terutama dalam kalangan golongan ugama, masyarakat Melayu dan ulama.

Oleh kerana PAS adalah sebuah parti yang meletakkan agama Islam sebagai asas perjuangannya, maka ia telah mendapat sokongan dari rakyat biasa Terengganu yang sememangnya amat berpegang teguh pada agama Islam hasil didikan daripada para ulama. Walaupun pada peringkat awal penubuhannya, PAS banyak didokong oleh golongan bukan ulama, namun dasar perjuangan yang bersandarkan kepada agama Islam menjadi penarik kepada sokongan orang ramai. Pemimpin PAS Terengganu pada zaman awal penubuhannya, seperti Dr. Haji Abbas Alias (Pameran Sejarah PAS, 2015), dan Mohd Daud Samad bukanlah daripada latar belakang berpendidikan agama atau ulama.

2. Konflik Kerajaan PAS dengan Kerajaan Persekutuan


3. Perpecahan Dalam Parti PAS


4. UMNO menentang kerajaan PAS

Ibrahim Fikri merupakan pemimpin UMNO yang berwibawa, anak tempatan serta berpendidikan agama. Beliau mendedahkan banyak kelemahan kerajaan PAS Terengganu dalam usahanya untuk menjatuhkan kerajaan itu. Antaranya kegagalan membasmi
kemiskinan, kegagalan meningkatkan mutu pendidikan, kegagalan menghapuskan upacara syirik seperti puja pantai dan sebagainya.


5. **Pertikaian Dalam Pembentukan Kerajaan Campuran PAS-Parti Negara**

Pada peringkat awal Parti Negara berpihak kepada Perikatan (Temu Bual Fatimah Ismail) namun begitu mereka kemudiannya mendekati parti PAS. Dalam usaha menyelamatkan kerajaan PAS Terengganu, Dato Onn mencadangkan pembentukan kerajaan campuran PAS-Parti Negara. Pada mulanya cadangan itu tidak mendapat sambutan daripada pihak PAS. Sewaktu Ahmad Azam mengisytiharkan dirinya sebagai calon bebas, Menteri Besar, dan Setiausaha Agungnya telah memberi keyakinan kepada umum bahawa mereka tidak akan mengadakan sebarang kerajaan campuran dengan Parti Negara kerana mempunyai ideologi yang bertentangan dengan PAS, serta cita-cita politik yang berlainan (Berita Harian, 1/10/1960). Dalam undi usul kerajaan campuran didapati keputusannya memihak kepada menyokong kerajaan campuran tersebut, iaitu sebanyak 12 cawangan PAS menyokong usul tersebut, lapan cawangan menentang dan enam cawangan lagi berkecuali (Berita Harian, 4/10/1960).


6. **Kemerosotan PAS Terengganu**

Ketiadaan pemimpin yang berwibawa sama ada di peringkat negeri mahupun di peringkat persekutuan merupakan punca utama kejatuhan kerajaan PAS Terengganu. Walaupun PAS mempunyai tokoh-tokoh besar di peringkat pusat seperti Dr.Burhanuddin dan Profesor Zulkifli Haji Muhammad, namun mereka merupakan “orang luar” yang kurang diterima di peringkat negeri Terengganu. sikap ini menghalang anggota PAS Terengganu daripada menerima pandangan dan nasihat daripada mereka. Sikap kerajaan PAS Terengganu yang tidak terbuka itu merugikan diri mereka sendiri.
Keadaan menjadi bertambah buruk apabila tunggak utama PAS, Dr. Burhanuddin al-Helmy telah dijatuhkan melalui sistem perundangan negara. Pada Mac 1964, Presiden PAS Dr. Burhanuddun al-Helmy didapati hilang kelayakan sebagai ahli parlimen akibat menjadi pengerusi haram Syarikat Malay-German Shipping Company, Terengganu yang menjalankan urusan membawa jemaah Haji. Mengikut Bab 4, Artikel 48(E) Perlembagaan Malaysia, yang menyatakan antara perkara yang membatalkan seseorang ahli parlimen ialah:

(e) Dia disabitkan atas sesuatu kesalahan oleh sesuatu mahkamah di Persekutuan (atau, sebelum Hari Malaysia, di wilayah yang termasuk di dalam negeri Sabah atau Sarawak atau di Singapura) dan dihukum dengan pemenjaraan selama tempoh tidak kurang daripada satu tahun atau denda tidak kurang daripada dua ribu ringgit dan dia tidak mendapat pengampunan bebas.


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**Lain-Lain Sumber**


ADMINISTRATION OF THE DECEASED’S ESTATE UNDER SECTION 17 OF PUBLIC TRUST CORPORATION ACT 1995 WITH SPECIAL REFERENCE TO VEHICLE

Drs Nasrul, M.A.* & Mohd Salim, W.N.**

ABSTRACT
As the Malaysia Public Trustee Company, Amanah Raya Berhad (ARB) possesses a jurisdiction in administering the deceased’s estate through the issuance of Declaration and Direction respectively. While the Fara’id Certificate is required by ARB to administer the deceased’s estate, problem occurs when administering estate cases involving vehicle per se. Distribution cannot be made to multiple beneficiaries as the requirement from the Road Transport Department (RTD) only allows for a single name to be registered as the new vehicle owner. This results in a conflict between the effect of Fara’id Certificate and rule imposed by the RTD. Despite the non-requirement of Fara’id Certificate by the RTD, such stood as the required document by ARB in order to administer the deceased’s estate. This paper addresses the problem in relation to the estate administration by ARB involving vehicle under Section 17 of the Public Trust Corporation Act 1995 and analyses the implication of such rules towards the estate administration. This paper is based primarily on the analysis of written sources namely text books, statutes, bylaws, journals and ARB related policies. Findings from this study shows that mutual understanding from the beneficiaries as well as amendment of the ARB policy are the key solution to overcome the problem.

Keyword: Fara’id Certificate, ARB, Estate Administration, Vehicle and Registration

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1. Introduction

Estate administration is a process that deals with the estate of the deceased, comprising of several tasks including collection of asset, payment of debt as well as distribution of asset. According to Curzon (2010), estate administration also involve appointment of personal representative, a person who is authorized to manage the deceased’s estate. Under the Malaysian inheritance law, the personal representative in intestate cases is known as the executor where his appointment is made under the will. In intestate cases, the representative is appointed through the letter of administration issued by the administrative bodies (Halim. A. H, 2012). Despite the different term, their task is more or less, similar as they are authorized to administer the deceased’s estate.

Among the essential aspects which needs to be considered in the administration of estate is the period of the administration. The duration in administrating the deceased estate is subjected to several aspects. One of them is the type of deceased’s asset. In normal circumstances, movable asset is easier and speedier to be administered compared to immovable asset. This is due to its asset realization procedures which does not involve various and complicated tasks. Realization of asset covers the process of gathering the deceased’s asset which includes, collection from every institution which holds the deceased’s asset such as banks, insurance, companies and other third party. Each and every asset, belonging to the deceased needs to gather and this includes the deceased’s vehicle. In the Malaysian inheritance context, vehicle is part of movable asset which is also subjected to the distribution under estate administration (Abdul Hakim Mohammed, Abdul Hamid Hj. Mar Iman & Adibah, 2009). Despite being categorized as part of the deceased’s asset, administration and distribution of the deceased’s vehicle is slightly different as to the others.

While other movable asset can be distributed to the beneficiaries according to the prescribed or agreed portions, distribution as to the deceased’s vehicle cannot be applied based on the similar method. In practice, there are two methods on how the deceased’s vehicle can be administered. The first one is by liquidating the asset, where the proceeds from the sale can be distributed to the beneficiaries. The second one is by transferring the name of the beneficiary as the new owner of the vehicle. However, the rule prescribes that only one
person can be named in the registration. Such is therefore requires the beneficiaries to decide as to whom the vehicle will be distributed to.

Within the various types of cases under inheritance, there are cases involving administration of the deceased’s estate which comprises of vehicle per se. Generally, the process of transferring the ownership of the vehicle from the name from the deceased’s to the beneficiaries requires letters of representation. In this case, letters of representation will be applied to ARB, also known as the corporation, since the only estate involved are vehicle, assuming that its value is less than RM600,000.00 which falls under the corporation’s jurisdiction. However in cases involving deceased Muslim, application for letters of representation under ARB requires the applicant to furnish Fara’id Certificate as part of required document.

The issue in this case is that, the process involving the registration of a single name render the rule of Fara’id inoperable as the rule has been set by the Road Transport Department. Therefore, the prerequisite set by ARB to the beneficiaries in obtaining the Fara’id Certificate before the issuance of letters of representation caused difficulty since they have to incur additional time and expenses in obtaining the certificate. This is especially true in cases involving vintage vehicle of low value which makes the requirement to obtain the certificate seems disproportionate to the commitment and its original cause. In either cases, the vehicle needs to be transferred to the new owner as to enable the vehicle user to renew its insurance and road tax.

This paper addresses on how the conflict between requirements from ARB and RTD as to Fara’id Certificate intricate the beneficiaries in the administration of the estate involving deceased Muslim. At the same time, the paper proposes solutions which can expedite the administration of estate and ease the hardship on part of the beneficiaries.

2. Fara’id Certificate

In Malaysia inheritance context, administration of estate of the deceased Muslim involves requirements as to apply for the Fara’id Certificate from the Syariah Court. Irrespective of whether the deceased died testate or intestate, Fara’id stood as the required document which is enclosed to the application for letters of representation from any
administrative bodies including the High Court and the Small Estate Distribution Section (F Shafie, W. Yusoff, W. Zahari, & S. Abdullah 2014). The function of Fara’id certificate is to determine the deceased’s heirs as well as their distribution portion from the deceased estate, based on the Fara’id calculation portion (Noordin, Shuib, Zainol, & Adil, 2012). Hence, details regarding the list of the deceased heirs and their portion entitlement is stated in the certificate.

The syariah court possesses several roles in estate administration involving deceased Muslim where one of the related to the issuance of Faraid Certificate (Wan Abdul Halim, 2009). Application for Fara’id certificate is generally made to the Syariah Subordinate Court. The law regarding the Fara’id certificate is governed by the state’s syariah enactment. For instance, under section 65 of the administration of the religion of Islam (State of Selangor) Enactment 2003 empowers the syariah court to issue Fara’id certificate. Generally, process in applying for Fara’id certificate involves several stages. The process starts with the application from the applicant by enclosing the required documents such as the heirs’ Identification Cards, deceased’s death certificate, marriage certificate and others. Upon payment of the application, the court will then issue a hearing date. Upon the hearing session, the judge will inquire the heirs regarding the deceased estate and entitled heirs as part of the brief investigation session. After affirming the portion of the beneficiaries and other related issues during the said session, the court will then issue the Fara’id certificate to the applicant. The Fara’id certificate will be enclosed with other required documents for the purpose of applying the letters of representation from any administrative bodies.

In cases involving application for orders under section 17 from ARB, Fara’id certificate must first be obtained by the beneficiaries. This is to determine the existence of beneficiaries as well as their entitled portion, which could be referred to the fara’id certificate. However, the corporation will conduct their own investigation in lieu of the relying on the Fara’id certificate, as to confirm the validity of the information given by the applicant regarding the entitled beneficiaries. This is because, there cases involving the concealment of the beneficiaries by others even after the issuance of Fara’id certificate. In addition, the issuance of Fara’id certificate is made by the syariah court upon the reliance of the information given by the applicant. Should the applicant conceal the existence of even

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1 In some states such as Kuala Lumpur, Fara’id certificates issued by the syariah court also states the deceased’s estate value.
one beneficiary, such action will jeopardize his right and entitlement over the deceased’
estate as his portion is not stated in the Fara’id certificate. The implication will complicate the
situation if the abandoned beneficiary realized about the matter and exercise his right over the
deceased’s estate

3. Jurisdiction

Amanah Raya Berhad (corporation) is one of the administrative body which deals with the
deceased’s estate administration besides the civil High Court and the Small Estate
Distribution Section (Afiqah & Mohamad, 2011). The corporation is statutory empowered
under the Public Trust Corporation Act 1995 (PTCA) to issue letters of representation to the
applicant in estate administration. The jurisdiction of ARB covers the value of movable asset
below RM600,000.00 in both testate and in testate cases. These type of estates falls under the
category of summary estate. There are two types of letters of representation issued by ARB,
namely Declaration and Direction Order. Declaration Order is specified under section 17(1)
of PTCA which states:

1) Whenever any person dies, whether testate or intestate leaving movable property in
Malaysia and the Corporation is satisfied after such investigation as it deems sufficient—
(a) that the total value of the property without deduction for debts, but not including the value
of any property which the deceased possessed or was entitled to as trustee and not
beneficially, does not exceed six hundred thousand ringgit; and

(b) that no person is entitled to apply to the Court for grant of probate of will or no petition
for letters of administration is pending, the Corporation shall, upon the application of a
person making a claim on the property and if it thinks fit to do so, by writing declare that it
undertakes to administer the property, and thereupon the Corporation shall be empowered to
administer the property.

Under this section, the corporation is authorized to issue a Declaration Order upon the
application from the beneficiary. In addition, this section confers a slight difference between
Declaration and letters of representation issued by the High Court or Form E issued by the
Small Estate Distribution Section (SEDS). The Declaration Order, empowers ARB not only to issue a letter of representation, but also empowers the corporation to administer the deceased’s estate. The term ‘administer’ includes a collection of tasks including execution and distribution of estate. This denotes the role of ARB not only as the issuer of letter of representation, but also assign itself as the personal representative. As comparison, letters of representation by the High Court or SEDS only formalize the appointment of personal representative. The role of these institutions are discharged upon the issuance of such letters. The letters from the two institutions actually differs to the Declaration Order issued by the corporation in this context. As the corporation is assigned as the personal representative, the task of the corporation continues after the issuance of the Declaration Order. In fact, the corporation is duty-bound to administer the deceased estate to its completion.

Direction Order on the other hand, governs the jurisdiction of estate where the value of the movable asset is less than RM50,000. As stated in section 17(2) (a) of the act:

(2) (a) When the Corporation is satisfied that the value of any property referred to in subsection (1) does not exceed fifty thousand ringgit, it may direct that the same or any part thereof be delivered to any person or persons on being satisfied as to the title of the claimant and value of the property by the oath or affirmation of the claimant or by such other evidence as the Corporation may require and the Corporation may in its discretion take such security as it thinks proper for the due administration of the property or the protection of the rights of any other person.

Direction Order is different from Declaration Order not only in terms of the value, but also in terms of effect on the deceased’s administration. In practice, issuance of Direction Order allows the beneficiaries to go and retrieve the deceased’s asset from the related institution by themselves. This is similar to the issuance of Form E by the SEDS which upon such issuance, the beneficiary will use the document to procure the deceased’s estate. In other words, the execution and distribution will be handled by the beneficiaries themselves literally. The involvement of ARB ceased upon the issuance of Direction Order. The selection of administration of deceased’s vehicle under section 17(1) or section 17(2) is
dependent on its value. In cases involving deceased Muslim, ARB will require the applicant to obtain the Fara’id certificate even in cases involving the administration of a single vehicle.

4. Administration and Distribution of vehicle

Administration and distribution of the vehicle involves a different scenario as compared to other types of asset. Although it employs a similar method to the land transfer and shares which involves a registration of beneficiary as the new owner, the transfer of vehicle only allows for one name to be registered in the vehicle registration, which is reflected through vehicle registration document. Through the transfer process, the ownership of the vehicle shifts from the deceased to the named beneficiaries as the new owner or the vehicle. Such however, can only be done should there is no outstanding or unpaid car loan balance. If there is an outstanding amount as to the carloan, the said amount must be settled first. This can be done either through the settlement via car insurance, or through payment from the beneficiary.

Since the car can only be registered under one name, other beneficiaries cannot obtain ownership of the car. Should the other beneficiaries insists over the car, the only method to obtain the share from the vehicle is by selling the car as part of liquidating the asset. The proceeds from the sale will then be distribute to the beneficiaries in accordance to their distribution portion. There are two sale methods which normally being practiced. The first practice involve selling the vehicle to the third party where the proceeds will be divided accordingly. The second practice involve the purchase of the vehicle by one of the beneficiary, normally whose name is registered as the new owner of the vehicle. The recipient of the vehicle will either incur his own money to pay for the vehicle price, or in cases involving other type estate, the recipient will deduct certain amount from his portion in exchange of obtaining the said vehicle. This however, can only be done upon the mutual consent from all beneficiaries.

5. Vehicle Transfer Procedures

Since the deceased vehicle is part of his estate, such vehicle cannot be disposed through sale or transfer to the parties, prior to the transfer of ownership. Even if the beneficiaries agree for the car to be sold, such transaction cannot be done prior to the transfer
of ownership from the deceased to the beneficiary. Such transfer process must comply with the rules set by the Road Transport Department (RTD). There several documents which needs to be provided by the applicant for the transfer process. The main document is the letters of representation obtained either from the high Court, Small Estate Distribution Section or ARB. Others include the deceased and recipient’s Identification Card, the vehicle registration card as well as the form provided by RTD known as the JPJ K3A form. Transfer process will take place upon the sufficiency of the documents, together with the payment of certain sum, being transfer process fee. One thing to note is that, the Fara’id is not required at all in cases involving deceased Muslim since the rules of Fara’id or mutual covenant does not apply due to the rule of single recipient registration. Once the transfer process takes place, the name of the new owner will be made available in the vehicle registration card, signifying him as the new owner. From this point, the new owner can dispose the vehicle through sale or transfer the vehicle to the third party, according to his wishes.

The rule set by the RTD states that the transfer process must be applied personally by the recipient. This is because, the process will involve the recipient’s finger print verification in the database system. In cases involving administration by ARB, the corporation will prepare the required documentation and hand it over to the recipient for the actual transfer process which needs to be done at the RTD office.

6. Complications and Implications

There are a lot of cases involving the administration of deceased’s vehicle per se. despite the fact that the deceased pass away leaving a single car, such vehicle is considered as his estate, and therefore, must be administered in similar manner to other types of deceased’s estate. The core requirement in this case is the ability to produce the letters of administration. Since the scope of this paper is limited to the application of declaration and Direction Order under section 17 of PTCA, the involved cases covers the vehicle below the value of RM600,000.00. The scope of this paper is also limited to cases involving deceased Muslim. For cases involving deceased Muslim, complication occurs in the different requirement set by two institutions, namely the RTD and ARB.
Transfer of vehicle’s ownership from the deceased to the beneficiary requires the letters of representation from any administrative bodies, including ARB. However, ARB has set the a ruling that the application for letters of administration involving deceased Muslim requires the applicant to obtain the Fara’id certificate as part of the required document. On a contrary, application without Fara’id certificate would most likely be set aside as it is the requirement of the corporation. In practice, the transfer process at RTD does not require procurement of Fara’id certificate since only one name can be transferred. This render the application of Fara’id, ineffective since the Fara’id distribution method cannot be applied in this matter. Therefore, requirement by ARB as to the Fara’id certificate is considered baseless and cause burden to the beneficiaries as they cannot proceed with the administration without such document.

The requirement forced the beneficiaries to incur additional time, cost and commitment in obtaining Fara’id certificate, which is not part of the required document for the purpose of ownership transfer. although the time and cost for the application and issuance of Fara’id certificate is not overwhelming, requiring the beneficiaries to give commitment in finding a suitable time for all members to be available to attend the hearing session would be difficult. This discourages the beneficiaries from initiating with the administration, especially in cases involving a low value of vehicle. Moreover, there are people who is skeptical about dealing with syariah court. They felt intimidated, insecure and unconfident to deal with the syariah judiciary, thinking that they might be prone to a punishment for any wrongdoing from the court. The wrong perception about the syariah court sometimes led to the delay in commencing with the estate administration. Such social attitude is part of the causes for the unwanted delay in estate administration as mentioned by Rashid, Hassan & Yaakub, (2013). Overall, it is the unawareness of the beneficiaries’ rights and obligations in estate administration that contributed to the frozen asset in Malaysia (Noraini et al., 2012). Consequently, no effort is made as to transfer the ownership of the vehicle as the deceased remained as the owner of the vehicle.

Such reluctant in initiating with the estate administration could bring adverse implications to the beneficiaries. First off all, the vehicle cannot be transfer or sold to the third party due to the vehicle status which still under the ownership of the deceased. No valid transaction as to the vehicle can take place, so long as administration is not commenced.
Stalling the administration will also decrease the value to of the vehicle due to the depreciation factor. This will lead to an economic loss, especially if the beneficiaries wish to sell the vehicle. Another implication is that renewal of the vehicle road tax and insurance cannot be done after certain amount of time. According to the policy set by RTD, the beneficiaries can renew the deceased’s road tax vehicle twice a year, up to three years from the date of the last renewal. Administration of the vehicle should therefore be made prior to the expiration of the said period.

Without renewing the insurance of the vehicle, the driver is exposed to a grave danger since the vehicle is not indemnified. The driver will not be able to claim for the insurance if the vehicle involve with an accident. Not to mentioned that driving the car without a valid road tax is an offence and can be penalized by the authority. in general, failure to the commence with the administration of the deceased’s estate, even if it only involve a single vehicle will only add up to the list of estate left administered in Malaysia which has reached up to sixty billion ringgit, as reported by the government.

7. **Suggestions**

The ongoing issue has been causing difficulty to the public where some of them felt discouraged to commence with the administration. A prompt action must be taken in order to remedy this problem. Based on the identified issue, there are several improvement which could be proposed towards remedying this issue.

The first suggestion involves changing the policy of the ARB in requiring Fara’id Certificate as part of the document for estate administration application. It is understood that even though Fara’id certificate is not applicable during the vehicle transfer process, the said certificate is important as to determine the existing heirs, as well as their prescribed portion, should the vehicle is eventually sold. Without prejudice to undermine the importance of Fara’id certificate, the writer believes that the corporation has the similar capability in determining the entitled heirs as well as their entitled Fara’id portion. ARB possesses the expertise to do the Fara’id calculation since they role as personal representative requires them to be familiar with the formula, when dealing with the estate of the deceased Muslim.
In addition, ARB possesses a link with the National Registration Department which allows them to conduct a search over a status of a person through the database. With the sufficient capability owned by the corporation, the requirement for the Fara’id certificate maybe waived. In exchange, it is the corporation self which could determine the entitled heirs and their prescribed portion under Fara’id. The corporation circulation and policy must be amended so that appointment for estate administration under section 17 can be made without producing Fara’id certificate as part of requirement. The focus here is to minimize hardship on part of the beneficiaries from having to deal with several institution. For this reason, suggestion is made as to empower the corporation to produce an order similar to the Fara’id certificate where such order is limited only for the application by ARB under section 17. Such order can either be produce through a production of a different certificate or, by integrating the Fara’id information into the Declaration and Direction Order respectively. The officer who indorse such Fara’id information should be among the officers who are competent and possess expertise in Fara’id knowledge. As such, the officers must be properly certified, similar to the concept of the ARB officers who are gazette which enable them to properly represent the corporation in discharging their duties.

As an alternative, the same Fara’id certificate can be issued by the syariah court officer through the collaboration between syariah court and ARB. For example, the ARB can provide a venue for the syariah court judges to have a hearing session, specifically for cases under section 17 of PTCA. The similar concept of circuit court can be adopted which enable the issuance of Fara’id certificate in a speedier manner, which at the same time reduce the burden for the beneficiaries from having to deal with multiple institution at different location.

8. Conclusion

The difficulty as to administration of the deceased’s asset is subjected to case by case basis. Cases involving the administration of vehicle on the other hand, does not involve a complex procedure, compared to other type of estate such as immovable asset. With a sufficient documentation, the vehicle can be transferred to the named beneficiary within a short time. However, the requirement set by ARB in demanding the Fara’id certificate seems to add unnecessary burden to the beneficiaries since the purpose of the certificate in this case, is more towards the confirmation of the entitled beneficiaries. Such confirmation of
beneficiaries could be made by ARB in addition to the calculation of Fara’id. The fact the Fara’id certificate is not required for the transfer process under the RTD clashes with the requirement set by ARB. Such inconsistency between the two institutions should be remedied immediately.

The proposed ideas focuses on the centralization of the administration under a single institution which could speed up the process time and reduce the hierocratic difficulty on part of the beneficiaries in applying for the administration. Administration of estate involving deceased Muslim should not be seen as a complicated and bureaucratic as opposed to the administration of non-Muslim. In fact, a good collaboration from the related institution including the Syariah Judiciary body could improve the administration of the estate overall system which could benefit the public. A good and easy to handle system could encourage the public to proceed with the estate administration, avoiding the problem about unmanaged estate.

References


Abstract

The Equal Opportunity Rule is the foundation of takeover laws in both the United Kingdom and Malaysia. Its key influence is towards the forms of shareholders’ protections in both jurisdictions. Under the rule, fairness in takeover proceedings is considered achieved through affording equal treatment to all shareholders of the target company. The notion of equality favours shareholders and imposes higher burden on the acquirer to ensure all shareholders are treated alike. Despite various criticisms, proponents of the rule maintains that the benefits derived from the application of the rule outweigh harms that it causes and necessary to protect shareholders of the target company from greater harms that takeover might causes in the absence of the protections.

Keywords: takeover, equal opportunity rule, mandatory bid rule, sharing rule, shareholder’s protection,
1.0 Introduction

A shift of corporate control via takeover presents real risk to target company’s minority shareholders of being placed in an unwarranted position. This is more imminent especially when an acquirer who newly gained control over a company intends to change the company’s status quo. For such reason, many jurisdictions had incorporated into their mercantile laws, mechanisms to regulate takeover with a view to protect interests of minority shareholders but at the same time cautiously do so, in order not to make takeover less attractive or put the person who intends to acquire or newly acquired control over a company at grave disadvantage.

Different jurisdictions may have different approaches in safeguarding the interests of minority shareholders during takeover proceedings. Some jurisdictions impose obligations on an acquirer to undertake certain compulsory measures to ensure that acquisition of corporate control by him is not at the expense of minority shareholders of the company. Some other jurisdictions impose obligations on management of the target company to act in the best interest of the company to get the best deal available in the market and create competitive takeover environment as protective measures.

From these two competing perspectives, two distinct rules were developed namely the Equal Opportunity Rule (EOR) which is currently dominant among the European Community and the Market Rule (MR) which is now prevailing in the United States of America. The EOR focuses on the acquirer’s responsibilities while the MR concentrates on director’s duties and competitiveness in takeover deals. In this paper, we analyse the EOR, history of its existence, how it differs from the MR, rationales for its formation and its impacts towards the shaping of takeover laws in Malaysia particularly from the perspective of how the rule contributed towards the forms of protection to minority shareholders’ interests. Malaysia shares a lot of common features with the English Law on takeovers and mergers. Thus the law in the UK will also be referred whenever relevant.

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2.0 The Equal Opportunity Rule and Its Application in the UK and Malaysia

2.1 The historical background of the Equal Opportunity Rule

The EOR, also referred to as the Mandatory Bid Rule or the Sharing Rule, has an origin which could be traced back in parallel with the history of the UK’s takeover regulatory regime specifically the City Code on Takeovers and Mergers (City Code). It essentially refers to a rule in takeover law that an acquirer has an obligation during takeover proceedings to afford the same treatment to all shareholders of a same class in the target company. This rule therefore, imposes duties on an acquirer, during takeover proceedings, to give due regards not only to the shareholders from whom he gained control in the target company by purchasing their shares (blockholder) but also to the remaining shareholders of the target company.

For purposes of this paper, we will refer to the rule as the EOR so as not to create confusion with reference to the Mandatory Bid Rule or the Sharing Rule which in our view, have specific meanings under the law of takeover. Apart from that, it is in our opinion, as we will discuss later that the terms are not synonyms but rather the Mandatory Bid Rule and the Sharing Rule are subsets or consequences of the EOR.

The pre-1950s corporate world in the UK witnessed that takeover activities were effected on mutual basis. The introduction of compulsory acquisition right in the UK’s Companies Act 1929 following recommendation from the Greene Committee, the insertion into the same Act of a company’s obligation to make public its earning and sale of shares below its actual price due to increase in tax that led directors to reduce distribution to shareholders and hoard cash in companies for tax and companies’ expansion had collectively enticed the beginning of hostile takeover in the UK in 1953.

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3 IoannaBalta: 13-14.

The emergence of hostile takeover together with other factors including transformation of corporate economy from family-controlled businesses into modern large corporations in which ownership and control had separated had called for the formation of regulation to govern takeover which prior to that were not given much attention as it did not raise much concern or dispute because they were largely consensual. During that period, the unregulated takeover field allowed an acquirer to control takeover proceedings by purchasing shares on a first-come-first-served basis, at a very cheap price compared to the assets that companies had, without providing shareholders with sufficient information about the takeover and within the period solely determined by the acquirer. Such unregulated field had given much benefits to the acquirer but put the shareholders at a handicap position.

To overcome the issues, among the initiatives taken was by the Governor of the Bank of England who convened a conference in 1959 to deliberate the formation of a code of conduct to regulate takeover offers on the basis that takeovers would be beneficial to the economy if correctly regulated. This subsequently led to the publication of the "Notes on Amalgamations" on 31 October 1959 by the Issuing Houses Association at the instance of the Bank of England in conjunction with a several other institutions which became the first attempt to self-regulate takeover arena and in many ways shaped the form of the subsequently published City Code.

Few years later, following several discussions between the Governor of the Bank of England and the Chairman of the Stock Exchange in August 1967, the Issuing Houses Association reconvened the City Working Party which had produced the Notes on Amalgamations with a view to improve the Notes. The drafting committee met during October 1967 and drew up a draft "code" which, after amendments and agreement by all the associations, was published and took its effect on 27 March 1968 as the City Code. Further,
to address the lack of respect shown to the earlier Notes on Amalgamations, a "Panel" was simultaneously established to supervise the administration of the City Code and give authoritative rulings and advice on its application with an aim to ensure fair treatment for all shareholders in takeover bids.

When it was first established in 1968, the City Code consisted of 10 General Principles, the first of which stated, “All shareholders of the same class of a target company must be treated similarly by the offeror” while the eight General Principle stated, “Rights of control must be exercised in good faith and the oppression of a minority is wholly

9 Andrew Johnston: 442.
12 The remaining 8 principles are:

1) …;
2) During the course of an offer, or when an offer is in contemplation, neither an offeror, nor the target company, nor any of their respective advisers may furnish information to some shareholders which is not made available to all shareholders. This principle does not apply to furnishing information in confidence by the target company to a bona fide potential offeror or vice versa;
3) An offeror should only announce an offer after the most careful and responsible consideration. Such an announcement should be made only when the offeror has every reason to believe that he can and will continue to be able to implement the offer: responsibility in this connection also rests on the financial adviser to the offeror;
4) Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision and must have sufficient time to do so. No relevant information should be withheld from them;
5) Any document or advertisement addressed to shareholders containing information or advice from an offeror or the board of the target company or their respective advisers must, as is the case with a prospectus, be prepared with the highest standard of care and accuracy;
6) All parties to an offer must use every endeavor to prevent the creation of a false market in the securities of an offeror or the target company. Parties involved in offers must take care that statements are not made which may mislead shareholders or the market;
7) At no time after a bona fide offer has been communicated to the board of the target company, or after the board of the target company has reason to believe that a bona fide offer might be imminent, may any action be taken by the board of the target company in relation to the affairs of the company without the approval of the shareholders in general meeting, which could effectively results in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.
8) …;
9) Directors of an offeror and the target company must always, in advising their shareholders, act only their capacity as director and not have regard to their personal or family shareholding or to their personal relationships with the companies. It is the shareholders’ interests taken as a whole, together with those of employees and creditors, which could be considered when the directors are giving advice to shareholders; and
10) Where control of a company is acquired by a person, or person acting in concert, a general offer to all of the shareholders is normally required; a similar obligation may arise if existing control (a holding over 30%) is consolidated. Where an acquisition is contemplated as a result of which a person may incur such an obligation, he must before making the acquisition, ensure that he can and will continue to be able to implement such an offer.
unacceptable‖. These principles became the foundation of the EOR\textsuperscript{13} and the starting point of change in takeover regulatory regime in the UK which resulted in the formation of various safeguards to the interest of shareholders during takeover proceedings that we have in our modern regulatory framework today. The same principle with some modifications was later adopted by the European Community in 2004 through Directive 2004/25/EC of the European Parliament (EU Takeover Directive)\textsuperscript{14}.

2.2 The Equal Opportunity Rule vs the Market Rule

The EOR requires an acquirer who acts individually or in concert with other persons to make general offer for the entire shares of the target company for the same consideration once the acquirer obtains effective control over the company. This is distinguishable from the MR (also referred to as the Private Negotiation Rule\textsuperscript{15} or the Street Rule\textsuperscript{16}) in the sense that the MR confers maximum freedom on a company’s incumbent controller by permitting transfer of control be effected based on market arrangement through private agreements. The seller and the acquirer are free to trade shares on a price acceptable to both parties.

Unlike the EOR, the MR allows an acquirer to gain control of a company without any obligation towards the remaining shareholders. The seller is allowed to sell his shares at the best achievable price without any requirement to “share” the consideration paid by the acquirer to them with other shareholders. Similarly, the acquirer is not obliged to make an offer to the remaining shareholders to buy all their shares. Instead, he enjoys the freedom to choose whether or not to buy the remaining shares and at which price\textsuperscript{17}.

The most often justification given for adopting a particular rule in a jurisdiction is the shareholding structure in that jurisdiction. It was suggested that the main reason for the USA adopting the MR is because its corporations have dispersed shareholding structure while countries in the EU which adopt the EOR have concentrated shareholding structure. However, this is not always the case because study shows that corporations in the UK have dispersed shareholding structure like the USA. Hence, there is no conclusive reason on why a

\begin{itemize}
\item \textsuperscript{13}Nicholas Jennings: 39.
\item \textsuperscript{14}Ioanna Balta: 8.
\item \textsuperscript{15}Ioanna Balta: 10.
\item \textsuperscript{16}Hubert De La Bruslerie.
\item \textsuperscript{17}Ioanna Balta: 10-12. See also Edmund-Philipp Schuster: 4-13.
\end{itemize}
country adopts either the EOR or the MR but it rather depends collectively on market conditions, shareholding structure and commercial, cultural, moral and historical background of that particular country\textsuperscript{18}.

2.3 The Equal Opportunity Rule in the UK’s Takeover Regulatory Regime

The City Code is the main instrument which governs takeovers in the UK since its first establishment in 1968. It was initially a stand alone instrument without any force of law with objectives “to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be achieved”\textsuperscript{19}. After almost 40 years operated as a soft law which depended on public censure\textsuperscript{20} as the main sanction against non-compliance and after undergoing more than five times revisions, the City Code finally had statutory basis in 2006 following the UK’s implementation of the EU Takeover Directive through Part 28 of the UK’s Companies Act 2006\textsuperscript{21}.

The current 11\textsuperscript{th} edition of the City Code is based upon 6 General Principles\textsuperscript{22} with the first General Principle, which is in pari materia with Article 3(1)(a) of the EU Takeover Directive, preserves the EOR in the City Code. It requires the equal treatment of all the holders of the securities, of the same class in the offeree company.

2.4 The Equal Opportunity Rule in the Malaysian Takeover Regulatory Regimes

In Malaysia, takeover activities are now mainly governed by Division 2 of Part VI of the Capital Market and Services Act 2007 (CMSA) (following the repeal of Division 2 of Part IV of the Securities Commission Act 1993\textsuperscript{23}) and the Malaysian Code on Take-Overs

\textsuperscript{18}Ioanna Balta: 11.
\textsuperscript{20}Andrew Johnston: 444.
\textsuperscript{21}Section 942 provides for the establishment of the Takeover Panel while Section 943(3) provides statutory basis for the City Code.
\textsuperscript{23}see Section 7 of the Securities Commission (Amendment) Act 2007 which took effect on 1 April 2010.
and Mergers 2010 (2010 Code) issued pursuant to Section 217(1) of the CMSA (following the revocation of the Malaysian Code on Take-overs and Mergers 1998 (1998 Code)).

The current 2010 Code which came into force in 15 December 2010 is the successor of the 1987 version of the Code that was introduced in 1 April 1987. Under the 1987 Code, a panel, similar to the UK’s Takeover Panel was set up to oversee and regulate matters relating to mergers and takeovers in accordance with the 1987 Code. However, when the Securities Commission (SC) was established by the Securities Commission Act 1993, the role of the panel was assumed by the SC and the panel was subsequently dissolved. After being revised twice through the 1998 Code and finally the 2010 Code, the latest Code “seeks to strengthen investor protection and institute higher standard of governance in takeover and merger exercise”.

The original 1987 Code was substantially influenced by the English takeover law and regulatory framework which, as discussed earlier, promotes the EOR. Although the new 2010 Code was founded upon the Australian takeover law objectives which embraced the Eggleston and Masel Principles, the 2010 Code still succeeded the EOR from the 1987 Code and preserves it in Section 217(5)(c) of the CMSA 2007.

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24 see Section 45 of the 2010 Code.
26 Mushera Ambaras Khan: 17.
28 Eggleston Principles:
1) The holders of shares in a company:
   a) know the identity of any person who proposes to acquire a substantial interest in the company;
   b) have a reasonable time to consider any proposal to acquire their shares; and
   c) are given enough information to allow them to consider the merits of any proposal to acquire their shares.
2) As far as practicable, all shareholders have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through a proposal under which a person would acquire a substantial interest in the company.
29 Masel Principle: The acquisition of control over the shares in a company takes place in an efficient, competitive and informed market
30 section 217(5) … in administering the Code and exercising its powers under this Act, the Commission … shall have regard to the need to ensure–
   …(c) that fair and equal treatment of all shareholders, in particular, minority shareholders, in relation to the take-over offer, merger or compulsory acquisition would be achieved;
This is further supported by Section 8(1)(b) of the 2010 Code which requires persons involved in take-over offer, merger or compulsory acquisitions to provide fair and equal treatment to all shareholders, in particular the minority shareholders. This preservation becomes the main reason on why Malaysian takeover laws have mandatory offer despite it adopts Australian takeover law objectives which do not apply mandatory offer.

3. Influences of the Equal Opportunity Rule to the Forms of Shareholders’ Protection in Takeover in the UK and Malaysia

It is important to first highlight that the EOR is triggered once a person together with persons acting in concert with him acquired shares sufficient for them to have “effective control” over a public company. Acquisition of shares in a private company or in public company which does not lead to effective control is not subject to the EOR but is transacted in accordance with the MR even in countries which adopts the EOR including in the UK and Malaysia because the main object of the EOR is to protect interests of minority shareholders whereas acquisition of shares which does not lead to effective control does not pose risk to the interests of minority shareholders.

In this chapter we will discuss how the EOR influences the forms of shareholders’ protection in takeover in the UK and Malaysia. The answer to this question lies within the definition of “opportunity” in the EOR. The “opportunity or “treatment” that the acquirer has to equally afford to all shareholders of a same class in the target company during takeover proceedings refers to at least three important rights of the minority shareholders enshrined in both the City Code and the 2010 Code which details are in the following:

3.1 Exit Right

When change of control in a company is likely to take place, which is triggered when an acquirer gained shares in a company of specific percentage determined by regulatory regime in the respective jurisdiction, the remaining shareholders should be granted an equal right of disinvestment or opportunity to cease from being a shareholder of the target company by withdrawing or liquidating their investment. This right, also known as the “exit right” is given to the remaining shareholders by ways of imposition against the acquirer, the
requirement to make mandatory general offer and by giving minority shareholders the bought out right upon fulfilment of certain preconditions. In this respect, Andrews said:
Whenever a controlling shareholder sells his shares, every other holder of shares (of the same class) is entitled to have an equal opportunity to sell his shares, or a pro-rata part of them, on substantially the same terms. Or... before a controlling stockholder may sell his shares to an outsider he must assure his fellow stockholders an equal opportunity to sell their shares, or as high a proportion of theirs as he ultimately sells of his own.31

a) Mandatory Offer

Mandatory offer or mandatory bid is a compulsory requirement imposed by the law against an acquirer who has acquired certain percentage of voting shares or rights in a public company, to make a general offer to purchase the remaining issued voting shares or rights of the company which are not yet his. As stated in the introductory part of this paper, due to this specific meaning of mandatory offer, we are of the view that it is inaccurate to equate Mandatory Offer/Bid Rule with the EOR since it is only one of the “opportunities” that the acquirer is required to afford the remaining shareholders during takeover proceedings. Hence, mandatory offer is a specie while the EOR is the genus.

The philosophy behind mandatory offer is mainly to protect the interest of minority shareholders of the target company but at the same time also benefits the acquirer by increasing the likelihood of the acquirer securing 100% control over the company and reducing prospect of competing offer from other offeror at the expense of the initial acquirer32. Unlike a voluntary offer in which the offeror is generally at liberty to determine the terms of the offer as he deems fit, the terms of a mandatory offer are dictated by law.

In the UK, Rule 9.1 of the City Code provides that mandatory offer is triggered when

(i) any person, together with persons acting in concert with him, acquire an interest in 30% or more of the voting rights of a company; or

32 Mushera Ambaras Khan: 37.
(ii) any person, together with persons acting in concert with him, is interested in 30% up to 50% of the voting rights of a company in aggregate, and such person or any person acting in concert with him acquires interest in any other shares which increases the percentage of shares carrying voting rights in which he is interested.

<table>
<thead>
<tr>
<th>Year ended</th>
<th>Number of Mandatory Bid</th>
</tr>
</thead>
<tbody>
<tr>
<td>31 March 2011</td>
<td>9</td>
</tr>
<tr>
<td>31 March 2012</td>
<td>7</td>
</tr>
<tr>
<td>31 March 2013</td>
<td>4</td>
</tr>
<tr>
<td>31 March 2014</td>
<td>5</td>
</tr>
<tr>
<td>31 March 2015</td>
<td>9</td>
</tr>
</tbody>
</table>

Figure 1: Statistics of mandatory bid in UK from 2010 to 2014

The Malaysian equivalent provision on mandatory offer can be found in Section 9(1) of the 2010 Codes which provides that mandatory offer also applies in 2 scenarios namely:

(i) where an acquirer has obtained control in a company through whatever means; or
(ii) where an acquirer, who holds at least 33% but not more that 50% of the voting shares or rights of a company acquires more than 2% of the voting shares or rights of the company through whatever means within the period of 6 months.

Based on the above provisions, the first scenario that triggers the obligation to make mandatory offer in the UK is when an acquirer and person acting in concert with him acquire interest in 30% or more of the voting shares or rights of a company. In Malaysia, the threshold is a little bit higher as Section 216(1) of the CMSA defines the term “control” to

essentially mean the acquisition, holding or entitlement to exercise or control the exercise of more than 33% voting shares or rights.

The second scenario that give rise to mandatory offer which is unique to Malaysia but no longer available in the UK is “creeping takeover”\(^{38}\) i.e. the gaining of control in a company by gradual acquisition of the company’s shares. Gradual acquisition of shares can be made through various means including purchase from the stock exchange, private treaty or even from an earlier offer which failed to reach 50% acceptance. In such situation, when the person’s shareholding reached at least 33% but not more than 50% of voting shares or rights, the requirement to make mandatory offer will trigger if he further acquires more than 2% of voting shares or rights of the company within any period of 6 months.

Nevertheless in the UK, the Takeover Panel is empowered under Paragraph 2(c) of Section A of the City Code to grant a waiver to a person from the application of a rule including rule on mandatory offer while in Malaysia, the SC is empowered to give exemption under Section 219(1) of the CMSA.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Application for Exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010(^{39})</td>
<td>22</td>
</tr>
<tr>
<td>2011(^{40})</td>
<td>26</td>
</tr>
<tr>
<td>2012(^{41})</td>
<td>25</td>
</tr>
<tr>
<td>2013(^{42})</td>
<td>28</td>
</tr>
<tr>
<td>2014(^{43})</td>
<td>17</td>
</tr>
<tr>
<td>Q3 2015(^{44})</td>
<td>12</td>
</tr>
</tbody>
</table>

Figure 2: Statistics of application for exemption from mandatory offer processed by the SC in Malaysia in 2010 – 2014

\(^{38}\)MusheraAmbaras Khan: 40-41.
\(^{41}\)Securities Commission Annual Report 2012.
b) Bought Out Right

The bought out right refers to minority shareholders’ right which correspond to acquirer’s right of compulsory acquisition. Under the UK and Malaysian law, an acquirer who had successfully secured interest in at least 90% of the target company’s voting shares or rights through takeover offer is given an option to compulsorily acquire the remaining 10% voting shares or rights so as to gain 100% control over the target company and eliminate any need to consider minority shareholders’ voice. On the contrary, the bought out right is given to minority shareholders to “force” the acquirer to purchase the remaining 10% voting shares or rights so that they may exit from the company if the acquirer did not exercise his compulsory acquisition right.

In the UK, the acquirer’s right to compulsory acquisition or squeeze out the minority dissenting shareholders exists since 1929. It came into existence following the Greene Committee’s recommendation to eliminate the risk of “oppression of the minority” which was incorporated into Section 155 of the UK’s Companies Act 1929 that the acquirer is allowed to compulsorily acquire the remaining shares belonging to minority shareholders once he had successfully acquired at least 90% of the target company’s voting shares or rights.

In 1945, with a view to strike a balance between acquirer’s interest to have 100% control over the target company and protection of minority shareholders’ interest, the corresponding right was conferred to minority shareholders to be bought out by the acquirer by way of insertion of the right into the UK’s Companies Act 1929 pursuant to recommendation by the Cohen Committee’s Report on Company Law Amendment.

Although the 1929 Companies Act has now been repealed, the UK Companies Act 2006 retains the minority shareholders’ right to be bought out by the acquirer under Section 983(2). Such right is generally exercisable by the dissenting shareholders subject to conditions that the acquirer’s shareholding of at least 90% in the target company must have been as a

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45 Andrew Johnston: 424.
46 Mushera Ambaras Khan: 103.
result of a previous takeover offer and that such rights is exercised within the period of 3 months\textsuperscript{48} from the expiry of the offer from which the acquirer obtained the 90% threshold.

In Malaysia, the bought out right is provided under Section 223(1) of the CMSA. The conditions which an offeror must fulfil is similar to the one in the UK. \textsuperscript{49}

There are several rationales for giving equal exit right to existing shareholders of a target company either by way of mandatory offer or through the bought out right when change of control occurs. The rationales are grounded on the basis that shift of control changes the nature of investment of the existing shareholders via the following means\textsuperscript{50}:

i) the acquisition of control in a company without a dominant shareholder may lead to a major change in the organisation and management of the company. As per the status quo, the affairs of the company are managed by the incumbent management, with no one shareholder being able to employ pressure over the decision making process. When an acquirer gained control, he is capable of procuring that the company is manage in accordance with his wishes. The nature of the investment by existing shareholders has therefore shifted from a share in an independent company to a share in an acquired target;

ii) the new controller may set up a different corporate agenda which present the prospect that the company will be run to suit the acquirer's objectives. For examples, a company which had been investing in low risk sectors and now ventures into high risk investments may not suit the risk appetite of the existing shareholders which prefer low but stable income. Another example is a company which is a manufacturer of security system components and now involves in manufacturing components used for spy, intelligence and military purposes may not suit the moral and ethical conscience of existing shareholders;

iii) there is also probability that the company will instead be managed to the disadvantage of the minority shareholders both in terms of a reduced shares’ value on the market and fraud on the minority. As shares’ value depends on assets of a company and its management, the value may depreciates due to mismanagement or simply because of the acquirer’s poor reputation among market participants. The position of minority shareholders would be even

\textsuperscript{48}Section 984(2) of UK’s Companies Act 2006  
\textsuperscript{49}the acquirer’s shareholding of at least 90% in the company must have been as a result of a takeover offer.  
\textsuperscript{50}Nicholas Jennings: 41-43.
worse if the acquirer's intention is actually to "loot" the company by stripping it of any valuable assets; and

iv) the new controller may even decides to privatise the company which make the shares of the company illiquid. This make it difficult for the minority shareholders to liquidate their investment after the target company was privatised.

Such changes in the nature of investment may happen against the wishes of the minority shareholders, removing the choice factor in their original investment in the target company. In this regards, the exit right reinstates the minority shareholders' choice so that they may decide whether to remain as a minority or leave the company. Further, in pre-empting prospective harm or injurious behaviour by the new controller against the minority shareholders, the aim of the EOR in providing an exit is to prevent the minority from coming into existence on an acquisition of control without their will.51

3.2 Right to Premium

The second right arises from the EOR is that all shareholders of the same class in the target company should be entitled to an equal amount of premium paid by the acquirer in consideration of control. This is often referred to as the “Sharing Rule” i.e. any premium the acquirer pays to the blockholder also has to be offered to the remaining shareholders, forcing the blockholder to share “his” premium with his fellow shareholders52. Due to this specific meaning of Sharing Rule, we mentioned in the introductory part of this paper that it is inaccurate to equate it with the EOR since it is only one component of the EOR.

In Malaysia, right to equal premium becomes one of the objectives of the 2010 Code as Section 217(5)(c) of the CMSA provides that the SC, in administering the 2010 Code and exercising its powers under the CMSA, shall ensure that, “so far as practicable, all shareholders of an offeree have equal opportunities to participate in benefits accruing from the take-over offer, including in the premium payable for control”.

51Nicholas Jennings: 42.
52 Edmund-Philipp Schuster: 6.
Shares are typically acquired at premium during a takeover because control over the corporation is a valuable “commodity” and brings with it the power to harness the activities of the company.\textsuperscript{53} Hence, an acquirer will be willing to pay above the market price also known as “premium” in return for a stake conferring control. Furthermore, the premium paid by the acquirer correspond to the value that the acquirer believes the target company possesses or at least the potential that it has in the future.

Equal opportunity to premium protects the target company’s shareholders from the perspective that the potential harms which that follows from a shift of control, as we have discussed above, may give no choice to the minority shareholders but to exit the company. When this happen, the minority shareholders are at the mercy of the acquirer in the sense that the acquirer may dictate price of the shares against the minority shareholders who have to either choose to sell their share at the price determined by the acquirer or remain as minority and face the potential harms from the takeover.

To prevent the acquirer from having an upper hand in the deal, the law interferes takeover proceedings by not merely providing exit opportunity but also regulate the terms through which the exit opportunity is exercised particularly the consideration provided by the acquirer. The law makes it incumbent upon an acquirer in a mandatory offer, compulsory acquisition and bought out to provide consideration equivalent to what he has paid for shares that he acquired within certain period prior to the making of the mandatory offer, compulsory acquisition or bought out.

a) Mandatory Offer

In the UK, consideration for mandatory offer is governed under Rule 9.5(a) of the City Code whereas in Malaysia, equivalent provision is Section 21(1) of the 2010 Code. Based on the said provisions, both jurisdictions requires that the consideration for mandatory offer must not be less than the highest price paid or offered to be paid by either the acquirer or person acting with concert with him for any voting shares or right to which the offer relates within the period of 12 months in the UK or 6 months in Malaysia prior to the mandatory offer. In addition, such consideration shall be paid in cash or if the consideration

\textsuperscript{53}Nicholas Jennings: 44.
is not solely in cash, the acquirer shall provide an alternative consideration of solely a cash sum\textsuperscript{54}.

b) Compulsory Acquisition

As discussed above, both the UK and Malaysia provide means for an acquirer to gain 100\% control over the target company via compulsory acquisition. Due to the sensitivity of the right which involves interference with the minority shareholders’ right to property, the compulsory acquisition right was inserted into the parent acts itself rather than merely in the takeover codes, which are subsidiary legislations.

Section 979(2) read together with Section 981(2) of the UK Companies Act 2006 provides that in compulsory acquisition, upon the giving of notice to the holder of shares by the acquirer on his intention to compulsorily acquire those shares, the acquirer is “entitled and bound to acquire the shares to which the notice relates on the terms of the offer”. The words “on the terms of the offer” is wide to cover terms relating to consideration. Hence, the acquirer is bound to provide consideration which is similar to the consideration offered in the previous takeover offer to which the compulsory acquisition relates.

The Malaysian equivalent provisions on consideration for compulsory acquisition of shares are Section 222(1) read together with Section 222(3) of the CMSA which in effect is similar to those of in the UK i.e. the consideration for the shares which are compulsorily acquired must be equivalent to the consideration offered in the previous takeover offer to which the compulsory acquisition relates.

c) Bought Out

The legal requirement concerning consideration for bought out in both the UK and Malaysia is similar to that of compulsory acquisition. Pursuant to Section 983 read together with Section 985(2) of UK Companies Act 2006 for the UK and Section 223(1) of the CMSA for Malaysia, the consideration offered by the acquirer in bought out must be the similar as per the previous takeover offer to which the bought out relates. Nevertheless, the parties are allowed to agree on other consideration on mutual basis.

\textsuperscript{54}Rule 9.5(a) of the City Code and Section 22(2) of the 2010 Code.
3.3 Right to Information

Most writers discussed the EOR from the perspective of the exit right and the right to premium only. However in our view, the rule is also relevant with regards to right of shareholders to obtain information on a takeover offer. Disclosure of information is essential to enable the shareholders to make proper assessment on whether or not to accept the offer while inadequate information might lead to shareholders accepting offer at a price substantially below the actual price of the shares as happened in the UK in 1950s that triggers hostile takeovers. In this respect, the EOR applies by ensuring each and every shareholder of the target company receive the exact same information relating to the takeover so that they can make their own evaluation and decision.

The second General Principle of the City Code requires that the offeree shareholders are given sufficient time and information to enable them to consider the takeover offer and to arrive at a properly informed decision. Similarly, The CMSA requires that the SC, in administering the 2010 Code and exercising its powers under the CMSA, shall ensure that the shareholders and directors of an offeree company are supplied with sufficient information necessary to enable them to assess the merits of any takeover offer.

The law imposes several obligations on acquirer and directors of the target company in ensuring that none of the shareholders of the target company is deprived of the right to make comprehensive assessment of a takeover offer. An acquirer is required to make an announcement on the offer that it proposes to make and to ensure that the information supplied to the target company’s shareholders in the offer document is sufficient to allow them to make informed decision. Apart from that, the law also requires the director of the target company to make announcement, provide its comment on the reasonableness of the offer and appoint independent advisor to give its recommendation on the offer.


56 See also the original second and fourth General Principle of the City Code in footnote 12 above.

57 *section 217(5)(a)(iii) of the CMSA*
a) Announcement

The City Code list down several circumstances in which announcement concerning a takeover offer is required to be made. The announcement is subject to conditions under Rule 2.7 of the City Code that the acquirer should announce its intention to make an offer only after the most careful and responsible consideration and when the offeror has every reason to believe that it can and will continue to be able to implement the offer. The details required to be inserted in the announcement are stated under the same Rule including the terms of the offer, the identity of the acquirer and all conditions or pre-conditions to which the offer or the making of an offer is subject to.

In Malaysia, the situations that trigger obligation to make announcement are enumerated in Section 11 of the 2010 Code which is supplemented by Practice Note 11.

b) Offer Document

<table>
<thead>
<tr>
<th>Year ended</th>
<th>Offers made</th>
<th>Resolved proposals(became wholly unconditional, lapsed or withdrawn)</th>
<th>Successful proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>31 March 2011</td>
<td>134</td>
<td>94</td>
<td>71</td>
</tr>
<tr>
<td>31 March 2012</td>
<td>103</td>
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<tr>
<td>31 March 2013</td>
<td>81</td>
<td>60</td>
<td>48</td>
</tr>
<tr>
<td>31 March 2014</td>
<td>61</td>
<td>43</td>
<td>33</td>
</tr>
<tr>
<td>31 March 2015</td>
<td>89</td>
<td>57</td>
<td>41</td>
</tr>
</tbody>
</table>

Figure 3: Statistics of takeover or merger proposals in UK from 2010 – 2014.

58 Rule 2.2 of the City Code.

The law dictates the contents of takeover offer document. Obligation to insert specific information in the takeover offer in the UK is found in Rule 24 of the City Code. Among the information required is information on the acquirer, the terms of the offer, all conditions to which the offer is subject, the acquirer’s intentions with regard to the future business and assets of the target company and the continued employment of the employees and management of the target company and of its subsidiaries.

In Malaysia, the offeror is required to disclose all information that the offeree shareholders and their advisers would reasonably require for the purpose of making an informed assessment as to the merits of accepting or rejecting the take-over offer and the extent of the risks involved in doing so”.

Further, Sections 12(5) and 12(6) read together with the First Schedule of the 2010 Code set the must have information that the acquirer has to insert in the takeover document which includes information on the offeror, the offeror’s intention on the continuation of the business of the target company, the major changes that it would introduce, the maintaining of the listing status of the target company, the invoking of

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71 Section 12(4) of the 2010 Code.
compulsory acquisition provision and the acquirer’s intentions with regard to the future business and assets of the target company.

c) Director’s Comments

The duty to provide information is not only imposed on the acquirer but also on the directors of the target company. In the UK, Rule 25 of the City Code states that the board of the target company must, within 14 days of the publication of the offer document, send a circular to shareholders of the target which shall set out, among others, the opinion of the board on the offer and the board’s reasons for forming its opinion.

In Malaysia, pursuant to Section 14(1) of the 2010 Code, the board of directors of the target company shall issue its comments, opinion and information on the takeover offer, including any other forms of consideration offered by the offeror, in a form of a circular to every target company’s shareholders within 10 days from the date that the offer document was dispatched to the target company’s shareholders. The circular shall also contain all information that the target company’s shareholders and their advisers would reasonably require and expect to find for the purpose of making an informed assessment as to the merits of accepting or rejecting the takeover offer and the extent of the risks involved in doing so.

d) Independent Advice Circular

Apart for issuing its own comments on the reasonableness of the takeover offer, the board of directors of the target is also required to appoint independent advisor to evaluate and provide comments on the soundness of a takeover offer. This serve as check and balance to the role of the board and to prevent the board from abusing their position and conspiring with the acquirer by recommending an unreasonable offer for the board’s advantage.

In the UK, Rule 3.1 of the City Code states that the board of the target company must obtain competent independent advice as to whether the financial terms of any offer are fair and reasonable and the substance of such advice must be made known to its shareholders. The Malaysian equivalent provision is Section 15(1) read together with Section 15(1) of the 2010 Code which provides that the board of directors of the target company shall appoint an

72 Section 14(2) of the 2010 Code
independent adviser to provide comments, opinions, information and recommendation on a take-over offer in an independent advice circular which shall be issued to among others, the shareholders of the target company within 10 days from the date the offer document was dispatched to such shareholders. Further, the contents of the independent advice circular have to be consented by the SC prior to its issuance to the shareholders.

<table>
<thead>
<tr>
<th>Year</th>
<th>Independent advice circular cleared by the SC</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010(^{73})</td>
<td>38</td>
</tr>
<tr>
<td>2011(^{74})</td>
<td>36</td>
</tr>
<tr>
<td>2012(^{75})</td>
<td>46</td>
</tr>
<tr>
<td>2013(^{76})</td>
<td>34</td>
</tr>
<tr>
<td>2014(^{77})</td>
<td>47</td>
</tr>
<tr>
<td>Q3 2015(^{78})</td>
<td>22</td>
</tr>
</tbody>
</table>

Figure 4: Statistics of independent advice circular cleared by the SC from 2010 – Q3 2015 in Malaysia

e) Disclosure of Information by Directors of Target Company to Offeror

It is interesting to note that in Malaysia in term of access to information, although the EOR is actually meant to protect minority shareholders’ interest in takeover, the 2010 Code somehow has a unique feature which is not available in the UK where it extends the equal right to information to the acquirers. Section 36 of the 2010 Code provides:


\(^{74}\) Securities Commission Annual Report 2011.

\(^{75}\) Securities Commission Annual Report 2012.


\(^{77}\) Securities Commission Annual Report 2014.

An offeree or board of directors of the offeree who gives any information, including particulars of offeree shareholders, to an offeror shall give the same information to another bona fide potential offeror upon request.

This unique feature indirectly benefits the shareholders in creating competitive environment that helps shareholders to get the best offer for their shares.

4. Criticisms to the Equal Opportunity Rule

Equality does not guarantee equity. Despite the protections that the EOR has afforded to minority shareholders of a target company in takeover, it has been criticised from many aspects because of deficiencies that it causes:

a) the equal premium requirement in mandatory offer, compulsory acquisition and bought out makes takeover becomes significantly expensive because an acquirer is obligated to purchase the remaining shares of the target company at the highest price he had paid for shares of the target company within the period of 6 to 12 months prior to a mandatory offer or at the terms of the offer to which the compulsory acquisition or bought out relates respectively. This makes takeover less attractive as the acquirer may not afford the increased cost of takeover and has to be certain that he has sufficient funds and ability to implement the mandatory offer, compulsory acquisition and bought out prior to making takeover offer;

b) mandatory offer reduces competitiveness because it lessen the prospect of participation by competitive offeror in takeover proceedings as they have to offer price which is higher or at least similar to the price of the mandatory offer which is already expensive. On the other hand, the non-competitive proceedings prevent rather than promote value-maximizing transaction. If the highest price paid within the period of 6 to 12 months prior to a mandatory offer was not an actual representation of the value of the company for example in distressed seller situation, the EOR would result in deprivation of shareholders’ right to premium despite of its original intention of protecting shareholders’ interests.

79 Ioanna Balta: 18-20, Edmund-Philipp Schuster: 7-8, Nicholas Jennings: 32-34.
Even in Australia itself where mandatory offer is not practiced, the Masel principle was criticised for being irreconcilable with the Eggleston principle\textsuperscript{80}. It is interesting to note that the 2010 Code, while inheriting and preserving the EOR from its predecessor, also incorporates the Masel principle which promotes competitiveness in takeover offer. There seems to be clear contradiction on the objectives of the 2010 Code which, at one hand, is aimed towards promoting competitiveness but at the same time requires equality of treatment to all shareholders;

c) in so much that the EOR tries to ensure equality between shareholders of a target company, it actually allows minority shareholders to free-ride on efforts of the blockholder. The blockholder’s entitlement to premium is justified on 2 main reasons firstly, shares conferring control worth more that minority shareholdings because it carries with it the power to harness the activities of the company and secondly, the blockholder had spent time, money and effort to negotiate the best achievable price for his shares. However, the minority shareholders’ entitlement to the premium is merely because of the EOR. This means that the EOR treats unequal shareholders equally which is not fair to the blockholder.

d) the EOR works on the presumption that the new controller will act to the detriment of minority shareholders\textsuperscript{81}. This presumption is obviously contradictory to the prevailing rule on giving the benefit of doubt unless there is evidence to suggest that the benefit is should not be afforded.

5. Conclusion

Based on the above discussion, it can be concluded that the EOR has significantly influenced and contributed to the formation of various protections for minority shareholders’ interests during takeover proceedings in both the UK and Malaysia. Such influence can be seen at least in three main aspects namely right of disinvestment, right to equal premium and right to information. This implies that the notion of equality in both the UK and Malaysia is predominant even if it makes takeover more expensive.

\textsuperscript{80} See Mushera Ambaras Khan, Azzal Isma Moideed, Sharon David Moreira and Azhana Khairuddin: 643.
\textsuperscript{81} Nicholas Jennings: 43.
We have to admit that there is no man-made rule without flaws. Without undermining the critics made against the EOR, at the very least we have to also recognise that the EOR had, for more than 50 years governed takeover arena in the UK and Malaysia and successfully protected the interest of shareholders, especially the minority shareholders from the harms present in the shifting of corporate control. Although the EOR seems to protect the shareholders in the offeree compared to the acquirer, we believe that such is necessary due to the reason that an acquirer always has an upper hand in term of economic capability as compared to shareholders especially individual shareholders in the offeree company.
THE DOCTRINE OF BASIC STRUCTURE OF THE MALAYSIAN CONSTITUTION: A STUDY OF FRAMEWORK

Hamid, N.A.*, Ismail Nawang, N.**, Salleh, K.*** & Makhtar, M.****

Abstract

The Federal Constitution of Malaysia (the Constitution) is an important piece of written law in the country. By virtue of article 4(1), it has been declared as the supreme law of the land i.e. the highest law in Malaysia and that every other law is subordinate to the Malaysian Constitution. In relation to this legal standing, the underlying sentiment is that the Constitution will be a permanent and abiding document. Nonetheless, the Constitution, like most of other written constitutions, is a living and vibrant document that may have to be amended in order to keep up with the contemporary social, economic and political needs of the society. And as of September 2015, the Malaysian Constitution has been amended 57 times by the Parliament since its inception in 1957, compared to only 27 amendments been made to the US Constitution since 1776. This has led to a contentious assertion that any provisions of the Constitution, including its basic structure, could easily be amended so long as all procedural requirements in articles 159 and 161 are followed. On the other hand, the opponent to this argument opined that certain constitutional provisions which have established the fundamental features of the Constitution such as the guarantees on fundamental liberties, the special position of Malays and natives and many others could not simply be amended by the Parliament if the proposed amendments may destroy its basic structure. In relation to this, this paper seeks to evaluate the doctrine of basic structure which has originally

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* Faculty of Law and International Relations, Universiti Sultan Zainal Abidin Kuala Terengganu. Email: maheranmakhtar@unisza.edu.my.
been developed by the courts in India. The study is largely based on doctrinal research as it is primarily concerned with the review of the provisions of the Constitution and reported cases that have been decided by the local courts. In addition, a comparative analysis with the development of the doctrine of basic structure in the Indian jurisprudence will be adopted since the doctrine has its root in India as well as the Indian authorities have been judicially accepted to be highly persuasive on the interpretation of the Constitution. It was found that in Malaysia since the Executive controls two thirds or more of the seats in the Dewan Rakyat, it may amend any part of the Constitution even if the amendment cuts cross or even destroys the basic structure of the Constitution.

**Keywords:** Malaysian Constitution, basic structure, constitutional amendment, Malaysia, India

### 1. AMENDMENT OF THE CONSTITUTION

As of September 2015, there have been 57 amendments to the Constitution of Malaysia since it was first enacted in 1957. Certain provisions in the constitution may not be practical or relevant as the time advanced due to the occurrences of changes in social, political and economic conditions, hence the amendment to certain provisions need to be done by the legislative so that it still relevant (Hamzah, 2009).

The Reid Commission Report (1957) stated that:

> ... amendments should be made by Act of Parliament provided that an Act to amend the Constitution must be passed in each House by a majority of at least two-thirds of the members voting. In this matter the House of Representatives should not have power to overrule the Senate. We think that this is a sufficient safeguard for the States because the majority of members of the Senate will represent the States... (p.34).

H.P. Lee (1978) wrote: “In subscribing to the adage that a constitution which cannot bend will ultimately be broken, one must also be aware of a constitution which is extremely easy to amend for it may turn out to be worse than having no constitution at all.” He observed that
some of the more fundamental amendments to the Malaysian Constitution has led to “a truncation of safeguards which had been considered by the Reid Commission as vital for the growth of a viable democratic nation”.

The provision to amend the Constitution falls under Article 159. The Constitution can be altered through an amendment Act supported by two-thirds of the members of Parliament. The Reid Commission framed it in such a way that an amendment would not be too difficult to the extent of frustrating the need for amendment, but at the same time, not too easy that it would end up weakening our constitutional safeguards.

2. AMENDMENT VERSUS BASIC STRUCTURE DOCTRINE OF THE CONSTITUTION

1. India

On the premise of Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225 (Kesavananda case) the Supreme Court of India outlined the basic structure doctrine of the Indian Constitution. In this case, Supreme Court ruled that all provisions of the constitution, including fundamental rights can be amended. However, the Parliament cannot alter the basic structure of the constitution like secularism, democracy, federalism, separation of powers. Often called the "Basic Structure Doctrine", this decision is widely regarded as an important part of Indian history. In Maneka Gandhi v. Union of India case AIR 1978 SC 597, the Supreme Court extended the doctrine's importance as superior to any parliamentary legislation. According to the verdict, no act of parliament can be considered a law if it violated the basic structure of the constitution. This landmark guarantee of fundamental rights was regarded as a unique example of judicial independence in preserving the sanctity of fundamental rights. The fundamental rights can only be altered by a constitutional amendment, hence their inclusion is a check not only on the executive branch, but also on the Parliament and state legislatures. The imposition of a state of emergency may lead to a temporary suspension of the rights conferred by Article 19 (including freedoms of speech, assembly and movement, etc.) to preserve national security and public order. The President can, by order, suspend the right to constitutional remedies as well.
In *R. Coelho v. State of Tamil Nadu* AIR 2007 SC 861 (*I. Coelho* case), the Supreme Court applied this doctrine and held that:

“All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a Constitutional amendment, its provision would be open to attack on the ground that they destroy or damage the Basic Structure if the fundamental right or rights taken away or abrogated pertains or pertain to the Basic Structure”.

### Table A: Features of Basic Structure according to judges in India

<table>
<thead>
<tr>
<th>No</th>
<th>Judge</th>
<th>Features of Basic structure</th>
</tr>
</thead>
</table>
| 1. | Sikri, C.J  
*Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 | o supremacy of the constitution  
o republican and democratic form of government  
o secular character of the constitution  
o separation of powers between the legislature, executive and the judiciary  
o federal character of the constitution. |
| 2. | Shelat, J. and Grover, J. | o mandate to build a welfare state contained in the Directive Principles of State Policy  
o unity and integrity of the nation.  
o the sovereignty of the country |
| 3. | Hegde, J. and Mukherjea, J. | o sovereignty of India  
o democratic character of the polity  
o unity of the country  
o essential features of the individual freedoms secured to the citizens  
o mandate to build a welfare state. |
| 4. | Jaganmohan Reddy, J.- | o sovereign democratic republic  
o parliamentary democracy  
o three organs of the State |
| 5. | Justice K.K. Thomas | o power of judicial review |
| 6. | Justice Y.V. Chandrachud | o unamendable sovereign democratic republic status  
o equality of status and opportunity of an individual |
As a whole, the court recognised that that basic structure includes supremacy of the Constitution (see Kesavananda case); rule of law (see S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124, P. Sambamurthy v. State of Andhra Pradesh (1987) SCC 362, Golakh Nath); judicial review (see Article 32, 226 and 227 of the Constitution in Chandrakumar L. vs. Union of India AIR 1997 SC 1125, Preamble of the Constitution in State of U.P. v. Dina Nath Shukla, AIR 1997 SC 1095); effective access to justice (see Central Coal Fields Ltd. v. Jaiswal Coal Co. 1980 Supp SCC 471); democracy and federalism (see S. R. Bommai v. Union of India AIR 1994 SC 1918); secularism (see S. R. Bommai v. Union of India AIR 1994 SC 1918; Valsamma Paul v. Cochin University, AIR 1996 SC 1011; Aruna Roy v. Union of India, AIR 2002 SC 3176). The Constitution of in its Preamble clearly states that India is a secular state but the insertion of Article 290-A by the Constitution (Seventh Amendment) Act 1956, the Constitution (Seventh Amendment) Act

<p>| | | |</p>
<table>
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</table>
| 7. | Chief Justice A.N. Ray | o secularism and freedom of conscience and religion  
|   |   | o government of laws and not of men’ i.e. the rule of law  
|   |   | o the constituent power of Parliament was above the constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections.  
| 8. | Justice K. Mathew | o that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary  
| 9. | Justice M.H. Beg | o that supremacy of the constitution  

| 7. | Chief Justice A.N. Ray |
| 8. | Justice K. Mathew |
| 9. | Justice M.H. Beg |
1956, Section 19 raises a question whether it is really a secular state. The Article 290A reads as: Annual payment to certain Devaswom Funds. A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Tranvancore Devaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Tamil Nadu, every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin (Raza, 2015). While in State of Bihar v. Bal Mukund Sah and Ors. (AIR 2000 SC 1296.), the Supreme Court observed that the concepts of “Separation of powers between the legislature, executive and judiciary” as well as “the fundamental concept of independent judiciary have been now elevated to the level of basic structure of the Constitution and are the very heart of the Constitutional scheme”. It also includes free, fair and periodic election (see Kihoto Hollohan v. Zachilhu, AIR 1993 SC 412).

The Doctrine of Basic Structure is vague in the sense that there is no clear cut list given by the judiciary that such provisions of the constitution forms the basic structure rather it has been left open before the judiciary to decide the same on the case to case basis. In India, Seervai (2008) has lamented that, “[a] precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting the scope of Art 368”. In the case of M. Nagraj v. Union of India (2006) 8 SCC, the Court has tried to formulate a general test to decide if an amendment is against the basic structure of the constitution. The Court held that “…of application of the principle of basic structure, twin tests have to be satisfied, namely, the ‘width test’ and the ‘test of identity’. The Court referred to the judgment in Keshavanada case which clarified that not an amendment of a particular article but an amendment that adversely affects or destroys the wider principles of the Constitution such as democracy, secularism, equality or republicanism or one that changes the identity of the Constitution is impermissible. Again in the case of I. R. Coelho, the Court held in respect of the amendments of the fundamental rights not a change in the particular article but the change in the essence of the right must be the test for the change in the identity. It was further held by the Court that if the triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the “essence of right test” but also the “rights
test” has to apply. The Court also observed that ‘rights test’ and the ‘essence of right’ test both forms part of the application of the doctrine of basic structure. Finally, the “impact test” can be used to determine whether any law destroys the basic structure. If the impact of such a law has an effect on any of the rights guaranteed under Part III of the Indian Constitution, then by applying this test, the answer will be in affirmative that such law is in violation of the basic structure.

2. **Malaysia**

In Malaysia by virtue of Article 159 and Article 161E (for East Malaysia) Parliament is empowered to amend the Constitution. These Articles set out the formal or procedural requirements for amendment. Certain parts can be amended by a simple majority while in others – for example, in the case of East Malaysia – two-thirds majority is required to effect an amendment.

The question then arises whether any part of the Constitution may be amended provided the procedure set in Article 159 is followed. In two decided cases\(^1\) the Federal Court answered that question in the affirmative. In other words, Parliament may, completely remove the whole of Part II of the Constitution (the fundamental rights guarantees) provided it meets the procedural requirements set out in Article 159. In short, the article provided the Executive controls two thirds or more of the seats in the Dewan Rakyat, it may amend any part of the Constitution even if the amendment cuts cross or even destroys the basic structure of the Constitution (Seri Gopal Sri Ram, 2010). It seems that the both decisions failed to protect and preserve the integrity of the Constitution.

However, there is an opposite view which says that not only must an Act amending the Constitution comply with the procedure prescribed by Article 159, also must not violate the fundamental rights provisions in Part II( Seri Gopal Sri Ram, 2010). Accordingly there are certain features of the Constitution that form part of its basic structure that an Act

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\(^1\) *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 ; *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70
amending the Constitution is invalid if it is inconsistent with the basic structure. Article 4(1) which declares the Constitution to be the supreme law and states that any law passed after Merdeka Day which is “inconsistent with this Constitution” shall be void to the extent of the inconsistency. They argued that the phrase “this Constitution” must include its basic structure. The fundamental rights provisions form part of the basic structure of the Constitution as does the concept of a Constitutional Monarchy (Sri Gopal Sri Ram, 2010).

In Sivarasa Rasiah v Badan Peguam Malaysia [2010] 3 CLJ 507 (Sivarasa Rasiah case), the Federal Court has departed from the earlier cases and held that the basic structure doctrine is part of our law and that the fundamental rights provisions form part of the basic structure. The effect is that even if an Act amending the Constitution complies with the procedural requirements of Article 159, it may nevertheless be struck down if it violates the basic structure. What forms part of the basic structure is something that must be decided on a case by case basis.

It was suggested by the counsel in Phang Chin Hock v PP [1980] 1 MLJ 70 that the basic structures of the Malaysian Constitution would consists of (a) supremacy of the Constitution; (b) constitutional monarchy; (c) that the religion of the Federation shall be Islam and that other religions may be practised in harmony; (d) separation of the powers of the three branches of Government; and (e) the federal character of the Constitution. However the Federal Court highlighted the distinction between Malaysian Constitution and Indian Constitution where the former does not has a Preamble, a Directive Principles and was not made by a constituent assembly. The court declined to make a conclusion whether there is an implied limitation on the power of Parliament in not destroying the basis structure of the Constitution amendments (p. 73).

In delivering his judgment in the Court of Appeal case of Mohd Hilman bin Idham & 3 Ors. vs Kerajaan Malaysia & 2 Ors (Civil Appeal No. W-01(IM)-636-2010), Justice Hishamudin Yunus commented the decision of the Federal Court in Sivarasa’s case where His Lordship said at page 9:
“In this regard I feel that I should add that the Federal Court also went further to hold that the fundamental rights guaranteed by Part II of the Federal Constitution form part of the basic structure of the Federal Constitution, thereby giving recognition for the first time, albeit in a limited fashion, to the doctrine of basic structure of the Constitution as enunciated by the Supreme Court of India almost 40 years ago in the landmark case of Kesavananda vs State of Kerala AIR 1973 SC 1461. This is a remarkable departure from the position taken by the Federal Court 33 years ago in Loh Kooi Choon vs Government of Malaysia [1977] 2 MLJ 187. In that case the Federal Court was urged to adopt the doctrine, but the Court then refused to do so” (p. 9).

At the same time, in the writers’ opinion the doctrine of separation of powers, the rule of law and an independent judiciary must forming part of the basic structure of our constitution. The question is whether these features have been recognised by our courts as part and parcel of our Constitution

i. **Doctrine of separation of powers**

The Federal Court in the case *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 said that Malaysia does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. The extent of the applicability of the doctrine depends on the provisions of the Constitution. The Federal Court pointed out that:

“A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. At the same time, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, although it may be inconsistent with the doctrine. The doctrine of the separation of powers is not a provision of the Malaysian Constitution, even; it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. It does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore null” ([2007] 6 CLJ 341 at p 355).
It is to say that the doctrine of strict separation of powers as propounded by the French philosopher Montesquieu has no application in Malaysia. It is contended by Shad Faruqi that “the motive force of the Malaysian Constitution is not in strict separation of, but in a balance amongst the various organs of State. Power of one organ was meant to check the power of another” (Faruqi, 2005).

However, it can be argued that the foundation of the entire constitutional structure of Malaysia resides in the separation of powers set out in articles 39, 44 and 121 of the Federal Constitution of Malaysia. These articles deal with executive, legislative and judicial powers respectively. Although the existing provision on judicial power has been amended to make it less certain, one can safely say that the Constitution still subscribes to the idea of separation of powers and hence, the judicial power to review legislative and executive actions. In our opinion, the doctrine of separation of power is definite and absolute. Judicial review is another proof that there is actually separation of powers in a Westminster democracy like ours. It lays within judicial review, although it does not subscribe to a “pure” separation of powers, a Westminster-model constitution can and does in fact incorporate the separation of power (See New South Wales v Commonwealth (1915) 20 CLR 54 at 88-90; AG for Australia v the Queen [1957] AC 288 (PC) p. 311-315, Liyanage v the Queen [1967] 1 AC 259 p. 287-288; Hinds v the Queen [1977] AC 195 p.212-213 (PC).

ii. The rule of law

The rule of law, in its most basic form, is the principle that no one is above the law. It should be noted that the doctrine is derived from article 4 (1) of the Federal Constitution which obviously establishing the Constitution as a basis of the rule of law. Article 4 (1)
provides that: “The constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency, be void”. Article 128 confers power on the Federal Court to determine the constitutionality of federal and state laws. And article 162(6) lays down that any court or tribunal applying the provisions of any existing law may apply it with such modification as may be necessary to bring into accord with the provisions of the Constitution. The implications of these article is that in Malaysia all persons and authorities including the Parliament are subject to the provisions of the Constitution, in so far their powers are to be found in the Constitution itself. In this context Harding (1996) observes that the Malaysian Constitution clearly embodies, expressly in many of its provisions, the principles outlined by Dicey. The equality provision is found in art 8(1) which states that: “All persons are equal before the law and entitled to the equal protection of the law”. The legal meaning of article 8 is that no one is above the law, thus everyone is equal in the eyes of the law. In short, article 8(1) is a codification of Dicey's rule of law. Article 8(1) emphasizes that this is a country where government is according to the rule of law. In other words there must be fairness of State action of any sort, legislative, executive or judicial. Therefore the doctrine of rule of law, which forms part of the common law, demands minimum standards of substantive and procedural fairness (Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd, [2003] 3 CLJ 378).

iii. Independent judiciary

Harding (2012) contended that the Constitution secure judicial independence in several ways through express provisions of the appointment, security of tenure, and removal of judges. Abusing or insulting a judge may amount to contempt. This is reflected in Article 126 of the Constitution. Judicial immunity is a part of judicial independence. The purpose of judicial immunity is to enable judges, counsel and witnesses to speak and act fearlessly in the interest of justice and to condemn inequity in appropriate language without fear of being sued or prosecuted. In the performance of their judicial functions all judges are immune from the law of torts and crime. Every judge of the superior and inferior courts is entitled to protection from liability for anything said or done while acting judicially.

The law on judicial immunity can be seen in the following instances:
1. The conduct of a judge cannot be discussed in Parliament and State Legislative Assembly as in Article 127.

2. There is passing reference to immunities in Article 122AB(1) for Judicial Commissioners but no explicit protection for other judges;

3. A number of other laws confer absolute privilege on judicial proceedings such as the ones under English common law which is applicable in Malaysia;

4. The Defamation Act in section 11(1) confers absolute privilege on reports of judicial proceedings including pleadings, judgments, sentences or findings. This is so if the reports are fair, accurate and contemporaneous and the proceedings were publicly heard before a lawful court. All comments on judicial proceedings are privileged if fair and in good faith; and

5. Under section 6(3) of the Government proceedings Act 1956 there is absolute immunity in torts for all acts performed in a judicial capacity

There is no such exhaustive or exclusive definition of basic structure given by the judiciary. Judicial approach has been on case to case basis to define what basically includes in the doctrine of basic structure in Malaysia. Malaysian courts have yet to develop the basic structure test as that has been developed by Indian judges.

3. CONCLUSION

The applicability of the Basic Structure Doctrine is contentious both in terms of its adaptability and enforcement in jurisdictions other than that of India. This doctrine due to its undefined nature continues to be unclear in its perception and application. Factors such as difference in political and constitutional history are currently posing hindrance towards the doctrine becoming a universal watchdog of legislative actions. The Indian basic structure doctrine was also presented in Malaysia in several cases. At early stage the Malaysian Federal Court rejected the Indian basic structure doctrine, granting Parliament an unlimited power to amend the Constitution. In the Loh Kooi Choon v. Government of Malaysia ([1977] 2 MLJ 187), Justice Raja Azlan contended, with direct reference to Kesavananda case, that, in contrast with Indian jurisprudence, any provisions of the Malaysian Constitution could be amended. In Phang Chin Hock, again with direct
reference to *Kesavananda* case, the Federal Court held that the basic structure doctrine does not apply in Malaysia due to the differences between the Indian and Malaysian Constitutions – mainly historical differences and the fact that in contrast with the Indian Constitution, the Malaysian Constitution of 1957 has no preamble. However, based on *Sivarasa Rasiah* case, it concludes that the doctrine of basic structure of the constitution is no longer rejected and treated as an unfamiliar concept in our constitutional law. As briefly pointed out by Justice Hishamudin in *Sivarasa Rasiah* case, the fundamental liberties as enshrined in Part II of the Federal Constitution ranging from Article 5 to Article 13 of the Federal Constitution are now being recognised as a part of the basic structure of the Federal Constitution.

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S. R. Bommai v. Union of India AIR 1994 SC 1918
Valsamma Paul v. Cochin University, AIR 1996 SC 1011
Aruna Roy v. Union of India, AIR 2002 SC 3176
Kihoto Hollohan v. Zachilhu, AIR 1993 SC 412
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Hinds v the Queen [1977] AC 195

Malaysian case laws:
Sivarasa Rasiah v Badan Peguam Malaysia [2010] 3 CLJ 507
Phang Chin Hock v PP [1980] 1 MLJ 70
Mohd Hilman bin Idham & 3 Ors. vs Kerajaan Malaysia & 2 Ors (Civil Appeal No. W-01(IM)-636-2010)
PP v. Kok Wah Kuan [2007] 6 CLJ 341
Determining Fundamental Breach in International Sale of Goods: Taming the Unruly Horse?

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**Abstract:**

The remedial system is the most distinctive feature of the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980 and the remedy of ‘avoidance’ is not available for every breach of contract but only for a fundamental one. Despite the fact that the term is specifically defined in Article 25, many commentators are of the view that the meaning of “fundamental breach” is vague and uncertain. The present paper analyzes the dual elements of ‘fundamental breach,’ namely, substantial detriment and unforeseeability, on the basis of interpretative tools of the Convention, legislative history, and an in-depth survey of judicial decisions on fundamental breach from various countries. The paper finds that it is too drastic to say that the meaning of fundamental breach as defined in CISG is vague and that on the contrary the meaning is clearly instructive and can be refined through judicial interpretation. The paper concludes that though it will take time for case law to completely cover most of the possible situations of fundamental breach, it is pretty clear at this stage that a number of basic principles for the determination of fundamental breach are well settled and established.

**Key Words:** Fundamental breach; CISG; remedy of avoidance; substantial detriment; foreseeability
1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods1 “governs the sale of goods between private parties whose places of business are in different countries, which are Contracting States to the CISG.”2 The convention unifies sale of goods laws of various countries, representing four-fifths of the world trade and covering all the major legal systems of the world.3 Looking from practical perspective, the remedial provisions are of crucial importance. A “fundamental breach” is an essential requirement for certain remedies under the Convention, in particular the remedy of avoidance under articles 49(1)(a) and 64(1)(a),4 and requiring performance under article 46(2).5

In view of the often harsh consequences of unilateral declaration of termination of contract, the CISG provides for rather far-reaching and strict requirements for the remedy of avoidance. A party may resort to the remedy of avoidance only if the other party has committed a “fundamental breach.”6 A simple or non-fundamental breach of contract does not entitle the aggrieved party to avoid the contract. It is the uniform conclusion of courts7 and doctrine8 that “avoidance under the CISG is a remedy of last resort, or an ultima ratio remedy, which should not be granted easily.”


2 Ibid., Article 1(1).


4 Article 49(1)(a) states: “The buyer may declare the contract avoided: if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. ...”. Article 64(1)(a) states: “The seller may declare the contract avoided: if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. ...”

5 According to article 46(2), “If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.”


7 See CLOUT Case No. 171 [Bundesgerichtshof, Germany, 3 Apr. 1996].

The main objectives of this paper are to investigate whether it is true that the meaning of fundamental breach under CISG is vague and uncertain and to identify proper ways and means of determining “fundamental breach.” Following this introduction, the paper digs deep into the concept of fundamental breach and continues with an analysis of the CISG interpretative tools. The paper also evaluates the legislative history of the fundamental breach as it appears in article 25 of the CISG, together with its two elements: substantial detriment and foreseeability. The key contribution of the paper is its thorough analysis of case law on fundamental breach in the light of CLOUT and Pace University database on CISG. Finally, the paper concludes with recommendations on effective means of determining a fundamental breach in international sale of goods.

2. The concept of fundamental breach

In the CISG, “avoidance” is not available for every breach. A party may avoid the contract only when the other party commits a “fundamental breach.” Why is it limited so? The reason lies in the underlying objective of CISG to maintain as much as possible the successful performance of the contract and also the fact that avoidance may create unnecessary and unproductive costs.9 Fundamental breach is a unique principle or as some commentators stated a “milestone concept.”10 Article 25 defines the term “fundamental breach:” A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.11 Article 25 defines the fundamental breach autonomously,12 i.e., independently from any connotations from domestic law concepts.13 In this way, Article 25 follows the “international character” as

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11 CISG, Article 25.
laid down in Article 7(1) of the CISG\textsuperscript{14} and contributes to its unification efforts.\textsuperscript{15} Fundamental breach in the Convention has nothing to do with the English doctrine of “fundamental breach,” which certain common law jurisdictions used to apply in a different context, and which died relatively young in the House of Lords in 1980.\textsuperscript{16} As Will rightly put, “Apart from this false predecessor, it seems to have no familiar parentage in other jurisdictions. It is a fresh legal concept, born from compromise and open to interpretation, when it comes to applying the two tests: substantial detriment and unforeseeability.”\textsuperscript{17}

Some commentators are of the view that the definition of fundamental breach in article 25 is vague.\textsuperscript{18} Will predicted that “as a fruit of world-wide compromise, the definition of fundamental breach may not always be easy to apply both for the parties and the judges, and foreseeablely may give rise to divergent interpretation and continuous controversy.”\textsuperscript{19} Zeller rebuts the criticism in these words:

“…this is not vague, as vagueness has often been linked to a lack of uniformity of outcomes…. the process approach is to be preferred over the outcome approach in the application of the CISG by tribunals and national courts. Arguably, because of the nature of fundamental breach, not every decision that is the outcome is uniform. Each decision can be unique to each case. However the method by which the decision has been reached is uniform. This is so because the methodology for applying and interpreting the CISG is clearly described. Any inconsistency or vagueness is not attributable to the CISG, but rather to those applying it. This is because any interpretation of the CISG must be approached with Art. 7 in mind.”\textsuperscript{20}

\textsuperscript{15} Graffi, Case law, above note 10, at 338-39.
\textsuperscript{16} Honnold, above note 8, at 205
\textsuperscript{17} Will, above note 12, at 209-10.
\textsuperscript{19} Will, above note 12, at 205.
Magnus argues that the concept can only be defined through its practical application.21 Farrari holds the view that “it is possible to define the concept of fundamental breach on the basis of the elements by which it is characterized (such as breach of an obligation, detriment, legitimate expectations, and foreseeability) in a way that can prove useful for the CISG’s practical application.”22

As rightly put by Farrari, although the elements of fundamental breach as stated in article 25 of the CISG are not defined in the convention, they can be interpreted by courts and tribunals of the Contracting States by applying the interpretative tools provided in the Convention. In the process of interpreting the concept each court and tribunal will use the same principles of interpretation, i.e., those contained within the CISG, namely: article 7 (for interpretation of CISG provisions) and article 8 (for interpretation of the contract in a way which reflects the true intentions of the parties), and envisaged in general international law. In this way consistent case law can be developed in the long run contributing to uniformity in interpretation of the concept of fundamental breach.

3. CISG interpretative tools

There are two types of interpretative tools under CISG: interpretation of CISG provisions (article 7), and interpretation of the contract (article 8). In respect of the rules concerning the Convention’s interpretation, there are three primary rules of interpretation as enshrined in article 7(1), namely: (i) the “international character” of the CISG, (ii) the promotion of “uniformity in application,” and (iii) the observance of “good faith in international trade.”23 In matters which are not settled in the Convention itself, Article 7(2) relies on the general principles upon which the CISG is founded or the law applicable by virtue of rules of private international law.24

23 CISG, article 7(1).
24 Ibid. article 7(2).
The ‘international character’ component in article 7(1) generally means that whenever interpreting the CISG, courts can refer to its legislative history and not the domestic law of any particular country.\textsuperscript{25} According to the rule of ‘uniformity in application,’ CISG provisions should not be interpreted in the light of domestic law but the interpretation should be guided by the CISG’s legislative history on one hand and interpretations made by courts and tribunals of other Contracting States to the CISG on the other.\textsuperscript{26} The observance of ‘good faith’ in international trade is the final interpretative rule.\textsuperscript{27} Some writers are of the view that the requirement of good faith should not be considered on the basic of good faith in national laws.\textsuperscript{28} It would be better to understand good faith as a reflection of the application of ‘reasonableness’ in trade usages.\textsuperscript{29} We can, therefore, fairly conclude that the guidance given by article 7(1) is that the provisions of CISG are to be interpreted with the use of legislative history and scholarly commentary, case law that considers CISG provisions, and international trade standards.

Rules on contract interpretation as shrined in article 8 are of utmost importance for the determination of “fundamental breach,” as before such a determination can be made it is necessary for courts and tribunals to ensure whether there is a substantial deprivation of what the injured party is entitled to expect under the contract.\textsuperscript{30} Article 8 put forward two set of criteria: subjective and objective. According to the subjective interpretation: “statements made by, and other conduct of, a party are to be interpreted according to his intent, where the other party knew or could not have been unaware what that intent was.”\textsuperscript{31} The objective interpretation is that if the parties have a different understanding of the meaning of the contract, the language of the contract has to be interpreted “according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”\textsuperscript{32} In so doing, due consideration is to be given to all “relevant circumstances

\textsuperscript{27} See Bianca, above note 25, at 85.
\textsuperscript{28} \textit{Ibid.} at 86; but see Honnold, above note 8, at 147.
\textsuperscript{29} See Honnold, above note 8, at 148.
\textsuperscript{30} See Zeller, above note 20, at 224.
\textsuperscript{31} CISG, article 8(1).
\textsuperscript{32} \textit{Ibid.} article 8(2).
of the case, including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties.”

4. Interpreting fundamental breach in light of legislative history

Article 25 defines ‘fundamental breach’ with two component elements, namely: substantial detriment and unforeseeability. In spite of the fact that the injured party can prove the existence of a fundamental breach by relying on ‘substantial detriment,’ a defence is still open for the other party to argue on the basis of ‘foreseeability.’ Legislative history is one important way of ascertaining the meaning of fundamental breach in the light of these two component elements.

The first element: substantial detriment

For a breach to be “fundamental,” the breach must cause a “detriment that substantially deprives the non-breaching party of its reasonable expectations under the contract.” This detriment concept developed out of the perceived weaknesses of the Uniform Law on the International Sale of Goods (ULIS), in particular, relying entirely on foreseeability test without specifying essential elements of fundamental breach. The substantial detriment test replaced those weaknesses. Neither definitions for the term “detriment” nor examples of a detriment that may attain the status of a fundamental breach are given in the CISG. Nevertheless, reliable guidance can be found in the unofficial commentary to the early drafts in the legislative history of the CISG.

According to the drafters’ commentary, “[t]he determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the

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33 Ibid. article 8(3).
34 See, for example Will, above note 12, at 206-07.
35 CISG Article 25.
36 Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107, [hereinafter ULIS]. Article 10 of ULIS provided the following definition of fundamental breach: “For purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.”
breach interferes with other activities of the injured party.” In fact, what the non-breaching party is entitled to expect under the contract is directly related to these objective factors. As specified as the elements of the formation of the contract in article 14(1) of the CISG, the parties to the contract will definitely expect a specific type of goods, a certain quantity of goods and the agreed price of the goods to be sold. Moreover, the buyer will normally be not a consumer but a merchant, whose business activities will definitely be affected by a particular sale transaction. This ‘contractual expectation’ is key on the basis of which courts and tribunals will determine whether there was a substantial detriment (injury) to the non-breaching party to the extent that it amounts to a fundamental breach under article 25. It can be found not only in the terms of the contract but also in the relevant circumstances surrounding the contractual relationship of the parties. This ‘contractual expectation’ was added by the drafters with a view to include an objective criterion to define substantial detriment.

The second element: foreseeability

The ‘foreseeability’ element of article 25 of the CISG includes two tests, namely, (i) the subjective test of whether the party in breach foresaw the substantial detriment which caused to the non-breaching party, or (ii) the objective test of whether a “reasonable person of the same kind in the same circumstances” would foresee that the breach of contract would cause the non-breaching party substantial detriment.

According to the legislative history of the CISG, the burden of proving the foreseeability of substantial detriment lies on the party in breach. There was a consensus that the party in breach should prove foreseeability due to “the logical difficulty of requiring the non-breaching party to prove what the party in breach actually foresaw or a party in its

38 See CISG, article 14 (1) (specifying the elements for formation of the contract).
39 See Ibid., article 2 (excluding transactions involving individual or consumer sales).
40 See Ibid., article 8 (setting forth contract interpretation rules)
42 CISG, article 25.
position could have foreseen."\textsuperscript{44} The first test, a subjective one, merely requires whether the party in breach actually foresaw the detriment that will cause to the non-breaching party.\textsuperscript{45} The second test, an objective one, requires the breaching party to show that “a reasonable person of the same kind in the same circumstances would not have foreseen the detriment to the non-breaching party.” Since parties to international sales contracts are presumed to be merchants,\textsuperscript{46} a “reasonable person” may be construed as a reasonable merchant. The phrase “of the same kind” refers to a merchant in the same business as the party in breach.\textsuperscript{47}

5. Determining fundamental breach in case law

Perusing through the case law on article 25 of CISG, the following are the findings and for convenience purpose case law will be categorized into four groups, namely: (1) non-performance of a basic contractual obligation, (1) late performance, (3) non-conformity of the goods, and (4) breach of other contractual obligations.

a. Non-performance: a complete failure to perform a basic contractual obligation

A complete failure to perform a basic contractual obligation can be a typical case of a fundamental breach. This may be “non-delivery” in the case of a seller and “non-payment of the price” in the case of a buyer.

The total non-delivery on the part of the seller is without doubt the most serious and fundamental breach and the buyer has every right to avoid the contract. In case law, however, such a clear-cut situation is a rarity and there is a decided case, which illustrates a very late and still a partial delivery of the goods. In Foliopack v. Daniplast, the Italian Court found that considering the statements made by and conduct of the parties it was the obligation on the part of the seller to deliver the goods in a week. It was held that “the delay by the seller in delivering the goods, together with the fact that two months after the conclusion of the contract the seller had delivered only one third of the goods sold, amounted to a fundamental breach.”\textsuperscript{48}

\textsuperscript{45} See Bianca, above note 25, at 217.
\textsuperscript{46} See CISG, article 2(a).
\textsuperscript{47} Bianca, above note 25, at 219. \textit{Ibid}.
\textsuperscript{48} CLOUT case No. 90, Italy Court of First Instance Parma, 24 November 1989, (Foliopack v. Daniplast) Case No 77/99. Retrieved from \url{http://cisgw3.law.pace.edu/cases/891124i3.html}
On the other hand, a simple case of partial non-delivery will not be a fundamental breach. In Shoes case, an Italian manufacturer sold shoes to a German buyer but failed to deliver the agreed quantity. The manufacturer demanded partial payment and the buyer wanted to avoid the contract. The German Appellate Court held: “Partial delivery did not lead to a fundamental breach of contract. Non-delivery on the agreed date of performance will amount to a fundamental breach of contract only if the buyer has a special interest in delivery on time by which the seller can foresee that the buyer would prefer non-delivery instead of late performance (for example, in the case of seasonal merchandise).”

‘Non-payment of the price’ definitely leads to a fundamental breach.’ In Hat case, at first, payment was made, but later the buyer defaulted on its payment obligation several times despite numerous demands by the seller. The China International Economic & Trade Arbitration Commission [CIETAC] ruled that “the buyer’s failure to pay the price for the goods constituted a fundamental breach of the contract under article 25 CISG.” In the Winter Shoes case, a German buyer ordered winter shoes from an Italian shoe manufacturer. Once manufacturing of the shoes were done, the manufacturer asked for security for the price of the goods as the buyer had other outstanding bills to settle with the manufacturer. Since the buyer did not pay or furnish security, the manufacturer declared the contract avoided. The German court held that there was a fundamental breach. New Zealand Raw Wool case is a remarkable one that resolved the issue of failure of a buyer to issue a ‘letter of credit’ as required by the contract. CIETAC held that this is an essential obligation of the buyer, the failure of which led to a fundamental breach of contract.

b. Late performance: late delivery or late payment

The general rule is that late performance by itself is not a fundamental breach of contract unless the time is of the essence by virtue of the terms of the contract or the relevant circumstances of the case.\(^{53}\) In respect of late delivery, in Italdecor v. Yiu's Industrie, Milan Appellate Court, Italy, decided that; “According to article 33 of CISG, the seller must deliver the goods on the date fixed in the contract, and as a consequence of a failure to perform this obligation, the buyer has the right to avoid the contract if failure to comply with the fixed time for delivery constitutes a fundamental breach of contract. In the pending case, taking into account clarifications between the parties in the days following the agreement, there is no doubt that the agreed time of delivery was a fundamental term and that the contract turned on the availability of the goods just before buyer’s end of the year sales. However, the seller let the fixed time pass without any excuse; this behavior is unjustifiable.”\(^{54}\)

Again in Diversitel v. Glacier, the buyer, a Canadian company doing business in research and development of satellite and terrestrial communications entered into a contract with the seller, an American company. The buyer required delivery of the insulation to meet the terms of a pre-existing contract with the Canadian Department of National Defence (DND). As a term of its contract with the seller, the buyer set out a specific schedule of delivery of the insulation by the defendant. The seller failed to deliver on time. The Court found that “the parties had made time of the essence in the contract by their conduct and communications and held that the seller’s failure to perform in time was thus a fundamental breach.”\(^{55}\)

Furthermore, in Iron molybdenum case, an English buyer contracted with a German seller for the supply of iron-molybdenum from China, CIF Rotterdam. The sellers failed to deliver the goods on time. An additional period of time for delivery was fixed and when it expired the buyer sued the seller. It was held that “There were fundamental breaches both under article 49(1)(a) and (b) of the CISG. As to paragraph (a), it said that, although delay in time is not generally considered as a fundamental breach of contract, it can constitute a fundamental breach if delivery within a specific time is of special interest to the buyer, which


must be foreseeable at the time of the conclusion of the contract (article 25 CISG). The Incoterms ‘CIF’ by definition determines the contract to be a transaction for delivery by a fixed date. As to paragraph (b), it found that the buyer had fixed an additional period of time for delivery (article 47(1) CISG) within which the seller had failed to deliver.”

In relation to late payment, in Foamed board machinery case, the ICC Arbitral Tribunal approved the seller’s declaration of avoidance of the contract and held that “the buyer, by failing to notify the letters of credit on the date required, had not complied with the requirements of articles 53 and 54 CISG regarding the buyer’s obligation to pay the price.”

Regarding article 25 CISG, which defines a fundamental breach, the arbitral tribunal ruled that “the mere fact that a buyer had some delay in payment was not always in itself a fundamental breach. In this case, the seller waited several months before declaring the contractual relations terminated, in spite of the fact that it was clear that the buyer did not have the financial resources. The period between the buyer’s default and the declaration of avoidance by the seller can be regarded as an ‘additional period’ fixed by the seller under articles 63(1) CISG and 64(1)(b) CISG.”

c. Non-conformity of the goods

The buyer can avoid the contract if defective goods are delivered and if the non-conformity can be considered as a fundamental breach of contract under the CISG. The question that can be raised here is under what circumstances delivery of non-conforming goods constitutes a fundamental breach. A careful analysis of the case law indicates that a non-conformity in relation to quality is merely a non-fundamental breach unless it can be shown that the buyer – without unreasonable inconvenience - can use the goods or resell them even at a discount.”

In Meat case, the German sellers delivered frozen meat by ship to Egypt and Jordan for a Swiss buyer. The buyer claimed lack of conformity of the goods. The Supreme Court of Switzerland found that “the difference in quality between that as had been agreed and that as was delivered was not significant enough to give the buyer a right to declare the contract

58 CISG, article 49(1)(a).
avoided, even though experts estimated that the decrease in value of the goods, which were too fat and too wet, amounted to 25.5 per cent.” The Court held that:

“[T]he CISG operates from the principle that the contract shall be avoided only in exceptional circumstances and that the right to declare a contract avoided is the buyer’s most serious remedy. Whether or not this remedy is justified has to be determined by taking into account all the relevant circumstances of the particular case. Such factors include the buyer’s ability to otherwise process the goods or to sell them, even at a lower price. The court confirmed that the buyer had had such alternatives and therefore denied the buyer the right to declare the contract avoided. The buyer could merely avail itself of a reduction in price of 25.5 per cent (articles 25 and 49(1)(a) CISG).”

In Cobalt sulphate case, a Dutch seller had sold cobalt sulphate to a German buyer. It was agreed that the goods should be of British origin and that the seller should supply certificates of origin and of quality. After the receipt of the documents, the buyer declared the contracts to be avoided since the cobalt sulphate was made in South Africa. The German Supreme Court held that: “[T]here were no grounds for avoidance of the contract....There was no fundamental breach of contract since [Buyer] failed to show that the sale of the South African cobalt sulphate in Germany or abroad was not possible (article 49(1)(a) CISG). Thus, [Buyer] failed to show that it was substantially deprived of what it was entitled to expect under the contract (article 25 CISG).”

In Souvenir coins case, a contract for the sale of souvenir coins was agreed upon between the parties and the seller delivered the coins. The buyer complained that the coins were not as described in the certificates and they doubted of their authenticity. The buyer requested the arbitral tribunal to order the seller to take back the unsold goods, i.e. approximately one-quarter of the total volume, to refund the price already paid and to compensate for the buyer’s other losses. The tribunal held that: “the breach was not fundamental because the buyer was able to sell three-quarters of the goods and therefore the

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seller did not substantially deprive the buyer of what it was entitled to expect under the contract.\(^{62}\)

In the *Shoes* case again, the German buyer refused to pay the purchase price of shoes bought from an Italian shoe manufacturer as the shoes did not conform with the specifications of the contract. The court held that: “the buyer was not entitled to declare the contract avoided and to refuse to pay the purchase price as the buyer did not specify whether the shoes were just below standards (in which case the buyer could, e.g., reduce the price or claim damages), or totally unfit for resale (in which case the buyer could declare the contract avoided).”\(^{63}\)

In *Sport Clothing* case between a German seller and a Swiss buyer, the German Court found that after washing the sportswear had shrunk about 10 to 15%. The Court held that: “there was a fundamental breach since the buyer’s customers would have either returned the merchandise or would not have bought any more from the buyer, which would cause substantial detriment to the buyer.”\(^{64}\)

*Packaging machine case* is a leading case on the issue of non-conformity of the goods under CISG where the Swiss Federal Supreme Court has comprehensively evaluated on the legal requirements of a fundamental breach. In this case, a Swiss seller and a Spanish buyer concluded a contract for the sale of a packaging machine. The contract also required the seller to install the packaging machine and prepare its operation at the buyer’s work place. After installation was completed, the seller made a trial run of the machine. As a result of that the parties were in dispute as to the exact performance level of the machine as required under the contract. The buyer’s assertion was that an output of 180 vials per minute had been agreed by the seller. The seller disagreed. The buyer finally declared avoidance of the contract.\(^{65}\) After


\(^{63}\) CLOUT case No. 79, Germany 18 January 1994 Appellate Court Frankfurt (*Shoes case*). Retrieved from [http://cisgw3.law.pace.edu/cases/940118g1.html](http://cisgw3.law.pace.edu/cases/940118g1.html). In this case, the court stated: “The buyer does not succeed in showing that the delivered shoes have been predominantly non-conforming.” The court reasoned as follows: “The [buyer] has only testified that . . . [the shoes] were ‘defective,’ . . . The manufacturing had been ‘varying,’ ‘sometimes’ the shoes had been ‘stitched,’ others had been ‘folded up.’ In all, they did not correspond to the original sample. As to the deviation from the sample, the evidence given by the buyer is not sufficient to determine whether or not she could reasonably be expected to use the shoes.”

\(^{64}\) Germany 5 April 1995 District Court Landshut (*Sport clothing case*), case no 54 O 644/94. Retrieved from [http://cisgw3.law.pace.edu/cases/950405g1.html](http://cisgw3.law.pace.edu/cases/950405g1.html).

an extensive evaluation of the available evidence, it was found that the parties had agreed to deliver a packaging machine with a performance level of 180 vials per minute. On the facts of the case, the Swiss Federal Supreme Court held:

“The actual performance of the packaging machine was well below the performance which had been required under the contract. Despite the fact that a maximum velocity of 115 vials per minute seemed to be possible... the long-term average output of merely 52 vials per minute had to be considered in accordance with [Buyer]'s line of argument....The actual output of 52 vials per minute was equivalent to a loss of production of 71% in comparison with 180 vials per minute as had been agreed in the contract. ...Given a loss of productivity of 71%, [Buyer] is substantially deprived of what it has been entitled to expect under the contract. This amounts to a fundamental breach. The numerous attempts by [Seller] to cure the lack of conformity also demonstrate that the non-conformity could not be remedied within a reasonable time. Moreover, the particular packaging machine was specifically designed for [Buyer]'s individual needs. Therefore, any resale of the machine has been impossible or at least inappropriate for [Buyer].”

In Garden flowers case, a Danish exporter of flowers sold garden flowers to the Austrian retailer, who refused to pay the price arguing that the seller had breached a guarantee and thus committed a fundamental breach of the contract since the flowers did not bloom through the entire summer. The Austrian Appeal Court dismissed the buyer's arguments on the ground that he had failed to prove that the seller had guaranteed that the flowers would bloom through the entire summer.

In Delchi Carrier v. Rotorex, Delchi ordered 10,800 compressors from Rotorex for use in its portable room air conditioners. Prior to executing the contract, Rotorex sent Delchi a sample compressor and accompanying written performance specifications. Rotorex sent the first shipment by sea. When the first lot of compressors were received, Delchi discovered that they did not conform to the sample model and specifications and informed Rotorex that 93 percent of the compressors were rejected in quality control checks. Once attempts to cure the

66 Ibid.
defects were proven to be unsuccessful, Delchi asked Rotorex to supply new compressors conforming to the original sample and specifications and the latter refused to do so. The American Federal Appeals Court held that: “Under the CISG, if the breach is fundamental the buyer may either require delivery of substitute goods, CISG art. 46, or declare the contract void, CISG art. 49, and seek damages. There appears to be no question that Delchi did not substantially receive that which it was entitled to expect and that any reasonable person could foresee that shipping non-conforming goods to a buyer would result in the buyer not receiving that which he expected and was entitled to receive. Rotorex, therefore, was liable for a fundamental breach of contract.”

In Schreiber v. Thermo Dynamique, a French buyer contracted with a German manufacturer to deliver 196 rolled metal sheets. The order specified the quality of the laminated metal sheets, the dimensional tolerances of the plates, and the condition of the surface as entirely suited to the application for tubular plates without any necessity of machining. The goods were delivered. The buyer, however, declared the contract avoided on the ground that there were a number of defects in the metal plates which made them unsuitable for the purpose of the sale. The expert evaluation before the court was that: “After all the tests and visual examination, I can affirm that the sheets are absolutely unacceptable for the use for which they were destined (plates for heat-exchanger heads).” Under these circumstances, the French Supreme Court held that “the buyer’s refusal to accept the goods was justified and its demand for avoidance of the sale is well founded.”

In Machinery case, an Italian seller and an Ecuadorian buyer entered into a contract for the sale of a machinery for recycling plastic bags used in the production of bananas. Since upon installation, the machinery turned out to be defective, the buyer, alleging non-conformity to the contractual specifications, brought an action before the Italian Court, claiming avoidance of the contract besides damages. It was held that; “[T]he goods sold were not fit for the particular use made known to the seller at the time of the conclusion of contract. Indeed, in the Court’s view, it had been widely demonstrated that during the negotiations the buyer had provided the seller with the sample of the material to be processed,

expressly pointing out that all the industrial equipment supplied by the European manufacturers previously entrusted with the recycling had fallen under a serious malfunction because of the special features of the goods to be worked. Since the seller had assured the buyer of the high performance which its own machinery would reach in the manufacturing process, this could be deemed the prima facie evidence of its liability, taking account of the failure of the recycle system to produce bags in the quantity originally agreed. From what has been said it is clear that the supplied machinery was completely unsuitable for the promised and agreed upon use and that the nature and type of the seller’s breach of contract, considering seriousness and fundamentality, would per se justify the request for avoidance of the contract under Art. 49 CISG.”

d. Violation of other contractual obligations

The failure of a buyer under a FOB contract to nominate a ship has been decided as a fundamental breach. In Mung bean case, the parties entered into a contract for the sale of mung beans subject to an FOB term. Subsequently, the parties specified the loading date. The seller delivered the goods to the port of loading and faxed the buyer that the goods were ready for loading. The date of loading expired without the buyer nominating a ship. The tribunal held that the buyer’s refusal to send a ship made the seller’s performance impossible, and this constituted fundamental breach of the contract under article 25 CISG.

The above analysis of case law demonstrates the following principles as well established in determining a fundamental breach:

(i) As reaffirmed by the Swiss Federal Supreme Court in ‘Packing Machine’ case: “[T]he term fundamental breach under Art. 25 CISG is to be interpreted narrowly. If it is doubtful whether or not a breach may qualify as fundamental, it should generally be assumed that no fundamental breach is existent.”

(ii) The two essential elements for the determination of a fundamental breach are as enshrined in its definition in article 25 of the CISG, namely: (a) whether “the injured

72 Packaging machine case, above note 65.
party is substantially deprived of what he is entitled to expect under the contract,‖ and (b) whether “the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." (iii) The requirement of ‘contractual expectation’ must be ascertained through objective standards, while mere subjective expectations are immaterial. (iv) In most cases courts rely on interpretative tools in article 8 of CISG, taking into account not only the contract itself but all the relevant circumstances of the case, in order to decide on the severity of the deprivation of contractual expectation of the injured party. (v) In the case of non-conformity, the requirement imposed by article 25 of the CISG is not an ordinary but a substantially serious lack of conformity. It means “a lack of conformity which cannot be remedied within reasonable time and by reasonable efforts to the effect that the goods are practically useless, unmerchantable or cannot be appropriately resold.”

6. Conclusion

Article 25 of the CISG defines fundamental breach. The definition intends to differentiate fundament from non-fundamental breach. This distinction is of cardinal importance for the remedial system of the CISG as it can decide whether the contract will live or die. There are commentators who maintain that the notion of fundamental breach as expressed in article 25 is uncertain and controversial. The present paper argues that although the components of the definition of fundamental breach, such as ‘substantial detriment’ and ‘contractual expectations,’ appears to be a bit strange for many people, it would not be fair to conclude that they are vague and uncertain. They can very well be properly construed with the support of legislative history, interpretative tools as set forth in the CISG, and judicial interpretation by courts and tribunals of various CISG contracting States. There are a growing number of judicial decisions (not less than 56 decisions) on the application of fundamental breach.

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73 CISG, article 25 (first limb); Cobalt Sulphate case, above note 61; Souvenir Coins case, above note 62; Sport Clothing case, above note 64; Packaging machine case, above note 65; 74 CISG, article 25 (second limb); Delchi Carrier v. Rotorex, above note 68. 75 Packaging machine case, above note 65. 76 Ibid.; Foliopack v. Daniplast, above note 48; Garden flowers case, above note 67. 77 Packaging machine case, above note 65; Meat case, above note 60.
breach. These decisions have in one way or another contributed to the development of consistent judicial interpretation of the concept, leading towards the unification of laws governing international sale of goods, the stated objective of the CISG.
FACILITATING THE DIVISION OF MATRIMONIAL ASSET IN MALAYSIAN SHARIAH COURT THROUGH HIBAH

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Abstract:
Distribution of matrimonial asset between spouses is always associated with unfairness to one of the the parties especially to the non-working wife due to the fact that the current provision on the distribution of matrimonial assets emphasizes on the contribution of the parties as a sole criteria in determining the proportion of the share. Though the law has not been amended to address the issue, it is observed that a transfer of ownership through hibah for the benefits of family member during marriage provides an alternative to the a more fairer distribution of matrimonial assets. Therefore, this study is undertaken to examine the applicability of hibah in dividing the assets through court practices. For that purpose, the study adopts a qualitative method which involves an analysis of unreported cases within the time frame of 2000-2012 collected from six zones representing Syariah Courts in Malaysia where analysis is made based on several variables such as types of matrimonial property, factors for consideration and proportion of distribution of the assets. Based on that sampling it has been discovered that the application of hibah in division of matrimonial asset in majority of cases are practically settled by way of sulh (amicable settlement). Ownership transfer of matrimonial asset especially through hibah could serve the best interest of children and their needs As well as providing adequate security for the spouse. This has been successfully practiced in polygamous marriage where the study shows that, the parties (husbands) are in fact more generous in dividing the assets especially when dealing with the interest of children to the level that the husband is willing to transfer the whole interest in the asset to the existing

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wife which is rarely achieved in other litigation process. Thus, this study suggests that *hibah* mechanism could be upgraded as a law and to be widely practiced when dealing with the division of matrimonial assets.

**Keywords:** Division; *Hibah*; Matrimonial Asset; Shariah Court

1. **Introduction**

Matrimonial assets or *harta sepencarian* is generally refers to any property acquired during marriage. Under Islamic Family Law Acts and Enactments, it is defined in the interpretation section. According to Section 2 of the Islamic Family Enactment (Selangor), 2003, (hereinafter referred to as the Islamic Family Law Law) *harta sepencarian* is interpreted as property jointly acquired by husband and wife during their subsistence of marriage according to Hukum Syarak. Section 122 of the same Act provides a specific provision on a division of matrimonial assets or *harta sepencarian* in Selangor. The provision requires the court to consider the contribution of parties in acquiring the asset, interest of minor children and debt of spouse in determining the share. The law and practice of division of matrimonial asset in the Shariah court emphasizes on the contribution of parties as a sole criteria in determining the proportion of the share in acquisition of assets. It is noted that the provision relating to distribution of matrimonial assets in Malaysian Shariah Courts seems not practical and does not complement the actual mode of division of assets which solely bases on the contribution of parties. The provision should focus on distributing the asset on a fair and equitable basis and should address holistic needs of all parties involved. Though the law has not been amended to address the issue, it is observed that a transfer of ownership through *hibah* for the benefits of family member during marriage provides an alternative to a fairer distribution of matrimonial assets. In order to protect and safeguard the interest of existing wife to the matrimonial asset from dissipating to the other party, the newly embodied law empowers the court to divide the existing matrimonial asset upon the application for permission of polygamous marriage. The division is subjected to the principle of division embodied in section 122 of Islamic Family law which requires the court to consider several
factors including contribution, interest of minor children and debt in determining the portion of share. Thus, this paper is eminent to identify the method used in solving the dispute and hence, examines the effectiveness of the law through the court practice. Hibah is one of the instruments in property division which is enforceable during the lifetime of the giver (Badruddin, 2009). For the sake of this article, reference is made mainly to the relevant provision in the Islamic Family Law Enactment (Selangor), 2003.

This study adopts qualitative method by using library research and content analysis. Sampling of unreported cases were analysed by using content analysis where three important variables were analysis i.e matrimonial assets, factors of consideration and proportion of share. This analysis is conducted to determine the division of matrimonial assets such as the scope of matrimonial assets, the factors of consideration which include monetary and non-monetary contributions and the proportion of division of matrimonial assets. The samplings highlight that hibah has been applied in division of matrimonial property after divorce or upon polygamous marriage. The application has been made through sulh of the party which remarks an important method adopted by the parties for resolving the dispute relating to division of Harta Sepencarian.

2. Hibah according to Islamic Law and Islamic Family Law Enactments

Hibah is a beneficiary contract which is defined as a contract of property transfer made during the lifetime of the donor voluntarily made without consideration (iwad) (al-Khin, al-Bugha & al-Shirbaji, 2000). This contract is categorised as contract of tabarru’ with similar effect as wasiat, gift, sadaqah and wakaf where the principle is based on giving from one party to another without any consideration (Shalabi, 2000). Though there is no specific enactment regulating the administration of hibah among muslim, in practice the shariah courts is not prevented hibah to be administered in the muslims’ transaction. This has been highlighted in number of research literatures where there are number of cases involving hibah has been litigated in the shariah courts (Badruddin, 2009). In the absence of a specific act relating gift courts are at discretion in giving judgment according to the stipulated law and follow his view and do fair for all parties involved (Badruddin, 2009). The judicial decision in almost cases is guided by the Islamic law of syafie. Hibah only applies after the fulfillment of the pillars of hibah that require the existence of offer and acceptance from the donor and
receiver. Terms of *sighah* is the distinguish element differentiating between *hibah* and gifts even though both have similar implications as regards the occurrence of property transfer from one party to another (Badruddin, 2009).

Basically the law in Malaysia is silent as regards to the application of *hibah* in the division of matrimonial assets. However, Islamic Family law Enactment highlights that the law protect rights of husband or wife to the matrimonial asset from being dispose to other person without due knowledge. This has been provided in section 108 of Islamic Family Law Enactments/Act that relates to the prohibition of order of disposal of *harta sepencarian*.

Sec 108

(1) The Court may, on the application of any party to a marriage—

a) where any matrimonial proceeding is pending in the Court; and

b) in such proceeding the Court may make an order under section 122, make an order prohibiting the wife or husband, as the case may be, from disposing of any property jointly acquired during the subsistence of their marriage if the Court is satisfied that it is necessary to do so.

(2) Failure to comply with an order made under subsection (1) shall be punishable as a contempt of Court.

Result and Discussion

3. *Sulh* in execution of *Hibah* involving Matrimonial Asset

Law of division of matrimonial asset emphasise on the fair distribution of the asset to the spouse by regulating the factors and consideration that the court has to take into account. This could be achieved by invoking *sulh* as an amicable settlement other than the normal litigation proceeding. *Sulh* is described as the result or finding from a conciliation or mutual consent of disputed parties achieved through the mediation process (Siti Noraini, 2008). *Sulh* is executed when it is depending on the claim and application enunciated by the disputed parties. Observation on some cases signifies that *sulh* is a preferred method for settlement in the division of matrimonial property and it is also used in settlement of other matrimonial property dispute. The cases showed that the court was in favour to invoke *sulh* as an amicable
settlement to guarantee fair division of *harta sepencarian* to both parties. Via *sulh*, the spousal agreement was obtained on the essential element and factors which commonly disputed in normal preceding for example the contribution of each spouse in acquiring the asset.

The study on 33 polygamy cases displays the well practice of division of matrimonial property in the Syariah Court in Malaysia like Selangor, Johor Bharu, Perak, Sarawak and Penang in the exception of the state of Kelantan due to the constraints in the jurisdiction of the court. Thus, this shows that division during marriage is practical and highly recommended to secure the existing asset from dissipating to other party. The data displays the frequent and amicable settlement was contributed by *sulh*. The spouse was corporative in arriving at the agreement on the important element which hardly achieved during litigation process for example an agreement to declare an asset as matrimonial property and agreement to the portion of share of matrimonial assets. This is illustrated in the case of *Aminah Bt Berkatal v. Mohd Shakdan B. Kamsah* (10100-017-0120-2009 (Selangor) where the Shariah Court of Shah Alam ordered a matrimonial home be transferred to the plaintiff and the defendant agreed to forego his interest in the home The cases emphasized that *hibah* on the matrimonial property occurred at the time application for polygamous marriage is made or after divorce by mutual agreement. The transfer of matrimonial asset is taking into effect not only to spouse but extended to their children of the marriage. Thus, the *sulh* mechanism in the division of matrimonial asset is deemed to be more practical. More consideration is given to the welfare of family especially so when the division involves a transfer of assets to the children and wife. The interests of a child are paramount and significant in the division in order to safeguard the child’s interest after the husband’s commits polygamy although this is still not widely practiced. It can be concluded that *sulh* of parties is an amicable settlement and its distribution is practical as parties’ need and children’s interest become vital in ensuring the fair and just division of assets.

Though the law emphasise on the power of the court to divide the property based on provided consideration, the party are free to have the matrimonial property to be transfer exclusively to any party or children as *hibah*. As far as the matrimonial asset concern, the practice of division through *hibah* also takes effect on the matrimonial property based on the practice in the shariah Court.
4. **Hibah of Matrimonial Asset after Divorce**

It has been observed that the parties may agree to transfer a joint effort asset registered in joint names to one of the parties. It is depicted in the Selangor case of *Norma Mokhtaram v. Kamaruddin B. Murat* (12200-17-17-2000, Selangor), where the court ordered that the defendant agreed to transfer his right to the plaintiff as the settlement of matrimonial property and agreed to cooperate in the transferring process. However, a house situated at Subang Jaya, Selangor registered under the defendant’s sole name was ordered to be transferred to the plaintiff. The defendant agreed to pay the mortgage instalments of the house until completion. This is illustrated in the case *Nordalilati Hashim v. Erwan Zafry* 10200-017-0303-2009 (Selangor); see *Khairul Hisam B. Portoo v. Noraini Othman*; 10300-017-0054-2008 (Selangor) a house in a joint name each at ½ part to the plaintiff and the defendant. Both agreed to transfer the house to the plaintiff and subsequently the plaintiff agreed to incur all liabilities related to the house. After the settlement, the plaintiff was required to pay RM10 000 to the defendant as reimbursement for the honesty of the defendant to transfer the house to the plaintiff. In Selangor case of *Alami Bt. A. Latif v. Mohd Yusof Bin Shamsuddin* (10200-017-013-2001, the plaintiff, the former wife claimed her rights against a bungalow situated at Subang Jaya valued at RM1 million. The home was registered in the defendant’s name and it was purchased during marriage. The plaintiff worked as dentist and she also did household chores and took care of the family. The plaintiff claimed that during her studies in UK, the defendant started his study in law and she assisted the defendant in settling the study fees and bore some living costs and daily expenses from 1978-1983. The court decided that on agreement, the respondent agrees to the claim of the applicant against 70% of the net value of the matrimonial home. In Penang case of *Minah Binti Kassim v. Anuar Bin Abu Bakar* (07100-017-0149-2003), it has been noted that the court ordered that RM20 000 be refunded to the plaintiff and in return, the plaintiff agrees to transfer a matrimonial home situated at Batu Feringgi to the defendant. The plaintiff contributed about RM17 000 for the construction and renovation of the home.

In a few cases, both parties agreed to waive their rights against the proportion of matrimonial home and agreed to transfer the interest in the home to their children. In the Selangor case of *Che Aminah Bt. Mohammed Saad v. Ibrahim B. Kassim* (1220-17-17-2000, Selangor) the court recorded a settlement of matrimonial property that the defendant agreed
to transfer a double-storey terrace house situated at Subang Jaya, Selangor registered under the defendant’s name to their four children. Hence, all expenses related to the renovation and maintenance of the house was to be borne by the defendant. Both parties also agreed to give the housing rent to the defendant. The defendant however, placed a condition pertaining to the house that no transaction was allowed without getting the defendant’s approval. Transfer of matrimonial home to wife and sharing of ownership of the matrimonial home with her children after the children attained the age of 18 were also ordered by the court (Rashid King @Richard Alan King v. Syahriza Binti Jeli Bohari 13100-017- 0298-2010(Sarawak).

In Sarawak, transfer of matrimonial assets to children of the spouses is highlighted in several cases. For example, in the case of Sarinah Bt. Herry v. Khalid Bin Chek (13001-017-0316-2010 (Sarawak) the court ordered the defendant to transfer a house situated at Kuching, Sarawak to the children as soon as the mortgage payments of the house was completed. In the case of Suraiya Bt Mohd Latiff v. Hamizan Bin Bohan (13001-017-0935-2004(Sarawak) where the court ordered the transfer of matrimonial home to two minor children to be effected after both children attain 18 years old. In Sarawak case Hajakah @ Hajarah Binti Abdullah v. Mohd Hanif Bin Majimon (13100-017- 0255-2007) it was held that a house on customary land was granted to the defendant and seven children.

5. **Hibah of Matrimonial Asset upon polygamous**

   Section 23(9) of Islamic Family Law Enactment/Acts Thus, the provision requires the husband to suggest the fair division of matrimonial assets acquired during the marriage of the existing wife before the husband can be allowed for polygamy (Norliah,2007). This method is purposely to safeguard the interest of existing wife and to protect the existing wife’s interest from being dissipated by third parties after the practice of polygamy (Roslina Che Soh, 2007). The cases showed that the court was in favor to invoke sulh as an amicable settlement to guarantee fair division of harta sepencarian to both parties. In sulh the meeting involved the parties and a sulh officer should be held within 21 days after registration of case where the agreement achieved will be endorsed and enforced by the court (MSS1/2002). Failure to reach for the agreement leads the case to be litigated in normal proceeding (Nora al-Hak, 2007)
The implication on the applicability of the law shows the division upon polygamy is well practiced via *sulh* where the existing matrimonial asset is declared as matrimonial asset and the parties is determined with the appropriate proportion as their share in the existing matrimonial asset. Basically, contribution remains the main factor in determining the proportion of share of the parties however when the division involved spousal agreement, the court no longer subjected to the provided statutory law as the court bound to order the division as specify in the agreement. Thus, in spousal agreement other factors other than contribution are taken into consideration as well and the factors are the need of parties and children. This indicates that the parties’ desire is obsolete and the division is effective after being endorsed by the court. For examples in the case of *Zulkifli Bin Hj Saudun v. Zaimatun Bt. Hj Suradi* (10100-011-0045-2008 (Selangor) the court based on the agreement of both parties ordered the house to be divided equally to the plaintiff and the defendant.

In the division of matrimonial home it was illustrated in some cases that the party agreed to transfer of whole ownership of the home to an existing wife who highlights the extension to the original rule in practices of division of matrimonial assets. In *Aminah Bt. Berkatal v. Mohd Shkdan B. Kamsah* (10100-017-0120-2009 (Selangor) the court held that based on the agreement of parties, a terrace house situated in Shah Alam to be transferred to the plaintiff and the defendant waived his right to claim the asset. Similarly, in the case of *Mohd Isa B. Hashim v. Rusnah Ahmad* (10300-011-0051-2006 (Selangor) the court ordered the parties to adhere to the agreement endorsed regarding the division of *harta sepencarian* that on an apartment situated in Puchong. In Selangor case of *Mohd Mohsi Bin Arsam v. Noraesah Bt Aman* (10100-011-0009-2009) where the court held that the permission of polygamy has been allowed and the court order the division agreed through *sulh* that a terrace house situated at Johore Bharu and grant no. HSD 95452 situated at Johor Bahru, the plaintiff has to surrender to the defendant, a Naza Ria car with registration number BJS 8983, the plaintiff should surrender to defendant as to be used as transportation by defendant and their children and a car of Wira TAD 983 was ordered that be surrendered to the defendant.

Observation on several cases highlights that when the matrimonial asset involved are multiples, the transfer of an asset to one party was type of agreement achieved by parties. In other words, both parties get sole ownership of the asset by waiving each party’s right towards another asset. In *Akhbar Bin Ahmad v. Zaharah Bt Md Salleh* (10300-011-0227-2007
(Selangor), the court after granted the permission to polygamy ordered a house situated in Ampang, Selangor be transferred to the plaintiff whereas another house situated at Bandar Ampang, District Hulu Langat under the ownership of the plaintiff be surrendered to the defendant. The division of the asset in some cases took into consideration the need of children to the parties where the children have been given a specific allocation as their share of hibah. In Selangor case of *Hj Sulaiman Abu Bakar v. Hjh Zainab Bt. Abd. Aziz* (10300-011-0043-2007), the court ordered that a semidetached house situated in Negeri Sembilan and a terrace house at Johor Bahru be transferred to their children as hibah.

Exclusive transfer to the wife is another variation of the court order in division of matrimonial home (*Borhan Bin Ahmad v. Khadijah Binti Muslimin* 07100-011-0280-2007 (Penang; The exclusive transfer of ownership to wife was also decided in the case of *Yusni B. Mohd Yusof v. Narizan Bt Che Namat* (08100-011-0007-2009 (Perak). The effective time of transfer takes place either at the time of granting the permission or after marriage to the subsequent wife. It is decided in the Sarawak case of *Rusli solihin v. Sabariyah Bt Udin* (13100-011-0400-2012). This signifies that through sulh the need of an existing wife to matrimonial home is prioritized for her survival in the future where the home is divided regardless of the number of the available matrimonial asset. This form of settlement should be seen as an appropriate division when involving cases of polygamy.

Based on the analysis it can be concluded that the division of assets during marriage is substantial and significant to ensure the polygamy does not affect to the survival and security of the existing wife. The interesting aspect that has been observed was that the division only involved the determination of shares of the asset which is not subjected to be sold. It has been observed that transfer of assets to the existing wife is commons where this indirectly gives advantage to the wife without the court emphasizing contribution as sole criteria in dividing the share of assets. Thus, this shows that sulh is an amicable form of settlement for the division of matrimonial assets thus leading to a fair and just division of assets upon polygamy.

The data described that landed property, vehicles, shares and business assets are part of the variation of assets involved in the division upon the husband getting permission to polygamy. It has been noted that overall no order that directs these assets to be sold and the division be in a form of determining the portion of ownership on the assets. This highlights
that the trend of the division during an existing marriage varies from other divisions where the determination of proportion of the asset is made without any disposal of the asset. In a majority of cases, the court order for the transfer of the entire interest in a vehicle to a wife. For example, in the case of Abdullah Bin Shikh Mohamed v. Ruhaidah Binti Ismail (01100-011-0040-2012 (Johor) the court ordered after agreed by the applicant to transfer the ownership of cars to the respondent and that the transfer be done ten days after the order of division issued by the court. In some cases the vehicle was transferred to the wife and children (Wong Siew Choo@Badawi Abdullah v Jata (P) anak Unjah 13100-011-0109-2009(Sarawak) and when the available vehicles are multiple, the court ordered the vehicle to be exclusively transferred to the children (Hj Sulaiman Abu Bakar v. Hjh Zainab Bt. Abd. Aziz 10300-011-0043-2007 (Selangor).

Different in normal proceedings, the mutual agreement or *sulh* of parties promotes the need to take into account the interest and welfare of children. It has been observed that mutual agreement to transfer the vehicle to children is depicts that the court is willing to expand the scope of division to children as *hibah*. This is illustrated in the case of Hj Sulaiman Abu Bakar v. Hjh Zainab Bt. Abd. Aziz (10300-011-0043-2007 (Selangor) where the court awarded to their sons a car and two units of motorcycles and a Kelisa car is awarded to their daughter as a gift. Thus, this signifies that in the context of *sulh* during polygamy, besides considering the needs of parties, the share for the children is also determined. It can be concluded that *sulh* of parties is an amicable settlement and its distribution is practical as parties’ need and children’s interest are the major considerations in ensuring a fair and just division upon polygamy.

The data describes that out of the 13 studied cases the division also involved landed property (Abdul Aziz Bin Jelani v. Noriah Binti Norbi 07200-011-069-2007 (Penang), rental payments, business asset, and savings money and shares (Abdullah Bin Shikh Mohamed v. Ruhaidah Binti Ismail 01100-011-0040-2012 (Johor) although there were rare. The division of these assets signifies the awareness of each party to divide any asset owned and the court has considerably expand the scope of assets to be involved in the division during marriage to tangible and intangible assets which are significant as they are high value assets.
This was illustrated in the case of Abdullah Bin Shikh Mohamed v. Ruhaidah Binti Ismail (01100-011-0040-2012 (Johor) the existing marriage lasted about 20 years. The husband was a businessman who had accumulated several assets including shares and landed property. The court after endorsing the *sulh* of parties ordered eight units of shop houses, four units to be surrendered and transferred to the respondent, the applicant’s wife. The wife was also allowed to collect the rental payment of the shop. Besides, the court ordered the business share owned by applicant, LM Star Auto World Sdn. Bhd. to be divided at 15% to the respondent. The court ordered a ESSO petrol station under construction at the PLUS Highway to be surrendered to the wife and the wife be given the rights to handle the business with the applicant bearing its capital finances. The court also ordered RM1million in saving monies to be deposited to the wife’s Pilgrimage fund account within 60 days effective date of order. Besides, the court ordered cash monies amounting to RM 2 million to be deposited into the wife’s RHB account from 20 until 28 February 2012.

6. **Interest of Minor Children**

The division after divorce, the data describes that the need of minor children is considered in *sulh* by allocating a portion of share of the matrimonial assets to the children. This is common in Sarawak especially when the asset involved in division is a matrimonial home. It has been observed that parties agreed to forgo their interest in the matrimonial assets and had also agreed to transfer their interest in the assets to the parties’ children. As regards the types of assets involved in the transfer these include land lots (*Zarina Binti Yusoff v. Muhammad Bin Abdul Ghani* 03100-01-0012-2003(Kelantan) and houses (*Che Aminah Bt Mohammed Saad v. Ibrahim B.Kassim* 1220-17-17-2000 (Johor)). In Kelantan, the situation is the same. This was illustrated in the case of *Zarina Binti Yusoff v. Muhammad Bin Abdul Ghani* (03100-01-0012-2003(Kelantan), where the court ordered a transfer of interest in two land lots and houses situated at Mukim Kenali, Daerah Kubang Kerian and Mukim Pasir Mas to all three children aged from 11, 16 and 20 years in equal portions. The plaintiff and the defendant also agreed to be trustees for their minor children. It was noted that sole effort assets registered in the sole name of a party which was acquired during marriage were also transferred to children. This is apparent in the case of *Che Aminah Bt. Mohammed Saad v. Ibrahim B. Kassim* (1220-17-17-2000 (Johor) where both parties agreed to transfer their
interest of a double-storey terrace house situated at Subang Jaya, Selangor which was registered under the sole name of the defendant to four of the children. All expenses related to maintenance and renovation of the said house was to be incurred solely by the defendant.

The transfer of interest of matrimonial home to children also takes effect when stipulated by agreement of parties. In the case of Roslinah Che Wan v. Azlan B Sabtu (10200-017-0009-2008 (Selangor) the court ordered a double-storey terrace house be considered as matrimonial property and the said house to be transferred wholly to the plaintiff with the mortgage instalments of the house to be continued to be paid by the defendant until 2029. A condition is imposed that if the plaintiff then wants to get married to another man, the plaintiff has to transfer the assets to the children as hibah. However, in the case of Mohd Mujiar Kadisan v. Fatimah Binti Main (10100-017-05-2001(Selangor) the defendant, the former wife waived her right against matrimonial property on a house situated at Bandar Baru Sg. Buloh, Selangor. In return, the house was to be sold at the original price of RM55 000 to their son soon after he obtains a permanent job. The plaintiff allowed the defendant to stay at the house with a rental of RM150 until the completion of the sale of the house.

The division upon polygamy, the data shows that six out of 14 cases attended to the welfare of children thus taking into account the division of the matrimonial asset through the spousal agreement. This is to protect the parties’ welfare and well-being and also to ensure the children’s security and stability. In the division of assets it has been observed that the greater portion of share is granted to children of a spouse as hibah and the division involved a variation of assets such as share, matrimonial home (Wong Siew Choo@ Badawi Abdullah v. Jata (P) anak Unjah 13100-011-0109-2009 (Sarawak), shop houses, vehicles (Hj. Sulaiman Bin Abu Bakar v. Hjh Zainab Bt. Abd. Aziz 10300-011-0043-2007(Selangor) and cash monies. However, the allocation of share to children does not prejudice the right of an existing wife to harta sepencarian and when the division to minor is only made available if multiple assets are involved. In Johor Bharu, in the case of Abdullah Shik Mohammad v. Ruaidah Binti Ismail (01100-011-0040-2012 (Johor) where in allowing the respondent husband’s application for polygamy, despite the appropriate proportion allocated to the homemaker wife, the court ordered the plaintiff to transfer four units of houses to their two sons and two daughters including one minor daughter and to deposit in Tabung Haji account cash monies amounting to RM 1 million. The applicant also agreed to divide business shares
owned by the applicant to the respondent that is 15% of the total share. However, the remaining 25% of shares were to be given to their two sons and 10% share each to the other two daughters.

Adult Children are not excluded from receiving their proportion as a gift. This is illustrated in the case of *Hj. Sulaiman Abu Bakar v. Hjh Zainab Bt. Abd. Aziz* (10300-011-0043-2007 (Selangor) where the parties transferred whole interest in the asset to their son and daughter who were at the time of the division were at majority aged. Here the courts ordered a car and two units of motorcycles to be transferred to their son, whereas the Kelisa car is to be given as *hibah* to their daughter. This shows that in the context of *sulh* during polygamy, besides considering the welfare of parties, the interest of children has also become pertinent in the division of assets.

7. **Conclusion**

The application of *hibah* in division of matrimonial asset is practically settled by way of *sulh* (amicable settlement) of the parties. Ownership transfer of matrimonial asset especially through *hibah* could serve the best interest of children and their needs as well as providing adequate security for the spouse. in polygamous marriage, *hibah* is practically applied in division of matrimonial property where the parties (husbands) are in fact more generous in dividing the assets especially when dealing with the interest of children to the level that the husband is willing to transfer the whole interest in the asset to the existing wife which is rarely achieved in other litigation process. Thus, this study suggests that *hibah* mechanism could be legislated and widely practiced in dividing the matrimonial property.
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WARRANTIES: THE HIDDEN SHIELD AND SWORD FOR THE INSURER TO RETAIN PROFIT UNDER MARINE INSURANCE

Ahmad, M.S.¹ & Abd Ghadas, Z.A.²

Abstract

Marine insurance is the medium to safeguard and protect the interest of the assured for any damage suffered during the valid policy. It will restore the assured to the same financial position enjoyed before the loss. However, the insurer are only obliged to indemnify the assured based on the damage suffered. The assured are only entitling for indemnity of loss. It is a crystal clear rule provide by s.3 of The Marine Insurance Act 1906 which provided that the marine insurance is a contract of indemnity and it is confirmed by the application of rules in the case of Brotherson v Barber (1816) 5 M&S 418. The issue arises when insured is trying to escape from make any payment by putting the strict restriction for claim. There are abundant of principle under marine insurance to justify the action and one of them is the concept of warranties. It is different from the warranties under the contract of charter party since it is means a promissory warranties. It is embedded shield and sword under the law for insurer to deny the payment of claim. The insurer are free to introduce any additional terms and conditions to be followed by the assured. In all cases, the assured has no room to refuse since it is considered as part and parcel of the consideration. Either they will accept or there will be no contract to insure at all. The warranties is either being used for defence in denial claim or to initiate the stand to escape from liabilities to pay. This is doctrinal research which is qualitative in nature. The paper will discuss and examine the above situation in terms of application and remedies by referring to main sources of law and current practice and principle under the law of marine insurance and other related law.

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1. Introduction.

Marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure. It is a promise or agreement of compensation for specific potential future losses in exchange for a periodic payment known as premium. Insurance is designed to safeguard and protect the financial well-being of an individual, company or other entity in the case of unexpected marine losses. However, in all cases the insurer will control the risks and perils by negotiating and inserting the limitations before the contract is concluded i.e warranties.

Warranties is originated from English law in 17th century and has been adopted by other countries which influenced by the English law. Warranty according to marine insurance means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

When the warranties is introduce, the element of materiality is signifies nothing. It means that the insurer has full autonomy to decide the terms and conditions to be part of written policy even though there is no connection with the risks. In Newcastle Fire Insurance Co v Macmorran & Co:-

“It is a first principle of the law of insurance, on all occasion, that where a representation is material it must be complied with- if immaterial, that immateriality may be inquired into and shown; but if there a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality signifies nothing.”

The concept of warranties has become the binding precedent and has been adopted in every case. For instance, in the Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck) that breach of warranty would put the risk to an end automatically as from the time of breach. This rule has been held appropriate to both marine and non-marine insurance contracts. The unique distinctive of warranty is that materiality and causation are irrelevant. Once the warranties have been made as part of
policy, it must be exactly complied with. There are no defence and no act of restoration of the breach might be acceptable. The rationale of warranty is that the insurer only accepts the risk provided that the warranty is fulfilled. It means that even though the undertaking is made by the assurer, the insurer will only accept the risk and agree to insure the subject matter after the warranties is agreed by the assurer. The warranties will be used as a defence for the insurer in rejecting the claim either during the defence of claim by assurer or commencing the stand that the contract is void.

2. The attempt to reform promissory warranties

The issue on marine insurance warranties had been the main discussion from the beginning of its emergence. The direct effect to the valid contract has bloomed the insurer intention to avoid from any liability. In all cases the insurer will discharge from any liability automatically even for the slight breach of the warranties. It is due to the nature of warranties as a promise. In the other word, it must be exactly comply with without any defence and opportunities to restore the breach even for the breach of promise which has no causal connection with the loss. In addition, the insurer is free to introduce any subject of promises to be undertaken by the assurer even though it is immaterial to the risk. This hardship has led to several attempt made by the scholar and judges via their verdict.

For instance Baris Soyer, warranties in marine insurance, 2001, has proposed the reformation to amend the s.33(3) of MIA 1906, breach of warranties which is not lead to loss or damage will not repudiate the contract. In addition, the assurer must proof that the breach has not caused or contribute to loss in order to enjoy the policy coverage. The second suggestion by the Writer is to Repeal of s 34(2)which illustrate that In a case where the breach is remedied before the loss the assurer will able to recover in the absence of a causal link between remedied breach and loss. The reformation is merely to amend the element of promissory warranty has caused conflict to the concept of promissory warranties.

Base on the research, there are many effort make by the scholar and judges during the process of delivery judgments to reform or amend the concept of promissory warranty. However, the attempt is technically parallel or similar. For example in the case of Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd [2006] WASC 104
Justice EM Heenan specified four reasons why the insured should have been indemnified: 1) the Plaintiff’s actions were reasonable, 2) the loss was caused by the same cyclonic peril the Plaintiff was escaping from, 3) the Plaintiff was acting to avoid damage and protect the insured property and 4) the loss was caused by a peril of the sea and not by the breach of warranty regarding the mooring.

Fundamentally, the Judge ruled that the legislation stating “a warranty… is a condition which must be exactly complied with, whether it be material to the risk or not” was not to be taken too literally. Its mere the trend base on the discretion of judges. It is clearly breached the MIA 1906 since it is promissory warranty and it must be exactly comply with without defence and the breach will automatically discharge from liability. Trending decision by justifying the existing rule in term of the application is not a solid solution. It just merely as an interpretation to the rules which open to disagreement and divergence.

In Hong Kong Nylon Enterprises Ltd v QBE Insurance (Hong Kong) Ltd (2002) HCCL 46/1999. When there are conflicting between policy and warranties, than the former will prevail. The insured “warranted that this is a container load shipment”. In fact there were no such containers, as they were shipped break bulk. The cargo was damaged, and the insurer refused indemnity. The insured claimed the Institute Cargo Clause (A) 8.3 overrode the warranty. Clause 8.3 stated “this insurance shall remain in force … during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.” Justice Stone agreed with the insured. His Honour stated, unusually, that the general Clause 8.3 made an exception to the specific warranty. However, to respond to the matters, once mentioned expressly, it is consider as express warranty. Since it is a promissory warranty therefore, must exactly be complied with and it still been enforced as promise.

The Newfoundland Explorer, GE Frankona Reinsurance Limited v. CMM Trust 1440 [2006] Lloyd’s Rep IR 704. The High Court of England and Wales (in Admiralty) has allowed breaches of warranty to not interfere with the insured’s indemnification, where that breach was remedied before the loss claimed had happened, and where that loss was unrelated to the breach. The reformation is only involving some element of warranties in
which is not a creation of new concept. In addition, eventually the concept of promissory warranties will prevail since it is still the main concept of warranties under marine insurance Act. The reformation can’t simply by changing the element without considering the whole concept of promissory warranties.

Staples v Great American Ins Co, New York, [1941] SCR 213. Kerwin J:

In the case at bar, I cannot read the statement in the margin of the policy as a condition that upon the yacht being used for other than private pleasure purposes the policy would be avoided even though at the time a loss was suffered the yacht was not being so used.

According to the case, the breach of warranties without having linking with the loss is permissible and is not considered as a breach of promissory warranty. The judge try to eliminate the element of promissory warranties whereby the causal connection between the breach and loss no need to be established. However, it is the same attempt to reform which has been taken by others.

Furthermore in, UK Law Commission Insurance Contract Law: The Business Insured’s Duty of Disclosure and the Law of Warranties (2012) (The Law Commission wrote this report in partnership with the Scottish Law Commission), Almost every country in the Common Law world using an unmodified (or almost unmodified) form of the UK Marine Insurance Act 1906, the Commission stated at page 167 of their report that these provisions bring the law in the UK into disrepute in the international market place’. It further criticised the harshness of the law by stating ‘the consequences [of the UK’s equivalent of s 39 of the MIA] 37 lack ‘logical reason’ and cannot be explained in terms of either legal fairness or economic efficiency’.

Bind by law MIA 1906. The solution is by creating a new concept of warranties. To abolished “promissory warranties”.

Insurance Contract Law: Summary of Responses — Law of Warranties (2013) 22-26, marine warranties should not be able to be relied upon by insurers to deny indemnity to their insured where the breach of those warranties is not causative of the loss claimed i.e Sus
pensive effect. However, the issue is when it involve the classification of promissory warranties according to the time of undertaking. i.e “warranted that there must be 3 crew at all time”. Therefore, it is the breach of the concept of promise.

Later on, in the case of ICS v West Bromwich Building Society [1998] 1WLR, 897 – Lord Hoffman attempt to modify the concept by interpreting the wording according to the audience:

“The meaning which a document would convey to a reasonable man is not the same as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.” However, It is a matter of interpretation. After it has been clearly interpreted, the concept of exactly compliance under the marine insurance is applied.

The further attempt to reform the warranties via judgement has been made in the case of The Milasan [2002] Lloyds Rep 458 - Mr Justice Aitkens “Warranted professional skippers and crew in charge at all times.”

“The warranty obliged the defendant to keep at least one crew member on board the vessel 24 hours a day, subject to (i) emergencies rendering his departure necessary or (ii) necessary temporary departures for the purposes of performing his crewing duties or other related activities.”

In this situation, the judges has given further explanation in order to assist the exact content of marine insurance. The explanation will become the justification not exactly comply with the express warranties stipulated by the insurer in the policy.

The same approached has been made in the case of The Newfoundland Explorer [2006] EWHC 429 – Mr Justice Gross and in case of Pratt –v- Aigaion Insurance [2008] EWCA Civ.1314 – Lord Justice Clarke/Lord Justice Burnton when it is considered as a matter of interpretation. However the moment it is concluded, the parties is subject to the concept of promissory warranties. According to the case, the insurance policy has a
warranties express term mentioned that “Warranted owner and/or owner’s experienced skipper on board and in charge at all times and one experienced crew member”.

It found that, “It cannot have been thought that the vessel would be crewed while she was aground or at a place of storage ashore, while being dismantled etc. It follows that the warranty….cannot be read literally. Some qualification to the term ‘at all times’ must have been intended.”

per Burnton LJ further explain that, “In the circumstances, the clause should be construed contra proferentem…At the time the crew left, the vessel was safely tied up alongside as must happen very often. I would hold that that the insurer has not established that there was here a breach of warranty.” - per Clarke LJ

WARRANTIES IN MARINE INSURANCE Christopher J. Giaschi Presented to the Association of Marine Underwriters of British Columbia at Vancouver on April 10, 1997, introduce Judicial amendment on the elements of warranties. Recent developments in the law in relation to warranties in policies of marine insurance indicate that there has been a judicial amendment of, if not complete revocation of the Marine Insurance Acts. It is only in very rare circumstances that a Canadian court will find a policy to contain a true warranty. These circumstances will essentially be limited situations where the warranty is material to the risk and the breach has a bearing on the loss. However, the amendment will jeopardise the concept of promissory warranty under marine insurance Act 1906.

a. Suspensive effect

Shearwater Marine Ltd. v Guardian Insurance Co. (February 28, 1997) No. C935887 (B.C.S.C.) illustrative of a restrictive approach to warranties. The policy in this case provided "Warranted vessel inspected daily basis and pumped as necessary". Although the court found that this condition had been complied with it did consider whether the condition was a true warranty or merely a suspensive condition and held that it was a suspensive condition.
Sus pensive condition is technically an amendment to element 1) the insurer is automatically discharge from the liability 2) the breach can be remedied.

The sus pensive effect also has been mention in the research of THE PROSPECTIVE REFORM OF MARINE INSURANCE LAW IN THE UK, Professor D. Rhidian Thomas Emeritus Professor of Maritime Law Founder Director of the Institute of International Shipping and Trade Law Swansea University. Breach of warranty to be treated as ‘suspensive’ – insurer not liable for the period the assured is in breach of a warranty which is designed to decrease a particular risk (e.g. fire) – the insurer is entitled to reject only claims relating to that risk. Suspensive condition is technically an amendment to element 1) the insurer is automatically discharge from the liability 2) the breach can be remedied 3) the warranty must be material to the risk.

It show that event though there are attempt made by scholar and jurist to reform the warranties, the reformation only involve the alteration or amendment of element of warranties without changing the whole concept of warranties. The reformation will create the balance situation between the parties of insurance in order to uphold the core concept of protection and indemnity.

3. Insurance Act 2015

In 2006 the Law Commission were asked to think through the existing insurance law regime in the UK to consider whether it was still fit for perseverance in the modern insurance market.

The Commission’s decision was that the current law is obsolete with the realities of 21st century commercial practice. As a result, the Law Commission published The Insurance Bill 2014 which was first put before Parliament in July 2014. The Bill received Royal Assent on 12th February 2015 to become the Insurance Act 2015 (the “Act”) but it will only enter into force on 12th August 2016 to allow the market time to regulate its practices. The Act seeks to extend reforms made in 2009 to consumer contracts of insurance: The Act makes will make it stiffer for insurers to avoid claims as a result of technical breaches by the insured.
The current position as stated in the MIA is that the warranties is a promissory warranties. The assurer claim will be rejected due to non-strictly compliance on express or implied warranties regardless the materiality of the promise. Unless the insurer waived his right, the assurer in no circumstances will entitle for claim.

Under sections 9 to 11 of the Act the effect of a breach of warranty will be less severe. Any warranty breach by an insured now merely suspends the insurer’s liability until the breach is remedied. The insurer will have no liability for any claim arising if the policy is suspended but once the breach has been remedied then the policy resumes in full force. The Act also stops an insurer avoiding an insurance contract if a warranty ceases to be applicable to the circumstances of the contract due to a change of circumstances or if it is rendered unlawful or is waived by the insurer.

A further amendment to the existing law under the Act arises from the Law Commission’s proposal. Section 11, the element of materiality of warranty must be taken into account. It means that the non-compliance of the warranties which has no connection with the risk or increasing the frequency of risks are permissible.

4. Conclusion

The introduction of new rules on warranties pursuant the legislation of Insurance Act 2015 will offer the balance between parties. The insurer absolute right upon breach of warranties to reject the claim (shield) requires direct and justify explanation of breaching and exposing the subject matter to the maritime perils. In addition, to allege that the claim is void due to breach is limited to specific circumstances.
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MIND FATIGUE: THE JEOPARDY TO CONTRACT OF CHARTER PARTY UNDER THE CARRIAGE OF GOODS BY SEA

Ahmad, M.S., 1 & Abd Ghadas, Z.A. 2

Abstract

Mind Fatigue is referred to tiredness, exhaustion, lethargy and listlessness, describe a physical and mental exhaustion due to exertion. The mental and mind are interconnected since the performance of any activities require both of them in good condition. When somebody experiences physical fatigue, it means they cannot continue functioning at their normal levels of physical ability. Mental fatigue, however is more slanted toward feeling sleepy and being unable to concentrate properly. The effect of mind fatigue becomes more severe when it happens during the commencement of contract to ship a goods from the port of origin to port of destination via charter party contract. It will repudiate the contract as a breach a core and condition of the said contract of charter party i.e seaworthiness. In addition, it is an implied obligation, thus, it is enforced although the contract is silent or the terms is not expressly mentioned in the contract of charter party. The materiality of the issue have reach the awareness level when the International Maritime Organization (IMO) has introduce STCW convention 1978 and having the latest amendment in 2010 to discuss the effect of mind fatigue. This is doctrinal research which is qualitative in nature. The paper will discuss and examine the above situation by referring to main sources of law and current practice and principle under the law of carriage of goods by sea and other related law.

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1. **Introduction**

Mind Fatigue is referred to tiredness, exhaustion, lethargy and listlessness, describe a physical and mental exhaustion due to exertion. The mental and mind are interconnected since the performance of any activities require both of them in good condition. When somebody experiences physical fatigue, it means they cannot continue functioning at their normal levels of physical ability. Mental fatigue, however is more slanted toward feeling sleepy and being unable to concentrated properly.

The effect of mind fatigue becomes more severe when it happens during the commencement of contract to ship goods from the port of origin to port of destination via charter party contract. It will repudiate the contract as a breach a core and condition of the said contract of charter party i.e seaworthiness. In addition, it is an implied obligation, thus, it is enforced although the contract is silent or the terms is not expressly mentioned in the contract of charter party. The materiality of the issue have reach the awareness level when the International Maritime Organization (IMO) has introduce STCW convention 1978 and having the latest amendment in 2010 to discuss the effect of mind fatigue into the compliance of implied obligation under the contract of affreightment.

2. **Contract of carriage (affreightment)**

When a ship-owner, either directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose, the arrangement is known as a contract of affreightment. The seller/shipper in an international sale can perform his obligation to ship the goods by make reservation on shipping space in a general ship or he can charter the entire vessel under a charter-party contract. The former contract of carriage is evidenced by a bill of lading, meanwhile for the later contract of carriage is contained in a charter-party contract. The main objective is to carriage a goods from the port of origin into the port of destination for the propose of deliver the goods to the consignee.

There are three (3) types of charter-parties. It is a time charter-party, voyage charter-party and demise charter-party. In time charter-party, the ship is hired by a charterer for a definite period of time. Meanwhile for the voyage charter-party the ship is hired for a particular or series of voyages. These type of charter-parties stipulated that the ship crews are
the servant of the ship-owner so that he is the actual carrier. In the other words, the management of the vessel is fall under the responsibility of the ship-owner together with any liabilities in terms of claim upon sustain damage to the vessel. However, under the third type of charter-party, the charterer takes over the management of the ship so that he is the legal and actual carrier of the goods. Therefore, either one of the above said method being preferred by the carrier, there are subject to the rules and regulation to provide a safe voyage. Above of all, the parties must comply with the contract and agreement agreed in order to sustain the deal.

Under charter-party terms, there are two (2) divisions which known as express and implied terms. For both of them have further sub divided into three (3) category base on the frequency of seriousness and importance. There are condition, warranties and in nominate terms. - Bunge Corp v Tradax Export SA[1981]1WLR711,HL.

Condition is a statement of fact or promise that forms an essential term or fundamental importance of the contract. The breach goes to the root of the contract Render the contract is void. The innocent party to be discharges from the further performance of the contract and he may repudiate the contract and claim damages for any loss suffered. However, if the party regards the terms as not essential but subsidiary or minor importance, it is warranty. Types of act under condition term including Statement as to identity of the ship, statement of the time of sailing, a named ship, statement as to nationality of vessel (and change of flag), statement as to class, Statement of ship’s position and time of sailing and Statement as to time of loading.

The word warranty may be referred to two difference situations. Warranty is used for the purpose of distinguishing the most important term (condition) from the less important term (warranty) and it may relate to a separate enforceable promise, which is collateral to the contract. The innocent party cannot repudiate the contract and his remedy is confined to claim damages only. Types of warranty cases such as statement as to vessel speed, statement as to size of bunkers and statement as to condition of vessel on delivery. Innominate terms, it is also known as intermediate terms. It is a contractual undertaking that cannot be categorized as being ‘condition or warranty’. The terms commonly referred to in nominated term ‘the grey zone’. Effect of Breach either will render the contract is repudiated or the contract is
existed and the remedy is confine to damages only. Types of cases in innominate terms such as statement as to maintenance of vessel and statement as to cargo capacity

The sustainability of the contract of carriage is directly depending to the compliance of the obligation which has expressly or impliedly agreed in the contract. The breach of any obligation stipulated in the contract will jeopardize the agreement according to degree or frequency of seriousness and importance.

During the international convention which was held at Manila in 2010 on STCW 1978 (standard of training certificate and watch keeping) for seafarer. There are significant and major amendment to the existence STCW code is proposed and implemented for the purpose of upgrading the level of safety and competency of seafarer. Part of the amendment was revised requirement on hour of works and rest to prevent the mind fatigue. The effect of amendment will be the main solution for the non-compliance of implied obligation under contract of charter-party i.e seaworthiness of vessel.

3.  **Implied obligation under the contract of charter-party**

Implied obligations which are automatically incorporated into the contract in the absent of agreement to the contrary. Terms applied for both charter party contract, or contract evidenced by Bill of Lading. Implied Obligation in a Contract of Affreightment are the undertaking as to seaworthiness, the obligation of Reasonable Dispatch, the obligation not to deviate from the agreed route, the obligation to nominate a safe port and the obligation not to ship dangerous goods.

a.  **Undertaking as to Seaworthiness**

In every contract of affreightment there is an implied obligation to provide seaworthy vessel. Kopitoff v Wilson (1876)1 QBD 377 ;Field J: “fit to meet and undergo the perils of the sea and other incidental risks to which of necessity she must be exposed in the course of voyage”. Normally, the implied undertaking is reinforced by an express term to the same effect. For instance, preamble to NYPE form requires the vessel be ‘tight, staunch, strong and in every way fitted for the service. The obligation cover not only the physical state of the
vessel but also the competence and adequacy of the crew, the sufficiency of fuel and other supplies and the facilities necessary and appropriate for the carriage of the cargo.

Under the common law the liability of breach the implied obligation of seaworthiness is absolute. Breach will be liable irrespective of fault. In the case of Steel v State Line Steamship Co (1877) Lord Blackburn: It amount to undertaking “not merely that they should do their best to make the ship fit, but that the ship should really be fit”. However, the ship owner not under the duty to provide a perfect ship but merely reasonably fit for the purpose intended. Furthermore, in the case of President of India v West Coast Steam Ship “The duty to furnish a ship and equipment reasonably suitable for intended use” – absolute duty (common law)

The test applied is an objective test. In the case of McFadden v Blue Star Line (1905) Channell J: “the vessel must have that degree of fitness which an ordinary careful and prudent owner would requires his vessel to have at the commencement of her voyage having regard to all the possible circumstances of it” However, the standard required will vary depending on the nature of the voyage, the type of cargo to be carried and the likely dangers to be encountered en route. Even though, the common law obligation (absolute) can be excluded by an appropriate clause in the contract of affreightment, the court apply a restrictive interpretation to them. For instance in the case of Nelson Line v Nelson it was held that word exemption for any liability for any damage to goods which is capable of being covered by insurance was not to be effective.the clause must expressed in clear and unambiguous language.

However, under The Rules (The Hague/ Hague Visby/Hamburg/ Rotterdam) The absolute obligation in common law is replaced by a duty to exercise due diligence to make the ship seaworthy. The obligation to make the ship is seaworthy proportionately lies to all the parties involve to make the ship seaworthy i.e contractor. Many modern standard charter forms have now adopted the Hague Rules formula with regard to the requirement of seaworthiness.
For example, Baltime form excludes the liability of the ship-owner for loss or damage to cargo unless such “loss has been caused by want of due diligence on the part of the owner or their manager in making the vessel seaworthy and fitted for voyage” The Gundulic [1981]

b. Incidence obligation

The requirement for the ship-owner to provide a seaworthy vessel comprised two-fold obligations. The vessel must be suitably manned and equipped to meet the ordinary perils likely to be encountered while performing the service required for it. Secondly, the vessel must be cargo worthy – it is in a fit state to receive the specified cargo.

Under the first obligation, it focuses on physical condition of the vessel and its equipment, the competency of crew and the adequacy of stores and documentation. Therefore, the following situation is considered as unseaworthy. For instance, defective engine as in the case of Hong Kong Fir Shipping Co v Kawasaki [1962] 2 QB 26. Defective Compass as in the case of Paterson Steamship Ltd v Robin Hood Mills (1937). Deck cargo is stowed in such a way as to render the vessel unstable as mention in the case Kish v Taylor [1912]. To employs an incompetent engineer or officer as in the case of The Makedonia [1962]. Inadequate bunker for voyage as in the case of McIver v Tate Steamer [1903] and inadequacy of document for voyage as in the case of The Madeleine [1967]

However, the implied undertaking does not extend to cover such matters as recommended manning levels and conditions of employment formulated by extra-legal organization such as trade nation. The Derby [1985]

The ship owner's obligation to provide a seaworthy vessel was classified as an innominate / intermediate term by Court of Appeal in Hong Kong Fir Shipping Co v Kawasaki [1962]2 QB 26 Diplock LJ: such undertaking can be broken by the presence of trivial defect easily and rapidly remediable as well as by defect which must inevitably result in a total loss of the vessel.

The mind fatigue which resulted of lack of rest or working exceeding hour which the body can tolerate will affect the competency of crew. It will shut-off the man capability and up to certain extend will prejudice the root of contract to make sure the vessel under the supervision or control of competent crew. The mind fatigue also will turn the competence
worker into the opposite although they are competence on paper. Especially in current business in which the high-tech vessel require less crew to operate will increase the risk of fatality - the crews are mind fatigue. It will jeopardize the contract of charter-party under the obligation to provide a seaworthy vessel since the crew is part and parcel of definition of seaworthy. Taking the point into consideration, The Manila amendments to the STCW Convention and Code were adopted on 25 June 2010.

4. The STCW Convention & Code 2010 Manila Amendments

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 was adopted on 7 July 1978 and entered into force on 28 April 1984. The main intention of the Convention is to support safety of life and property at sea and the protection of the marine environment by establishing in common agreement international standards of training, certification and watchkeeping for seafarers.

The Manila amendments to the STCW Convention and Code were adopted on 25 June 2010, marking a major revision of the STCW Convention and Code. The 2010 amendments are set to enter into force on 1 January 2012 under the tacit acceptance procedure and are aimed at bringing the Convention and Code up to date with developments since they were initially adopted and to enable them to address issues that are anticipated to emerge in the foreseeable future since the tremendous development of technology and its application.

Amongst the amendments adopted, there are a number of important changes to each chapter of the Convention and Code, including revised requirements on hours of work and rest and new requirements for the prevention of drug and alcohol abuse, as well as updated standards relating to medical fitness standards for seafarers. The main objective and intention is to prevent any casualties or accident at sea which caused by human error or negligence. In addition, the amendment has overcome the core problem of mind fatigue which will jeopardizing the charter party contract under the carriage of goods by sea.
5. Conclusion

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers amendment 2010 marking the proactive respond from the organization to hamper the main issues regarding to safety at the sea. The dynamic development of carriage of goods by sea has denote the improvement and enhancement of the rules and regulation to meet with the futures needs as well as to remedy the existence predicament.

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FINANCIAL NEGLECT AND CHILDREN’S RIGHT TO EDUCATION: ISSUES ON THE MAINTENANCE OF CHILDREN AFTER DIVORCE IN MUSLIM MARRIAGES IN MALAYSIA

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Abstract

Divorce among Muslims married couples in Malaysia occurs once in every 15 minutes. The rate of divorce in among Muslims couples is as twice as higher as compared to non-Muslims couples and has become an alarming issue. Children are the most affected individuals from this separation not only in terms of social and emotional aspects but also in financial aspect. Thus, this paper adopted a qualitative approach by way of analyzing the laws, international conventions and related cases in discussing the concept of right to education. Furthermore, it attempts to discuss the financial implications of divorce to the children’s right to education particularly when the father fails or unable to pay the maintenance to the children. Though the right to education is guaranteed in Malaysia and that the government had abolished school fees, the cost of education is still high and it causes a heavy burden to the single mother to send every child to school. Therefore, enforcement of judgment order by the court needs to improve in order to protect the best interest of children i.e. for their right in respect of education.

Keywords: children – separated parents – neglect on maintenance – right to education

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1. Introduction

Divorce or separation of married couples is seen as a commonly thing in the world today. Most people no longer perceive marriage as a sacred institution, to be protected and maintained at all cost, for the betterment of not only for the couples and the family, but more importantly, the children. Among the identified causes crisis which leads to divorce were the spouses are incompatible with each other, infidelity, polygamy, excessive family intervention, and health problems including infertile couples, spouses having an affair with other people, debt problems, economic problems, unemployment, limited job opportunities, work commitments, jealousy, poor moral upbringing, abuse and neglect. As Malaysia consists of Muslims and non-Muslims citizens, the matter of matrimonial is governed under separate laws. The Law Reform (Marriage and Divorce) Act 1976 governs matters of matrimonial of non-Muslim marriages while various states’ Islamic Family Law Enactments cover the issues in marriage and divorce for Muslims couples. This paper seeks to focus on divorce among Muslims in Malaysia.

In Malaysia, the report from the Malaysian Islamic Development Department (JAKIM) in 2009 shows that divorce among Muslim couples occurs every 15 minutes. In 2010, the statistics from JAKIM showed an increase number of divorces which was 28,000 compared to 13,000 in the year 2001. In 2013, it is reported that in every three marriages, two couples ended up in a divorce. The high rate of divorce cases among Muslims is alarming. This is a serious challenge for the Muslim society as a whole because divorces can lead to social problems such as children being abandoned and their schooling neglected. On average, it is reported that the number of divorces among Muslims is twice as high as among non-Muslims. The implication of divorce is huge especially when children are involved. The children will suffer from the breakdown of normal family structure socially, emotionally and financially.

___Children who are and who have been caught up in the conflict surrounding the divorce or separation of their parents are categorized as vulnerable children in need of special protection. Thus, their rights are to be given a high priority as compared to the separated parents themselves. In the Islamic Family Law Enactments in Malaysia, the issue of child custody, division of matrimonial property, mut’ah, maintenance of children and wives will arise. These issues are to be considered by the court and are to be given a judgment order in
order to enforce them. Therefore, this paper seeks to discuss how the impact of neglect to pay maintenance would affect children’s right to education in Malaysia.

2. Ancillary Reliefs

It is common in all laws relating to family matters, issues of payment of maintenance would arise, usually borne by the breadwinner of the family, the father. The problem with regard to the law on ancillary claims had been in existence since immemorial and it remains as unsettled issue as to date. In Islamic family law, ancillary claims are claims which normally arise after divorce, which includes the issue of division of matrimonial property, maintenance of wife during iddah, custody of children, maintenance of children, and mut’ah. These claims would have certain implication to children either socially, emotionally or economically. Below are the related matters on ancillary claims under Islamic family law.

a. Division of matrimonial property

Matrimonial property has been generally referred to as property acquired during the marriage either by the joint effort or sole effort of the parties. The concept of harta sepencarian (Jointly acquired property) has long been recognised under Malay customary law and now has been statutorily recognized in Islamic Family Law Enactments. Under the Islamic Family Law (Federal Territories) Act 1984 (IFLA) for example, it defines harta sepencarian as “property jointly acquired by husband and wife during the subsistence of marriage in accordance with the stipulations stipulated by Hukum Syara’”. It does not only cover the parties efforts in acquiring the property but it also extend to their contribution whether formally or otherwise. This has been recognised in the case of Piah bt Said v Che Lah bin Awang (1983) 3 J.H. 266-220 where the term has been defined as:

“Property acquired jointly during the subsistence of the marriage as a result of joint efforts of the parties. This would arises in cases where the parties were either employed in similar occupation or otherwise and whether the contribution by the parties were formalised or not, and irrespective of whether there was a clear division of functions or otherwise”.
From the above definition, it is clearly stated that matrimonial property is basically based upon a recognition of the part played by a divorce spouse in the acquisition of the relevant property and improvements done to it (in cases where it was acquired by the sole effort of one spouse) it is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property.

b. **Maintenance of wife (nafkah)**

Maintenance or *nafkah* in Islamic point of view means to produce expense to persons under the obligation of a certain person (usually husband), covering all needs and desires according to the circumstances and place, such as food, clothing, accommodation and other things. Maintenance must be paid to the wife during the subsistence of the marriage based on the ability of the husband to provide them. It is the obligation of the husband to provide for the maintenance required for the marriage and the failure of the husband to provide for it will become due on the husband in the event of a divorce. The wife must prove to the court that during the subsistence of the marriage, the husband has failed to provide the wife’s needs which are required upon the former to provide for.

Section 69 of IFLA provides for the recovery of arrears of maintenance where it is stated that:

i. Arrears of unsecured maintenance shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter shall be provable in his bankruptcy and, where they accrued due before his death, shall be a debt due from his estate.

ii. Arrears of unsecured maintenance that accrued due before the death of the person entitled thereto shall be recoverable as a debt by the legal personal representatives of the person.

c. **Maintenance for children**

Abdul Hak (2009) expressed that one of the problems regarding children maintenance is the failure of the father to pay maintenance after divorce. In some cases, there are fathers who did not pay the maintenance at all, for instance in the case where the interim order has been withdrawn (without the issuance of new interim order). The father simply alleged that he is unable to pay the maintenance. This problem becomes worse when the mother has to
make a new application for her children’s maintenance. The claim will be delayed for a long period; and the trial process which takes years to complete would cause the mother to give up and no longer excited to proceed with the claim. In addition to that, Abdul Hak also stated that the irresponsible father gives a great problem for the enforcement of the maintenance order. Some of the fathers would avoid paying children’s maintenance by transferring the ownership of their properties to some other persons. The refusal of the father to pay maintenance especially when he was the sole breadwinner of the family will cause great financial hardship to the family particularly in meeting the needs of the children. This could cause a neglect of certain rights of the children, for example, the right in respect of education.

Though Section 77 of IFLA provides for the recovery of arrears of maintenance to children, but due to the many excuses of the husband and the lack of enforcement by the court, it could be timely.

d. Mut’ah

Mut’ah is defined as a ‘gratification’ or ‘a gift’, a payment given by a husband to his wife upon divorcing her without lawful justification or cause. The best way to determine the amount of mut’ah is with the consent of both parties. However where the parties dispute as to the amount of mut’ah, the court would interfere in determining the amount of mut’ah, depending on the means of the parties. Section 56 of IFLA clearly shows the relation between nafkah and mut’ah where it is stated that:

“In addition to her right to apply for maintenance, a women who has been divorced without just cause by the husband may apply to the court for mut’ah or consolatory gift, and the Court may, after hearing the parties and upon being satisfied that the woman has been divorced without just cause, order the husband to pay such sum as may be fair and just according to Hukum Syarak”

The ancillary reliefs explained above are the reliefs that the wife (in most cases) could be obtained after divorce. These ancillary reliefs which are in a monetary form are important especially on the sustainability of the family after the husband left the household. The lack of enforcement of maintenance order by the court and the refusal of the husband to comply with such order may cause great hardship to the family. In cases that the wife has never worked
before and had to embark on a job, the right of the children financially could be affected. One of the most cost consuming right of children is the right to education. The cost of education is borne by parents whether indirectly through taxes or directly through personal expenditure to support the day-to-day schooling activities. Parents have to meet a number of costs in order to educate their children namely the school fees, school uniform, books and equipment, pocket money for meals, school trips and extra reading materials, tuition and other charges (Hassan & Rasiah, 2011). This could cause a great challenge to single parent who has many children (which is a typical Malay Muslim family in Malaysia) to provide for education to each of the children.

3. The right to education in Islam

The right of education in Islam is clearly emphasized in the first verse of Surah al-Alaq of the Holy Quran which reads:

*Read in the name of your Lord who created, created man from a clinging form. Read! Your Lord is the Most Generous, who taught by means of the pen; taught man what he did not know.* (96:1-5)

These verses address humankind to seek knowledge and delve in critical thinking. It also shows that reading, writing and seeking knowledge is very important in Islam. Thus, it surpasses any statement or action denying any children’ right to education. In another verse in the Quran, God says:

*(This is) a Book (the Quran) which We have sent down to you, full of blessings that they may ponder over its Verses, and that men of understanding may remember.* (38:29)

These and other verses inform the reader that engaging in critical thinking is a moral obligation on every people; adult or children. The Quran also repetitively reminds people to ponder, think, analyze, thus using their mind power to contemplate and understand, whilst making no distinction between men and women.
There is also hadith by the Prophet said:

“Seeking knowledge is mandatory for every Muslim.”

“If anyone travels on a road in search of knowledge, Allah will cause him to travel on one of the roads of Paradise. The angels will lower their wings in their great pleasure with one who seeks knowledge, the inhabitants of the heavens and the Earth and the fish in the deep waters will ask forgiveness for the learned man. The superiority of the learned man over the devout is like that of the moon, on the night when it is full, over the rest of the stars. The learned are the heirs of the Prophets, and the Prophets leave neither dinar nor dirham, leaving only knowledge, and he who takes it takes an abundant portion.” (emphasis added)

Three important themes around education are emerging in the above traditions. From the first Hadith we infer that education is not a right but a responsibility on every Muslim, male or female, adult or children. In the second Hadith, it mentioned about the superiority of the person who seeks knowledge over the one who does not. Thus it is very important for all level of people to seek knowledge and ensure this right to be given to all people regardless of the status, sex and level of thinking.

4. The right to education in Malaysia

Education is seen as an important element for the development of a child. The Malaysian Child Act 2001 recognizes the that every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status. In addition to that, Article 3 of the Convention on Right of Child 1989 (CRC) provides that the best interests of the child shall be a primary consideration in all actions affecting children.

The international community now recognizes the importance of education for the economic, social, and physical well-being of children, their family members, and society at large. Article 26 of the Universal Declaration of Human Rights states that the right to education should be available to everyone and that primary education should be made free
and compulsory. The provision states that:

a. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

b. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

c. Parents have a prior right to choose the kind of education that shall be given to their children.

A similar provision can also be found in article 28 of the CRC, which Malaysia has acceded to in 1995. It states that “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular”:

a. Make primary education compulsory and available free to all;

b. Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

c. Make higher education accessible to all on the basis of capacity by every appropriate means;

d. Make educational and vocational information and guidance available and accessible to all children;

e. Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

f. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
g. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

In Malaysia, article 12 of Malaysian Federal Constitution provides for the right in respect to education to all citizens in Malaysia whereby the provision guarantees that no citizen shall be discriminated on the ground of religion, race, descent or place of birth in the admission to public schools or in the payment of fees. It is then codified in the Education Act 1996 which provides that the government may publish in the Gazette to prescribe for primary education to be a compulsory education. In 2003, Malaysian government had gazetted for compulsory primary education in the Professional Circular No. 14/2002: Implementation of Compulsory Education in Primary Level in 2003, dated 27th November 2002. Thus, from the legislations, all citizens of Malaysia must send their children to school for the compulsory elementary education, ranging from age 7 to 12 years old. The Education Act 1996 also provides for criminal liability for parents who fail to send their children to school, though this provision is never utilized. As far as secondary and tertiary education is concerned, the Education Act 1996 makes these two levels of education as recommendable and optional. Though these two levels are recommended but higher education is seen to be the most important level of education as it would give opportunity for children to create a better future. This level is the most cost consuming level of education especially when the children embark in private institution. Without proper financial aid from the parents, the children would face great challenges to embark themselves in education and would opt for labour hood at the early age.

In 2012, the Malaysian government had announced the abolishment of school fees in both elementary and secondary public schools with the aim of providing access to quality and affordable education to every child irrespective of their socio-economic background. This announcement is perceived as a good development in Malaysia, following the recommendation of UDHR and CRC that promotes free and compulsory education, at least at
the elementary level. Assessing that the cost of education in Malaysia is not simply by looking at the school fees, these announcements relieve less than half of financial problems faced by the parents. Other costs such as school uniforms, extra reading materials, pocket money for meals, transport fare are among other indirect costs that parents should bear when sending the children to schools. Thus, a financially constrained single parent may find this a heavy burden especially when their children are more than two, all at once are in schooling age.

5. **Educational neglect due to financial constraints**

Failure to meet the basic needs of a child is considered as neglect (Watson, 2005). The definition of neglect in previous literature which focused on physical neglect has far extended to other multiple categories such as supervisory neglect, abandonment and desertion, medical neglect as well as educational neglect. Thus, failure to provide a child for his or her basic development needs is constructed as a social neglect. Failure to enrol in school is also constitute as an educational neglect (Kelly, Barr and Wheatherby, 2005) as Moran (2009) defines educational neglect as failure to provide a stimulating environment in education as well as failing to comply with the state requirements regarding school attendance. Educational neglect also occurs when parents fail to get children to school (waking them, getting them dressed, arranging for transportation), allow children to be chronically truant from school, or fail to assist children in completing educational tasks (Vernon, 1996). Educational neglect generally applies to children under the age of 11 and children under parent’s control. Thus, situation involving older children will only falls under the meaning of truancy rather that educational neglect can lead to underachievement in acquiring necessary basic skills, dropping out of school or having continually disruptive behaviour (Perry et. al, 2002)

Family structure forms an important implication for children’s ability to enrol and persist in school as the family or parents will play a particularly important role in devoting financial, cultural, and social resources to their children. Thus, the economic, cultural and social capital of the family plays a crucial role in shaping the arc of children’s educational attainment in general. The physical absence of one of the adults may be described as a structural deficiency in family social capital. Most importantly, if the absent adult is the sole
breedwinner of the family, the family is seen as not only structurally and socially deficient but also financially lacking (Vafa & Ismail, 2009). Parke (2003) reports that single parent families had a higher poverty rate than the intact families and this causes a high risk for negative educational outcomes for children in single-parent families is due to living with a significantly reduced household income. The decline in income following divorce account for the risk for children dropping out of high school and places the children to grow up in a financially constraint environment. Thus, the children from single parent families are likely to achieve lower levels of education as compared to children from an intact family.

Economic crises are a standing situation with most of single parent’s families. It becomes difficult in meeting the basic needs of children such as food, clothing, school fees, maintaining the previous standard of living and to meet daily personal expenses. The situation was that of economic helplessness. Single mothers, especially who had never worked before the separation had to become the primary wage earner and are forced to shoulder huge financial responsibilities of the family (Kotwal & Prabhakar, 2009). Child’s education attainment is viewed as a commodity desired by the household and the financial resources would allow parents to purchase goods and services important for child development. As a direct consequence of divorce, the economic status tends to decline and the limited family income may affect child educational attainment by reducing financial support for further schooling. The divorce is closely associated with the changes of family’s socioeconomic status and exposes children to potential disadvantages in respect of education (Liu, 2007). Children of separated parents are at a risk of growing up on low income households, performing less well in school and gaining fewer educational qualifications and leaving school at early age because the family cannot afford to send the children to school especially when there are many younger siblings left (Mooney, Oliver and Smith, 2009). The ability of parental income to pay for the cost of education and the number of schooling children that they have to support may jeopardize the right of the older siblings in getting education. Hassan and Rasiah (2011) reports that schooling cost is a very heavy burden to the parents even taking into account the subsidies that their children may have received from the government.
The household and family incomes do affect children’s schooling performance due to constraint of financial resources as the low income parents often have difficulty becoming active partners in their children’s education. The children from separated families were disadvantaged in respect of education and socioeconomic outcomes in childhood and adulthood compared to children of intact families as they are more likely to drop out from school especially in secondary level due to mostly, financial reasons. The reports from the Child Rights Coalition Malaysia (2012) shows that children from poor families (including those from families of separated parents) would drop out from schools especially in secondary level in order to help the family and younger siblings. For them, education is no longer an important element in life as the sustainability of the family comes into priority. Drop out children would then suffer in the future when they enter adulthood which requires more qualifications in order to change their economic standing of themselves and their families.

Parental income affects children’s educational attainment by affecting the quality of primary and secondary schooling, thereby affecting student’s achievement in these lower grades and hence their achievement in and expectation for post-secondary schooling. Parental income may also affect parent’s expectation for their children. If parents think that they cannot afford to send their children to college they may discourage these aspirations (Mayer, 2002). Due to separation of parents, children may exhibit depression, behavioural and learning difficulties. Single mothers who are forced to work in order to finance the family would unintentionally neglect the children. Neglect can negatively affect a child’s cognitive capacity, language development and academic performance. Neglected children are more prone to encounter different problems in their future life when their problems left unnoticed and would demonstrate a notable decline in academic (DePanfilis, 2006). Divorce may also subject children to emotional distress that may negatively affect their educational attainment. The children of single parents household have access to lower levels of economic and social resources necessary for human capital development. This impacts the child’s educational attainment through reduced financial resources for further and better schooling and through possible early entrance into the labor force (Xie, 2010)
6. Conclusion

Claim ancillary reliefs especially the maintenance of children is very much needed for single mothers who have to care and provide for their children when the husband left the household. For single mothers who have never worked previously, this may give them a great challenge to provide for the family financially and to work at the same time. Matured children will be forced to experience financial hardship of the family and eventually try to provide some help to the working mother and younger siblings by leaving school and embark on labour, thus jeopardizing themselves to education. Protecting the best interest of these children would be rather difficult when they have entered into adulthood’ at the early age. Therefore, a proper mechanism in the enforcement of ancillary claims in the Syariah Court in Malaysia is needed in order for the children to be protected by providing for them a good education for the preparation of their future.

Besides that, there is also a memorandum on Legislation for Education of Individuals with Special Needs initiated by the Malaysian Bar which aimed to introduce the legislation for individuals with special needs. However, the term "individuals with special needs" is to be defined for the purposes of this Act as referring to "individuals with special needs assessed and identified by medical standards and having a physical, mental or other impairment which has a substantial and/or long term adverse effect on their ability to carry out normal day-to-day activities". Form the definition, it is presumed that this Act is only protecting the rights of education to the children who have been diagnosed with some medical problem but those who are neglected does not fall under this ambit. Since it is also a crucial need for the neglected children to have this kind of protection, thus this kind of legislation should also be enacted to them.
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**CORPORATE SOCIAL RESPONSIBILITY FROM THE SHARI ‘AH PERSPECTIVE; THE PRACTICES IN BIMB AND AL-RAJHI BANK**

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**Abstract:**

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Corporate social responsibility (CSR) has been globally recognized as an element of good governance and one of the key factors in sustainability of businesses. However, despite its recognition, the practices of corporate social responsibility (CSR) are still philanthropy in nature. Under the Islamic law (Shari’ah), it is vital for the businessmen to undertake that the main purpose or object of carrying out the business is not mainly for profit maximization but more importantly to ensure the utmost benefit of the society. This paper discusses the principles of CSR from the Shari’ah perspectives and the implementation of CSR in Malaysia and in Saudi Arabia with special reference to the CSR practice by BIMB and Al-Rajhi bank. These two banks are chosen as they are the pioneer of Islamic banks in both country, respectively and considered as the frontrunners of the Shari’ah compliance businesses. Research methodology adopted in this paper is doctrinal and statutory analysis.

1. Introduction

The concept of CSR encompasses a broader meaning, embracing the taqwa (God-consciousness) by which corporations (as groups of individuals) assume their roles and responsibilities as servants and vicegerents of God in all situations (Raysuni, 1992). By doing so, they make themselves ultimately responsible to God, the Owner of their very selves and the resources that they utilize and manage. It needs to be stressed here that invoking the Shari‘ah and employing a taqwa-based business paradigm imply that the entrepreneur is no longer driven by profit maximization alone, but by the pursuit of ultimate happiness in this life and in the hereafter. In other words, his/her corporation has acknowledged its social and moral responsibility for the well-being of others (e.g., consumers, employees, shareholders, and local communities) (Raysuni, 1992). Asyraf Wajdi Dusuki et al (2007), highlighted that the Islamic view of CSR takes a holistic approach by offering an intergalactic spiritual view based on the Qur’an and the Hadith of the Prophet Muhammad (S.A.W).37 Such an
approach provides a better alternative philosophical framework for a person’s interaction with nature and his/her fellow human beings.

2. **Corporate Social Responsibility**

CSR is an emerging important agenda in business operations in the world today. The Institute of Directors, UK, views CSR as being about business and other organizations going beyond the legal obligations to manage the impact they have on the environment and society (Ruth Lea, 2002). The concept of CSR has been advocated for decades and is commonly employed by corporations globally. Agreement on how it should be defined and implemented remains a contentious debate amongst academia, businesses and society. This gap is problematic for corporations because they are increasingly being required to align with societal norms while generating financial returns. CSR does not have a universally accepted definition. Rather, it is a way firms integrate social, environmental and economic related issues into their morals, customs, decision making, strategy and operations, in a transparent and responsible manner, and thereby establish better practices within the firm, creating wealth and improving society.

There are various terms for CSR. It is also known as corporate accountability, corporate ethics, corporate citizenship or stewardship, responsible entrepreneurship, and “triple bottom line” (Sendil Mourougan, 2015). For its definition there is no single definition agreed by the scholars. There are multiple definitions about the concept of CSR since various interpretations could be found about it which differ from one to another.

Merrick Dodd(1932) defines CSR as:

“A sense of social responsibility toward employees, consumers, and the general public may thus come to be regarded as the appropriate attitude to be adopted by those who are engaged in business.”

Frank Abrams defines it as:

“business’ obligation to conduct the affairs of the enterprise in order to maintain an equitable and workable balance among the claims of the various
directly interested groups, a harmonious balance among stockholders, employees, customers, and the public at large.” (William Crittenden Frederic, 2006)

Saleem Sheikh (1996) defines CSR as:

“the assumption of responsibilities by companies, whether voluntarily or by virtue of statute, in discharging socio-economic obligations in society comprises of two main principles that is corporate philanthropy, where company discharges social service role and trusteeship principle, where directors act as trustees for shareholders, creditors, employees, consumers and the wider community.”

In above mentioned definition Saleem Sheikh introduces two main principles that are corporate philanthropy and trusteeship principle. For the former, it is a duty of corporations to fulfill their obligation for social service and for the latter directors of corporations are considered as trustee for shareholders, creditors, employees, consumers and society at large.

There are also various definitions of CSR defined by various institutions for example the Canadian Centre for Philanthropy defines CSR as (Pinney C, 2011):

“a set of management practices that ensure the company minimizes the negative impacts of its operations on society while maximizing its positive impacts”

The World Business Council for Sustainable Development also has its definition of CSR. The CSR according to the Council connotes:

“the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.”

According to the aforementioned definition CSR is an ongoing process and it is a bond between business and ethics about employees and society. It is ethical obligation of
corporations to improve the quality of life of their workforce and family, local community and society.

3. Theories of CSR

In order to contribute to a clarification of the field of business and society, aim here is to map the territory in which most relevant CSR theories and related approaches are situated. It can be done by considering each theory from the perspective of how the interaction phenomena between business and society are focused. As the starting point for a proper classification, it is assumed as that the most relevant CSR theories and related approaches are focused on one of the following aspects of social reality: 1) economics, 2) politics, 3) social integration and 4) ethics (Parsons, 1961).

a. Economic Theory

In this group of theories CSR is seen only as a strategic tool to achieve economic objectives and, ultimately, wealth creation. Representative of this approach is the well-known Friedman view that “the only one responsibility of business towards society is the maximization of profits to the shareholders within the legal framework and the ethical custom of the country”\(^1\)

Instrumental theories have a long tradition and have enjoyed a wide acceptance in business so far. As Windsor has pointed out recently, “a leitmotiv of wealth creation progressively dominates the managerial conception of responsibility”\(^2\)

Three main groups of instrumental theories can be identified, depending on the economic objective proposed. In the first group the objective is the maximization of shareholder value, measured by the share price. Frequently, this leads to a short-term profits orientation.

The second group of theories focuses on the strategic goal of achieving competitive advantages, which would produce long-term profits.\(^1\) In both cases, CSR is only a question of

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enlightened self-interest since CSR is a mere instrument for profits. The third is related to cause-related marketing and is very close to the second.

b. Political Theory

A group of CSR theories and approaches focus on interactions and connections between business and society and on the power and position of business and its inherent responsibility. They include both political considerations and political analysis in the CSR debate. Although there are a variety of approaches, two major theories can be distinguished that is corporate constitutionalism and corporate citizenship.

**Corporate constitutionalism:** Davis was one of the first to explore the role of power that business has in society and the social impact of this power4. In doing so, he introduces business power as a new element in the debate of CSR. He held that business is a social institution and it must use power responsibly. Additionally, Davis noted that the causes that generate the social power of the firm are not solely internal of the firm but also external. Their locus is unstable and constantly shifting, from the economic to the social forum and from there to the political forum and vice versa.2 According to Davis, the equation of social power responsibility has to be understood through the functional role of business and managers. In this respect, Davis rejects the idea of total responsibility of business as he rejected the radical free-market ideology of no responsibility of business.3 The limits of functional power come from the pressures of different constituency groups. This restricts organizational power in the same way that a governmental constitution does.

**Corporate citizenship:** In the 80s the term “corporate citizenship” was introduced into the business and society relationship mainly through practitioners.4 Since the late 1990s and early 21st century this term has become more and more popular in business and increasing academic work has been carried out.5 The term “corporate citizenship” cannot

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have the same meaning for everybody. Matten et al. have distinguished three views of “corporate citizenship”: i) a limited view, ii) a view equivalent to CSR and iii) an extended view of corporate citizenship, which is held by them. In the limited view corporate citizenship is used in a sense quite close to corporate philanthropy, social investment or certain responsibilities assumed towards the local community.¹

The term “citizenship”, taken from political science, is at the core of the “corporate citizenship” notion. For Wood and Logsdon “business citizenship cannot be deemed equivalent to individual citizenship-instead it derives from and is secondary to individual citizenship”.² Whether or not this view is accepted, theories and approaches on “corporate citizenship” are focused on rights, responsibilities and possible partnerships of business in society.

In spite of some noteworthy differences in corporate citizenship theories, most authors generally converge on some points, such as a strong sense of business responsibility towards the local community, partnerships, which are the specific ways of formalizing the willingness to improve the local community, and for consideration for the environment.³ In fact, different models have been constructed in order to explain how and why partnerships are built and how to determine, measure, evaluate partnerships.⁴

The concern for local community has extended progressively to a global concern in great part due to the very intense protests against globalization, mainly since the end of the 90s. This sense of global corporate citizenship led to the joint statement “Global Corporate Citizenship – the Leadership Challenge for CEOs and Boards”, signed by 34 of the world largest multinational corporations during the World Economic Forum in New York in January 2002.⁵ Subsequently, business with local responsibility and, at the same time, being a

global actor that places emphasis on business responsibilities in a global context, have been considered as a key issue by some scholars.

c. Integrative Theory

This theory looks at how business integrates social demands, arguing that business depends on society for its existence, continuity and growth. Social demands are generally considered to be the way in which society interacts with business and gives it a certain legitimacy and prestige. As a consequence, corporate management should take into account social demands, and integrate them in such a way that the business operates in accordance with social values.

So, the content of business responsibility is limited to the space and time of each situation depending on the values of society at that moment, and comes through the company’s functional roles. In other words, there is no specific action that management is responsible for performing throughout time and in each industry. Basically, the theories of this group are focused on the detection and scanning of, and response to, the social demands that achieve social legitimacy, greater social acceptance and prestige.

Issues management: Social responsiveness, or responsiveness in the face of social issues, and processes to manage them within the organization was an approach which arose in the 70s. In this approach it is crucial to consider the gap between what the organization’s relevant publics expect its performance to be and the organization’s actual performance.

Ackerman, among other scholars, analyzed the relevant factors regarding the internal structures of organizations and integration mechanisms to manage social issues within the organization. The way a social objective is spread and integrated across the organization, he termed “process of institutionalization”.

Jones draws an analogy with the political process assessing that the appropriate process of CSR should be a fair process where all interests have had the opportunity to be

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3 Ackerman, R. & R. Bauer, Corporate Social Responsiveness, (Reston, Virginia, 1976).
heard. So Jones has shifted the criterion to the inputs in the decision-making process rather than outcomes, and has focused more on the process of implementation of CSR activities than on the process of conceptualization.\(^1\) Other factors, which have been considered, include the corporate responses to media exposure, interest group pressures and business crises, as well as organization size, top management commitment and other organizational factors.\(^2\)

**Principle of public responsibility:** Some authors have tried to give an appropriate content and substance to help and guide the firm’s responsibility by limiting the scope of the corporate responsibility. Preston and Post criticized a responsiveness approach and the purely process approach as insufficient.\(^3\) Instead, they proposed “the principle of public responsibility”. They choose the term “public” rather than “social”, to stress the importance of the public process, rather than personal-morality views or narrow interest groups defining the scope of responsibilities.

According to Preston and Post an appropriate guideline for a legitimate managerial behavior is found within the framework of relevant public policy. They added that “public policy includes not only the literal text of law and regulation but also the broad pattern of social direction reflected in public opinion, emerging issues, formal legal requirements and enforcement or implementation practices”.\(^4\)

This is the essence of the principle of public responsibility. The development of this approach was parallel to the study of the scope regarding business government relationship. These studies focused on government regulations their formulation and implementation as well as corporate strategies to influence these regulations, including campaign contributions, lobbying, coalition building, grassroots organization, corporate public affairs and the role of public interest and other advocacy groups.\(^5\)

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1 Alexander C. Michalos & Deborah C Poff, Citation Classics from the Journal of Business Ethics: Celebrating the First Thirty Years of Publication, (Springer, 2012): p.79
5 Ibid
Stakeholder management: Instead of focusing on generic responsiveness, specific issues or on the public responsibility principle, the approach called “stakeholder management” is oriented towards “stakeholders” or people who are affected by corporate policies and practices. Although the practice of stakeholder management is long-established, its academic development started only at the end of 70s.¹

In a seminal paper, Emshoff and Freeman, presented two basic principles, which underpin stakeholder management. The first is that the central goal is to achieve maximum overall cooperation between the entire system of stakeholder groups and the objectives of the corporation. The second states that the most efficient strategies for managing stakeholder relations involve efforts, which simultaneously deal with issues affecting multiple stakeholders.²

In recent times, corporations have been pressured by non-governmental organizations (NGOs), activists, communities, governments, media and other institutional forces. These groups demand what they consider to be responsible corporate practices. Now some corporations are seeking corporate responses to social demands by establishing dialogue with a wide spectrum of stakeholders.³

Corporate social performance: A set of theories attempts to integrate some of the previous theories. The corporate social performance (CSP) includes a search for social legitimacy, with processes for giving appropriate responses. Carroll, generally considered to have introduced this model, suggested a model of “corporate performance” with three elements: a basic definition of social responsibility, a listing of issues in which social responsibility exists and a specification of the philosophy of response to social issues.⁴ Carroll considered that a definition of social responsibility, which fully addresses the entire range of obligations business has to society, must embody the economic, legal, ethical, and discretionary categories of business performance.⁵

³ Ibid
⁵ Ibid
Wartich and Cochran extended the Carroll approach suggesting that corporate social involvement rests on the principles of social responsibility, the process of social responsiveness and the policy of issues management.¹

A new development came with Wood who presented a model of corporate social performance composed of principles of CSR, processes of corporate social responsiveness and outcomes of corporate behavior.² The principles of CSR are understood to be analytical forms to be filled with value content that is operationalized. They include: principles of CSR, expressed on institutional, organizational and individual levels, processes of corporate social responsiveness, such as environmental assessment, stakeholder management and issues management, and outcomes of corporate behavior including social impacts, social programs and social policies.

d. Ethical Theory

There is a fourth group of theories or approaches focus on the ethical requirements that cement the relationship between business and society. They are based on principles that express the right thing to do or the necessity to achieve a good society. As main approaches we can distinguish the following.

Normative stakeholder theory: Stakeholder management has been included within the integrative theories group because some authors consider that this form of management is a way to integrate social demands. However, stakeholder management has become an ethical based theory mainly since. He considered as stakeholders those groups who have a stake in or claim on the firm (suppliers, customers, employees, stockholders, and the local community).³

In a more precise way, Donaldson and Preston held that the stakeholder theory has a normative core based on two major ideas i) stakeholders are persons or groups with legitimate interests in procedural and/or substantive aspects of corporate activity (stakeholders are identified by their interests in the corporation, whether or not the corporation has any corresponding functional interest in them and ii) the interests of all

stakeholders are of intrinsic value (that is, each group of stakeholders merits consideration for its own sake and not merely because of its ability to further the interests of some other group, such as the shareowners.\textsuperscript{1} In short, stakeholder approach grounded in ethical theories presents a different perspective on CSR, in which ethics is central.

**Universal rights:** Human rights have been taken as a basis for CSR, especially in the global market place.\textsuperscript{2} In recent years, some human-rights-based approaches for corporate responsibility have been proposed. One of them is the UN Global Compact, which includes nine principles in the areas of human rights, labor and the environment. It was first presented by the United Nations Secretary General Kofi Annan in an address to the World Economic Forum in 1999. In 2000 the Global Compact’s operational phase was launched at UN Headquarters in New York. Many companies have since adopted it. Another, previously presented and updated in 1999, is the Global Sullivan Principles, which has the objective of supporting economic, social and political justice by companies where they do business. The certification for accreditation of social responsibility is also based on human and labor rights.\textsuperscript{3} Despite using different approaches, all are based on the Universal Declaration of Human Rights adopted by the United Nations general assembly in 1948 and on other international declarations of human rights, labor rights and environmental protection. Although for many people universal rights are a question of mere consensus, they have a theoretical grounding, and some moral philosophy theories give them support.\textsuperscript{4}

**Sustainable development:** Another values-based concept, which has become popular, is “sustainable development”. Although this approach was developed at macro level rather than corporate level, it demands a relevant corporate contribution. The term came into widespread use in 1987, when the World Commission on Environment and Development (United Nations) published a report known as “Brutland Report”.\textsuperscript{5}

This report stated that “sustainable development” seeks to meet the needs of the present without compromising the ability to meet the future generation to meet their own needs. Although this report originally only included the environmental factor, the concept of “sustainable development” has since expanded to include the consideration of the social dimension as being inseparable from development.

The problem comes when the corporation has to develop the processes and implement strategies to meet the corporate challenge of corporate sustainable development. As Wheeler et al. have stated, sustainability is “an ideal toward which society and business can continually strive, the way we strive is by creating value, creating outcomes that are consistent with the ideal of sustainability along social environmental and economic dimensions”.

A pragmatic proposal is to extend the traditional “bottom line” accounting, which shows overall net profitability, to a “triple bottom line” that would include economic, social and environmental aspects of corporation. Van Marrewijk and Werre maintain that corporate sustainability is a custom-made process and each organization should choose its own specific ambition and approach regarding corporate sustainability.

The common good approach: The common good is a classical concept rooted in Aristotelian tradition, and in Medieval Scholastics. This approach maintains that business, as with any other social group or individual in society, has to contribute to the common good, because it is a part of society. In this respect, it has been argued that business is a mediating institution.

Business should be neither harmful to nor a parasite on society, but purely a positive contributor to the wellbeing of the society. Business contributes to the common good in

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2 Ibid
different ways, such as creating wealth, providing goods and services in an efficient and fair way, at the same time respecting the dignity and the inalienable and fundamental rights of the individual. Furthermore, it contributes to social well-being and a harmonic way of living together in just, peaceful and friendly conditions, both in the present and in the future.¹

4. CSR from Shari‘ah Perspectives

The concept of CSR from the Shari‘ah perspective is basically based on the Qur’an and Hadith of the Prophet Muhammad (S.A.W) as these two sources of law are the main references for any established rules and principles of Shari‘ah in CSR. There are various authorities from the Qur’an and the Hadith of the Prophet Muhammad (S.A.W) that encourage fairness and justice to a certain extent make it obligatory to the practice CSR. The encouragement for such practice is basically based on social and moral principles of Shari‘ah. The principles include helping each other, justice (‘adl), and kindness (ihsan).

In Islam, the profit made by business enterprises should not involve harming others or violating their rights. Therefore, creation of wealth and making gain by the business enterprises may not involve disregarding responsibilities to the society at any level. This is because under the Shari‘ah, wealth is given to people with establishment of rights therein even for those who did not take part in producing it.

Certain key types of behaviours for the merchants and businessmen have been specified in the sources of Islamic law, particularly the primary sources which are the Qur’an and Hadith of the Prophet Muhammad (S.A.W). Part of the behaviour to be imbibed by the business men according to Shari‘ah is being kind and helpful. It can be seen generally that Islam encourages benevolence. Before that Islam has put an end to all business elements that can cause harm to the society on a long term or short term basis, such as interest, prohibited forms of transactions, business related to vices.

The Prophet Muhammad (S.A.W) also emphasized on being kind with poor people especially who are not able to return their loan and there is big reward for this deed. The

¹ Mele, D., Not only Stakeholder Interests. The Firm Oriented toward the Common Good, (University of Notre Dame Press, Notre Dame:2002)
Prophet Muhammad (S.A.W) also reaffirms the importance of magnanimity on the part of the lender. As it is reported that the Prophet Muhammad (S.A.W) said:

“Before your time the angels received the soul of a man and asked him, ‘did you do any good deeds (in your life) ‘He replied ‘I used to order my employees to grant time to the rich person to pay his debts at his convenience and excuse (the one in hard circumstances). ‘So Allah (S.W.T) said to the angels, excuse him.”  

It is clear from the above mentioned verse and Hadith that the kindness and benevolence are among the manners encouraged by the Islam to be practiced by every single Muslim as well as Muslim community and Islamic financial institutions in general. Therefore, CSR as a form of kindness being given by corporations towards society could be directly said that it is one of the manners encouraged to be practiced.

Thus Islam goes beyond the more common issues associated with CSR and adds this significant moral virtue in social responsibility which is to be adopted by businessmen and thus will come under the purview of the concept of corporate social responsibility. Another important behaviour recommended for the business persons under Islamic law is the need to help each other and destitute members of the society where they live and earn their livelihood. The Qur’an clearly stated in this regard while disapproving the decision made by Abu Bakar (R.A) that he will stop feeding some of poor people:

“And let not those among you who are blessed with graces and wealth swear not to give to their kinsmen, and the needy, and those who left their homes for Allah’s Cause.”

In this verse Allah (S.W.T) is urging those who have been blessed with wealth to give and practice tolerance. Those who have the means to give charity as well. It also shows that the reward fits the action and that if you forgive others you will be forgiven, then as Siddiq said of course by Allah we love O our Lord that You should forgive us.”

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1 Sahih Bukhari. No. 3.291
2 Qur’an, Surah An-Nur: 22.
Then he resumed his spending on Mistah and said “by Allah I will never stop spending on him.”

It is narrated by Safwan bin Salim (R.A) that the Prophet Muhammad (S.A.W) also stressed the reward of engaging in this kind of act in one of the Hadith where he was reported to have said:

“The one who looks after and works for a widow and for a poor person, is like a warrior fighting for Allah’s cause or like a person who fasts during the day and prays all night.”

There is another Hadith narrated Abu Hurairah (R.A) that Allah's Messenger (S.A.W) said:

"The one who looks after and works for a widow and for a poor person is like a warrior fighting for Allah's Cause." (The narrator Al-Qa'abibi is not sure whether he also said "Like the one who prays all the night without slackness and fasts continuously and never breaks his fast").

Islam’s strong emphasis on the responsibility of the businesses towards society can be seen in the most often quoted letter of one of the four rightly guided Caliphs of Islam, Ali ibn Abu Talib (R.A) in his letter to Malik bin Al-Ashtar (R.A) upon the latter’s appointment as the Governor of Egypt. Part of the letter for better clarification is reproduced hereunder:

“You are advised to treat well businessmen and artisans and direct others to do likewise. Some of them live in towns and some of them move from place to place with their ware and tools and earn their living by providing labour. They are the real source of profit to the state and provider of consumer goods. While the general public are not inclined to bear the strain, those engaged in these professions take the trouble to collect commodities from far and near. From land and from across the sea and from mountains and forests and naturally derive benefits. It is this class of peace-loving people from whom no

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2 Sahih Bukhari, Book 78, Hadith 37
3 Sahih Bukhari, Book 78, Hadith 38
4 The rightly guided fourth Caliph of Islam, Ali ibn Abu Talib who is well known for his knowledge and wisdom
disturbance needs to be feared. They love peace and order. Indeed they are transacting business at your place or in other towns. But bear in mind that a good many of them are intensely greedy and are not immune to bad dealings. They hoard grain and go to sell it at a high price and this is most harmful to the public. It is a blot on the name of the ruler not to fight this evil. Prevent them from hoarding; for the prophet of God had prohibited it. See to it that trade is carried on with the utmost ease. That the scales are evenly held and that prices are so fixed that neither the seller nor the buyer is put to a loss. And if in spite of your warning, should anyone go against your commands and commit the crime of hoarding. Then inflict upon him a severe punishment."

This letter affirms certain aspects of the concept of CSR from an Islamic perspective concerning trade and industry. A closer look at this letter in this present day context, suggests that the business entity or the corporate sector is expected to provide numerous pertinent services to the society where it carries out its business. In fact some of the expected activities that need to be the core of every human being who are in charge of the corporate entity have aspects of social responsibility in them. Although recognising the legal personality of business entities would not make them to be addressed by the commands of Shari’ah which are directed at human beings possessing intelligence, the human beings who are invariably at their helm of affairs are governed by the commands of Shari’ah that require that the operations and objectives of the entity be subject to the guidelines of the Shari’ah will therefore be the responsibility of the human beings who are in charge of them and also of the Islamic government. Furthermore, the letter shows the extent of Shari’ah close governance of the activities of the business entity in the prohibition and reprehension of certain business practices such as hoarding, monopoly of businesses, engaging in prohibited sales and transactions, riba and gambling is to the benefit of the society as a whole. Thus, Islam provides a system where ensuring fulfilment of social responsibilities is inbuilt and if the system is implemented as a whole, it would require separate legislation for this purpose only to cover those situations where specific rules are not given.

Also, a corporate entity may be mandated as part of the requirements of Shari’ah to provide employment opportunities for the major proportion of a nation’s teeming population and provide an important impetus to the growth and expansion of the economy apart from drawing in foreign investments and much needed foreign exchange. This can be imposed by the Islamic government as one of its expectations of such entities. If all these activities are efficiently carried out by these corporate entities they can play a significant role in determining the quality of life through impacts on the physical and social environment.

Thus in a way they will be adopting CSR while at the same time aiming to make enough profit just like the fourth Caliph rightly pointed out, all these activities are actually motivated essentially by profits, which they desire to make for all the hard work they do, and the risks they bear. This is because Islam does not aim to create a society of martyr-like merchants i.e. doing business for philanthropic reasons (Qard al Hassan).\(^1\) However, it is important to note that these entities are not solely guided by profits and thus seek to accumulate wealth at all cost. The Qur’an states in this regard that:

\[ \text{“Wealth and sons are allurements of the life of this world; but things that endure good deeds are best in the sight of your Lord, as rewards, and best as (the foundation for) hopes.”} \]

\(^2\)

It can be seen from the above verse that all other things are fleeting, but good deeds have a lasting value in the sight of Allah (S.W.T). They become the foundation of hopes for the highest reward in the hereafter.\(^3\) On the Day of Judgment, none of the landmarks achieved by individuals will remain, including wealth and offspring. Everyone will stand as they were created, with none of the possessions that were collected during this lifetime, which would all have vanished.\(^4\) Consequently, a Muslim’s action must be displayed to please Allah (S.W.T) alone. The fourth Caliph of Islam also reminded followers that many of those in business are intensely greedy. It is this greed that has been said to encourage businesses to resort to

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\(^1\) In Islamic law, business is distinct from loan in the sense that while business is for making profit or gain, loan should only be a form of assistance for the one in need of it.

\(^2\) Qur’an, Surah Al Kahf, 18: 46

\(^3\) As-Shaukani, Muhammad Bin Aliy Bin Muhammad Bin Abdullah, Fath al-Qadeer, (Beirut: Dar-Ibn Katheer, 1414ah), Vol. 3 at 343.

\(^4\) Qur’an, Surah Al Kahf, 18:47

From the above discussion it can be seen that the Islamic view on CSR is more comprehensive and holistic. Therefore, CSR is understood as part of \textit{Shari’ah} compliance since it derives its philosophy from \textit{Shari’ah}.\footnote{Muhammad Yasir Yusuf Zakaria bin Bahari, “Islamic Corporate Social Responsibility in Islamic Banking: Towards Poverty Alleviation” 8th International Conference on Islamic Economics and Finance Center for Islamic Economics and Finance, Qatar Faculty of Islamic Studies, Qatar Foundation, (2008).}

This actually shows that the values and morals as well as the principles of Islam, especially those connected to the social responsibility have helped in eliminating completely the threat of poverty that there was no longer a single poor person to be found in the society.

5. **Activities of CSR by BIMB AL-RAJHI**

CSR can be said to have developed specifically in the Islamic finance industry when the banking industry started enjoying a robust growth. The first Islamic bank in Malaysia is Bank Islam Malaysia Berhad (BIMB) and it was after the success recorded by BIMB that many more banks were licensed to carry on the business of Islamic banking and finance in Malaysia (Muhammad Ridza Abdullah’ 2011)\footnote{Encik Muhammad Ridza Abdullah, Development of Islamic Banking in Malaysia, (January-March 2011, Klrc NewsLetter). At 1.} BIMB has a CSR manual which is an internal policy and classified document which is not made available for the public. This manual therefore represents the legal framework for CSR in the Bank. Generally BIMB conducted 4 scopes of CSR activities namely:

i) inspiring the workplace  
ii) ii) enriching the marketplace  
iii) elevating the community  
iv) iv) sustaining the environment.
Al-Rajhi was established in 1957 with a base in Riyadh and is now one of the largest Islamic banks in the world with total assets of SR 288 billion (US$ 76.8 bn), a paid up capital of US$4.3 billion and an employee base of over 8,400 associates. Al-Rajhi has continuously committed itself to a series of CSR programs in different sections of the community, including educational, health, and general social programs.\(^1\) Responsibility to the community has always been at the forefront of the bank’s obligations and it is one of the main objectives of the Bank.\(^2\) The Bank is proud of its services to the society through redirecting the funds from the clearance account to serve the community.

### CSR activities of BIMB and Al-Rajhi Bank

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<tr>
<th>Dimension</th>
<th>BIMB</th>
<th>Al-Rajhi</th>
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<tr>
<td>Workplace</td>
<td>- Providing training to the staff.</td>
<td>- Providing Training to the staff</td>
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<td>- Encouraging them to participate in sports.</td>
<td>- Providing conducive working environment</td>
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<td></td>
<td>- Preparing conducive working environment.</td>
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<tr>
<td>Marketplace</td>
<td>- Raising public awareness about Shari’ah-based products and services.</td>
<td>- Forming Shari ‘ah Advisory Council to ensure the business is fully Shari’ah-compliant.</td>
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<td></td>
<td>- Ensuring that any product introduced has non-riba elements in it.</td>
<td>- Establishment of 100 branches just for women.</td>
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<td>- Promoting its products and services by participating in</td>
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\(^2\) Ibid.
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<th>Communities</th>
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<td></td>
<td>- Contribution for education and increased educators.</td>
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<td>- Contribution for health care purpose.</td>
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<td>- Contribution for housing issues.</td>
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<td>- Building masjids, surau and musalla</td>
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<td>- Sponsoring training and developments programs in collaboration with the</td>
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<td>Ministry of Social Affairs.</td>
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<td>- Sponsoring education for women empowerment in collaboration with Women</td>
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<td>University.</td>
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<td></td>
<td>- Sponsoring scientific research centers in universities</td>
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<td></td>
<td>- Establishment of children’s library association.</td>
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<td>- Sponsoring the Friends of Sick program.</td>
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<td>- Organizing road shows to prevent blindness caused by diabetes.</td>
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<td>- Running anti-smoking campaign.</td>
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<td>- Organizing awareness campaign “Bar ila”</td>
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<tr>
<td>Environment</td>
<td>- Conducting programs on how to prevent climate change and how to conserve the</td>
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and marine life.
- Encouraging staff to save energy.
- Celebrating Green Day every year to save energy.
- Encouraging community to engage in clean activity.

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Nafayat”, for clean environment.

a. **Similarities**

The similarities between BIMB and Al-Rajhi are to be mentioned in the following:

Firstly, BIMB and Al-Rajhi in regards to CSR’s policy and practice are quite similar as both have practiced CSR components of inspiring the workplace, enriching the marketplace, elevating the community and sustaining the environment.

Secondly, with regards to laws and ethical codes of CSR in these two banks by looking in to this side it is clearly understood that BIMB uses CR manual which is an internal policy and classified document to guide the activities of the banks. Likewise, Al-Rajhi also uses an internal policy of social responsibility which made provision for four core areas of CSR which are: Internal environment; employees; bank shareholder and customers; and society. Al-Rajhi in addition to this is also guided by its ethical codes.

Thirdly, in terms of the effect and contribution to the community, it has been made clear that practice of CSR of these two banks has a great impact on the development of the lives of members of the society and has boosted the image of Islamic financial institutions in Malaysia and Saudi Arabia respectively.

b. **Differences**

There are various differences between BIMB and Al-Rajhi in regards to CSR’s policy. Firstly, despite the policy that has been used by both of the two banks being an internal policy, which means is not accessible for public, in terms of the name, there is a difference
between the two banks. BIMB called its policy as “CSR Manual” whereas Al-Rajhi called its policy as “Policy of Al-Rajhi Social Responsibility”.

Secondly, terms of financial donation, both banks have made a provision pertaining to that. However, BIMB has a standard form specifically for donations or sponsorship of more than twenty thousand Ringgit, where it becomes necessary for the donor to obtain a secure approval from the Bank’s Chief Financial Officer. But if the amount is less than the above said amount there is no need of seek such kind of secure approval, as the officer has power to obtain approval from the unit’s head of division. However, in Al-Rajhi, there is no kind of classification in terms of the amount to be donated.

6. **Conclusion**

The discussion shows that the CSR initiatives at the both BIMB and Al-Rajhi are highly associated with religious obligations and the main source of CSR fund is derived from the zakat. Islamic banking strives for a just, fair and balanced society as envisioned by Islamic economics. Islamic banking is constructed upon the principle of brotherhood and cooperation which stands for a system of equity-sharing, risk-sharing and stake-taking. Islamic banking system has an in-built dimension that promotes social responsibility, as it resides within a financial trajectory underpinned by the forces of Shari‘ah injunctions. These Shari‘ah injunctions interweave Islamic financial transactions with genuine concern for ethically and socially responsible activities at the same time as prohibiting involvement in illegal activities or those which are detrimental to social and environmental well-being. In addition, donation, non-compliance Shari‘ah income and purification fund have been used to fulfill various stakeholders' demands.

Furthermore, following components including inspiring the workplace, enriching the marketplace, elevating the community and sustaining the environment are vital for the practice of CSR in both banks. It may conclude that both banks are proving proper training to enhance employee’s performance and skills. BIMB also encourages its staff to participate in sports activities to keep them healthy. It is also Bank’s policy not put excessive work pressure on employees and encourage them to avoid work more than eight hours. Both Banks are conducting workshops and road shows for public awareness about Shari‘ah-based products.
In BIMB there is Shari’ah Advisory Board under Shari’ah Division to conduct proper research before launching any product to check it’s all aspects should be according to Shari’ah-compliance. Whereas, Al-Rajhi formed its Shari’ah Advisory Council to do brainstorming about all products and to ensure that products are Shari’ah-compliance.

Both banks are well aware form elevating the community and it is priority of the Bank to pay back to the society. BIMB involves in plenty of community services such as building houses, schools, masjids, surau, and musalla. Bank is using zakat according to the Shari’ah principles. Bank is also helping needy families and students by providing scholarships. There are other various charitable activities sponsored by BIMB for the betterment of society. Al-Rajhi also taking part in community service actively and initiated plenty of charitable activities including building hospitals, schools, houses, and masjids.

Sustainable environment is the priority of both banks and for keeping environment clean and safe there are plenty initiatives taken by the banks. BIMB is celebrating Green Day yearly to raise public awareness about the protection of environment. Bank also conducts public talks and workshops to enhance the importance of clean environment. Whereas, Al-Rajhi also conducting awareness campaign for the protection of environment. There are plenty of initiatives taken by Al-Rajhi for the sustainable environment including promoting efficient technology and cutting the emission of carbon so on and so forth.

In short, it is shown that BIMB and Al-Rajhi have always been committed towards undertaking responsible corporate practices to create corporate sustainability for the future. Bringing long-term values for the stakeholders, especially the communities where banks operate, and which promote the development of Islamic banking. Both banks continue to advocate integrity in their business undertakings and strong endeavor to putting endless commitment and efforts towards CR initiatives that are impactful to the workplace, marketplace, community and the environment.
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HUMAN RIGHTS AND THE UNITED NATIONS CHARTER:
TRANSCENDENCE OF THE INTERNATIONAL STANDARDS OF HUMAN
RIGHTS

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Abstract:

It can be said that the source of modern concept of human rights came from the United Nations. By looking at its charter one will be able to see that the main purpose of the institution is prevent wars at a global scale but in the same time the charter also lays down various explicit and implicit inferences with regards to the accepted standards of human rights. This charter came into being way before the Universal Declaration of Human Rights and it has the effect of international law both customary and peremptory norms (jus cogens) rather than the mere declaratory effect of the latter, thus should prevail as paramount authority of human rights law. This article wishes to trace the creation of the charter, its references to human rights standards, the jurisprudential argument with regards to the obligatory nature of the charter, the impediments both causal and argumentative and the transcendence of a 'uniform' standard of human rights together with the erosion of local perspectives of human rights.

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1. Introduction: The Adoption of the United Nations Charter

The 20th century witnessed two world wars that had occurred within the span of the first fifty years of that century. Both wars had caused tremendous destruction worldwide and it was estimated that human lives, both civilian and armed forces, lost during both of the wars were 80 million. The wars shocked and appalled the whole world by the violations of fundamental human rights committed during those wars. However, despite the misery caused, both of the wars had acted as the impetus that led towards the creation of the United Nations.

The fight against and later the capitulation of the Axis powers namely Nazi Germany, Fascist Italy and the Empire of Japan gave rise to a series of international declarations and conferences between the allied nations namely the United States of America, the United Kingdom of Great Britain, the Soviet Union, France and China which then became the victorious nations of the Second World War. The significant declarations and conferences are as follows: (See also Table 1 for the chronological list)

1) The Inter-Allied Declaration (London Declaration);
2) The Atlantic Charter;
3) The Declaration by United Nations;
4) The Moscow Declaration;
5) The Dumbarton Oaks Conference;
6) The Yalta Conference; and the

Though each of the conferences focused on different or slightly different agenda, it can be said that these conferences acted as the prelude to the establishment of the United Nations and the adoption of the United Nations Charter.

The first event that laid the foundation of the creation of the United Nations was the Inter-Allied Declaration (London Declaration). It was held on the 12th June 1941 at St. James Palace in London hence the declaration is also known and be referred to as The Declaration of St. James’ Palace or The St. James Agreement. This declaration was signed by
representatives of fourteen nations including nine governments in exile\(^1\), to address the concerns of those nations with regard to postwar future in order to secure lasting peace. This is evident in the wordings of the declaration which stated that the signatories “…..are resolved…..that the only true basis of enduring peace is the willing cooperation of free peoples in a world in which, relieved of the menace of aggression, all may enjoy economic and social security…..”\(^2\).

Then, on 14\(^{th}\) August 1941 the leaders from the United States of America and the United Kingdom, President Franklin D. Roosevelt and Prime Minister Winston S. Churchill came to an agreement of a joint declaration known as the Atlantic Charter. In the Charter it was stated that “certain common principles….of their respective countries (United States of America and United Kingdom)….for a better future for the world\(^3\)….established a peace which will afford to all nations the means of dwelling in safety\(^4\)….the abandonment by all nations of the use of force….the establishment of a wider and permanent system of general security….\(^5\)” It is clear from the wordings of the Charter that it was one of the first indication of intention on the effort for the creation of a new world organization for the purpose of maintaining world peace.

At first the Atlantic Charter was only an agreement between the two states (as mentioned above between the United States of America and the United Kingdom). However, later in 1\(^{st}\) January 1942 both principal states\(^6\) in the Atlantic Charter together with twenty four states\(^7\) subscribed, as put by the wordings of the declaration, to the common program of purposes and principles embodied in the Atlantic Charter. This declaration is known as the Declaration of the United Nations. It was in this declaration that the term “United Nations” was first used. Though the content of the declaration emphasized on the effort of the parties

\(^1\) The signatories are representatives from the United Kingdom, Canada, Australia, New Zealand and the Union of South Africa and the governments in exile are of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia and France (under the Charles de Gaulle government).
\(^2\) Inter-Allied Declaration (London Declaration) art 3.
\(^3\) Atlantic Charter preamble
\(^4\) Atlantic Charter art 6.
\(^5\) Atlantic Charter art 8.
\(^6\) United States of America and the United Kingdom of Great Britain and Northern Ireland
\(^7\) The 24 states are the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, and Yugoslavia. See The Declaration by the United Nations, opened for signature 1 Jan. 1942, (entered into force 1 Jan. 1942 – 1 Mar. 1945)
in their fight against the Axis Powers, it nevertheless express the common intention of the signatories to unite in order “….to defend life, liberty, independence and religious freedom, and to preserve human rights….”¹ Later, 21 additional states subsequently signed this declaration after the date it was first signed up until 1st March 1945.

The declarations discussed above show the common and collective need and intention of contracting States to form a united front that allowed them to work together to promote peace and security. Though there was a common understanding on that issue and to achieve that goal, there was yet no push by the states to establish an international organization to materialize that understanding.

It was only at the Moscow Conference in Tehran on 30th October 1943 that a declaration was made between the States that attended the meeting which hinted establishment of an international organization to replace the now defunct League of Nations. This declaration is also known as the Joint Four-Nation Declaration. In this declaration it was stated that the parties “….recognize the necessity of establishing….a general international organization….open to membership by all such States, large and small, for the maintenance of international peace and security.”² It envisaged characteristics of an organization that can be seen in the United Nations today. It was on this premise that started the process that led to the adoption of the United Nations Charter and the establishment of the United Nations.

The specific meeting that discussed the establishment of a new world organization was the Dumbarton Oaks Conference or more formally, the Washington Conference on International Peace and Security Organization. It was held in Dumbarton Oaks from 21st August 1944 to 7th October 1944. Upon the completion of the meeting the document known as the Dumbarton Oak’s Proposal was made. The Proposal consist the proposed structure of the new world organization. Chapter IV of the Proposal laid down proposed principal organs of the organization namely a General Assembly, a Security Council, an International Court of Justice and a Secretariat. Chapter IX of the Proposal also stated the establishment of the Economic and Social Council under the authority of the General Assembly. The Proposal was

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¹ Declaration by the United Nations preamble
² Joint Four-Nation Declaration art 4.
then submitted by the parties of the meeting to all “United Nations” governments as per the Declaration of the United Nations 1942 for their perusal.

The Dumbarton Oaks Proposal, though was considered as exhaustive in nature, had left open the issue of the proposed Security Council voting procedure due to political reasons. This issue was later addressed in the subsequent meeting known as the Yalta Conference which was held on February 1945. It was during this conference that the parties spearheaded by the American President Franklin D. Roosevelt, the British Prime Minister Winston Churchill, and the former USSR President Joseph Stalin, were able to come to a compromise as to the Dumbarton Oak’s Proposals including the method of voting in the Security Council. It was also in this conference that the parties came to an agreement on the issue administration of dependent states¹ which to be placed under a trusteeship system of the international organization. Later after the Yalta Conference, on 11th February 1945 it was announced by the world powers that a conference would be convened in San Francisco on 25th April 1945 for the purpose of establishing the international organization.

The San Francisco Conference was successfully held on 25th April 1945 to 26th June 1945 as planned. This conference was also known as the United Nations Conference on International Organization (UNCIO). Fifty nations joined this conference by which the Dumbarton Oaks Proposal was reviewed and amended. 26th June 1945 marked the date when the draft of the proposed United Nations Charter was completed. Also on that date, all fifty representatives from the governments attending the conference ceremoniously signed the Charter. However, in line with Article 110 of the Charter, which stated that the Charter will only come into force upon the deposit of ratifications by the veto bearing states as mentioned in the said article, the Charter finally came into force on 24th October 1945, hence the establishment of the international organization known as the United Nations.

<table>
<thead>
<tr>
<th>No.</th>
<th>Declarations/Conferences</th>
<th>Date</th>
<th>Party States</th>
</tr>
</thead>
</table>

¹ States which were yet to receive independence such as colonies and conquered nations.
1. **The Inter-Allied Declaration (London Declaration)**  
   12 June 1941  
   United Kingdom, Canada, Australia, New Zealand and the Union of South Africa and the governments in exile are of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia and France (under the Charles de Gaulle government)

2. **The Atlantic Charter**  
   14 August 1941  
   United Kingdom and United States of America.

3. **The Declaration by United Nations**  
   1 January 1942  
   United Kingdom, United States of America, Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, and Yugoslavia.

4. **The Moscow Declaration – Declaration of the Four Nations on General Security**  
   30 October 1943  
   United States, United Kingdom and the Soviet Union.

5. **The Dumbarton Oaks Conference**  
   21 August – 7 October 1944  
   United States, United Kingdom, Soviet Union and China.

6. **The Yalta Conference**  
   February 1945  
   United States, United Kingdom and the Soviet Union.

2. Explicit and implicit references to human rights in the United Nations Charter

As discussed in the previous part of this paper, the United Nations is an international organization that was formed as a collective effort to regulate and conduct inter-national affairs, to prevent occurrence of war between nations and in the same time respecting the notion of fundamental human rights. On the context of human rights, it was only after Second World War that nations began to ponder positively on this issue\(^1\). The ratification of the Charter by member states and the formation of the United Nations should be seen as the desire of nations that the organization becomes, as described by Thomas Buergenthal\(^2\), the international protector of human rights due to the tragic experience of the world wars.

Though the United Nations and its Charter was formed with the reiteration of faith in fundamental human rights, the constitution of the organization that is the Charter itself do not provide any provisions that define these rights or establish any system for the protection of human rights. According to Buergenthal (2000), the main reason for the lack of such provisions was caused by the opposition of the major powers, namely the United States of America, United Kingdom, Soviet Union and France, on its inclusion\(^3\).

During the San Francisco Conference 1945, various countries such as Chile, Panama and Cuba proposed for the incorporation of systematic provisions of human rights that is an international bill of rights\(^4\) in the United Nations Charter. Though the countries intention was

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\(^1\) This can be seen in President Franklin D. Roosevelt’s famous ‘Four Freedoms’ speech in 1941. The four freedoms are the freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. See Franklin Delano Roosevelt, “Annual Presidential Message to Congress 1941”, Congress of the United States of America, Washington DC, 6 January 1941, for the often quoted passage on looking forward “to a world based on essential freedoms… freedom of speech and expression… freedom of every person to worship God in his own way… freedom from want… freedom from fear…”


\(^3\) Ibid.

\(^4\) Modeled after the American and French bills of rights.
noble, the proposal failed to gain support from the major powers and it was stated by Meyer (1981) that the proposal was rejected as too controversial.¹

There are three reasons why the proposal was rejected. First is time constraint. If the conference accepted the proposal then the standards of human rights itself must be ascertained and agreed by the parties of the conference. This will inevitably consume time. Due to the diverse differences between the parties including the factors of different levels of cultural development, traditions, religions and political ideologies it was impossible for the countries especially the major powers to agree on a set of human rights². The diversity of factors caused different approach and interpretation between the countries and it was near impossible for the countries to agree and view human rights in the same focal point.

Secondly, the great powers were not prepared to surrender matters on the protection of human rights to an international organization because it was viewed that by doing so, would be an ‘intervention pure and simple’ into the domestic affairs of a state. Here the issue of state sovereignty came greatly into play.

The third reason of the rejection of the proposal would be that the great powers are not ready to give their commitment on defining a standard form of human rights. This was because at the time of the conference all the major powers reputed to have serious human rights problems in their own respective countries and dependent territories³.

Based on the three reasons above, tough the proposal of codification of human rights under an International Bill of Rights was rejected, several non-governmental organizations (NGO) maintained active pressure on the matter. These NGO groups accepted the fact that the International Bill of Rights would never be included as an integral part of the Charter and they acknowledged that it was not within the realm of practical accomplishment. From that point, the NGO groups decided to put their effort in ensuring that the Charter will provide

³ In the United States of America, the human rights problem prevailing at that time was racial discrimination. Furthermore the gulags in the Soviet Union and in the United Kingdom and France, their colonies.
avenue for countries to become committed to promote observance of human rights\(^1\). This led
to the inclusion of several provisions on human rights in the United Nations Charter\(^2\). It was
mentioned by Steiner (2007) that “the Charter’s references to human rights are scattered,
terse, even cryptic….the terms ‘human rights’ appears infrequently”\(^3\).

Throughout the Charter there are eleven provisions in the Charter that refers to human
rights, explicitly and implicitly.


There are nine direct or explicit reference concerning human rights in the United Nations
Charter. They are as follows:

1) Second Paragraph of the Preamble;
2) Article 1(3);
3) Article 13(1)(b);
4) Article 55(c);
5) Article 56;
6) Article 62(2);
7) Article 68; and
8) Article 76(c).

The second paragraph of the preamble of the Charter provides that the peoples of the
United Nations have determined to reaffirm their “…. faith in fundamental human rights, in
the dignity and worth of the human person, in the equal rights of men and women….” It is
accepted that a preamble is an introductory and explanatory statement in a document that
explains the document's purpose and underlying philosophy. Thus the said preamble of the
Charter gave purpose and philosophy on human rights by first recognizing it.

\(^3\) Steiner, Henry J, et al., International Human Rights in Context: Law, politics, Morals: Text and Materials,
Article 1(3) of the Charter deals with one of the purposes of the United Nations. Under the context of human rights it provides that the purpose of the United Nations is “to achieve international co-operation….in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion…..” From this article two important points can be made. First that the article establish the concept of universality of human rights by stating that human rights and fundamental freedoms are for all and secondly, the article emphasize that the rights and freedoms should be enjoyed by all without any form of discrimination.

Article 13(1)(b) deals with functions and powers of the United Nations General Assembly (UNGA). It provides that the UNGA “….shall initiate studies and make recommendations for the purpose of….assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” This article gives obligation and imposes duty on the UNGA to initiate studies and make recommendations on matters of promotion of human rights. In the same time this article resonate the wordings and spirit of Article 1(3) by expressly stating the concept of universality of human rights and non-discrimination.

Article 55(c) then provides “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote….universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Then Article 56 states that “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” These two articles mentioned need to read together in order to understand what they provide for. They provide member states with an undertaking to promote and observe human rights either by working together with the United Nations or separately.

1 Lillich, *op cit.*, 67
Another explicit reference to human rights can also be seen under the prescribed functions and powers of the Economic and Social Council (ECOSOC). In Article 62(2) of the Charter, ECOSOC has been given the power to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.” For the purpose of realization of this power the Charter further provides ECOSOC with the authority to set up commissions for the promotion of human rights. This can be seen in Article 68 which states that ECOSOC shall “….set up commissions….for the promotion of human rights”.

The last explicit reference on human rights in the United Nations Charter can be seen in Article 76(c). The article provides that “the basic objectives of the trusteeship system….shall be….to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world…."

From these explicit references to human rights in the Charter, three United Nations Organs have been given the specific obligation of promoting and encouraging respect for human rights and for fundamental freedoms (See Table 2 below).

<table>
<thead>
<tr>
<th>No.</th>
<th>UN Organ</th>
<th>Relevant provisions</th>
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<tbody>
<tr>
<td>1.</td>
<td>The General Assembly</td>
<td>Article 13(1)(b)</td>
</tr>
<tr>
<td>2.</td>
<td>The Economic and Social Council under the authority of the General Assembly</td>
<td>Article 62(2) and 68</td>
</tr>
<tr>
<td>3.</td>
<td>Trusteeship Council</td>
<td>Article 76(c)</td>
</tr>
</tbody>
</table>

There are two indirect or implicit references with regard to human rights in the Charter. They are as follows:

1) Article 8;
2) Article 10; and
3) Article 14.

Article 8 provides that the United Nations “.... shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality...” This principle of non-discrimination as to sex is specific for the purpose of participation in the United Nations in its “principal and subsidiary organs”.

Article 10 states that the UNGA “....may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United nations or to the Security Council or to both on any such questions or matters”. This allows the UNGA to discuss any questions or any matters that include human rights and fundamental freedoms, which theme recurs again and again explicitly in the Charter, thus making it obvious that they are within the scope of the present Charter. This power of the UNGA is however curtailed by Article 12⁴ which restricts UNGA to discuss any matters if the situation is under the exercise of the United Nations Security Council.

Article 14 provides that subject to the provisions under Article 12, the UNGA “....may recommend measures for....situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations”. Purposes and Principles of the United Nation can be found in Article 1 of the Charter. For the purpose of discussion under the human rights theme, the specific relevant article under the said article would be Article 1(3). When Article 14 is read together with Article 1(3) of the Charter, it is clear and evident that the UNGA is given the power to recommend measure to solve situations that occur caused by violations of universal human rights and discrimination.

⁴ Article 12 of the Charter provides that “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the general Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so request.
Thus it can be said that there are eleven instances in the United Nations Charter provisions that make reference to human rights and fundamental liberties. Though the proposal, by interested countries and non-governmental organizations, to include the International Bill of Rights was rejected, their continued effort however was not in vain. It was in a way a success in the sense that even in the situation or era which the major powers were quite resistant to the idea of universal human rights and fundamental freedoms, all members of the United Nations including the major powers had put their strong promise and commitment on promoting human rights and fundamental freedoms. This allowed the making of the Universal Declaration of Human Rights in 1948 and later the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1966, including its optional protocols which are also referred to together as the International Bill of Rights.

5. The significance of the United Nations Charter on the state of human rights

In the previous discussion above, it can be concluded that the Charter contains several provisions that refer to human rights. These provisions alone show that human rights were considered by the members of the United Nations, during the adoption of the Charter, as an important theme that needs international recognition and affirmation. Under this chapter the significance of the Charter on the state of human rights will be discussed.

There are six significance of the United Nations Charter on human rights. They are as follows:

1) Human rights constitute a theme that recurs again and again throughout the Charter and is singular in its predominance.


3) The United Nations Charter is the first international instrument in which nations agreed to work closely on the international level for the promotion of human rights.

4) The provisions of the Charter contain broad non-discrimination clauses with regard universality of human rights including the equality of men and women.
5) The United Nations Charter has the status of multi-lateral treaty and it imposes obligations on the member states which are binding under international law.

6) The United Nations Charter allows the propagation and education on the concept of universal human rights.

Under the second part of this assignment I concluded that there are eleven provisions, both explicit and implicit, that refers to human rights in the United Nations Charter. The various recurrences of provisions that touch on human rights show that the theme was deemed important at the point when the Charter was adopted. Both explicit and implicit reference on the matter recurs again and again throughout the Charter. They are so vivid and radiant and that it will not possibly escape readers’ attention to it. On this Lauterpacht stated that “The idea of the recognition and protection of human rights is woven like a golden thread throughout the entire Charter as one of the principal objectives of the United Nations Organization.”

The provisions discussed above shows that the human rights and fundamental freedoms is a dominant theme in the United Nations Charter. Reading the Charter, one cannot escape from making a conclusion that human rights dominate the instrument. Ramcharan (2004) stated that “the core concept of the United Nations when the Charter was drafted was…. for the maintenance of international peace and security…. alongside this, the Organization would promote development and the universal realization of human rights.”

The second significance is that the United Nations Charter has internationalized the concept of human rights. Prior to adoption of the Charter in 1945 human rights were considered as a domestic and municipal issue. Based on the concept of law and sovereignty, each state has their own version of human rights depending on the state’s political ideology and even religion and culture. Under this domestic version of human rights, no foreign state or any international organization may interfere or involve with one state’s practice of human rights. The adoption of the Charter marked the agreement of the members of the United

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Nations in accepting and internationalized view of human rights and as stated by Buergenthal (2000) that with the signing of the Charter member states “….could no longer claim human rights as such were essentially domestic in character.”\(^1\) Though the question of what are human rights was not defined in the Charter but later in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Though the internationalized universal concept of human rights was positively accepted, there are however criticism on this concept. Some critics advocated that the universal human rights now adhered to were based on the western notion on the issue which foundation can be traced back to the United States Bill of Rights and the French Declaration of the Rights of Man. On this, Steiner (2007) mentioned about the conflict between universalism against relativism. He argued that on the relativist point of view that it is not prudent to impose an exogenous concept of human rights on states which have their own endogenous concept of human rights\(^2\). He also commented that “to a relativist, these instruments (human rights instruments) and their pretentions to universality may suggest primarily the arrogance or cultural imperialism of the West…”\(^3\)

The third significance of the Charter on the state of human rights is that the Charter is the first international instrument in which nations agreed to work closely on international level for human rights promotion. This is evident in Article 1(3) of the Charter that encourages international co-operation in the promotion of human rights. It is also evident in other provisions which are Articles 55(c) and 56. These three provisions can be seen as the ‘obligations’ of member states on the promotion of human rights. These provisions are among the most frequently invoked provisions of the Charter when dealing with inter-states ‘obligations’ on human rights.

As mentioned above, though human rights were internationalized by the Charter, human rights were not defined. The obligation imposed on the member states to work with the United Nations allowed the organization to embark on the mission to define human rights. According to Buergenthal the above provisions provided the United Nations “….with the

\(^1\) Buergenthal. *Op cit.* 12
\(^3\) Id. 518
requisite legal authority to undertake a massive effort to define and codify these rights”\(^1\). It was by this collective effort by member states that human rights was given the definition and accepted understanding by the Universal Declaration of Human Rights 1948.

The fourth significance of the Charter with regards to human rights is the broad non-discrimination against gender provisions. Issue of gender discrimination has existed prior the Charter and continues even after its international recognition in the Charter. Tough it continues the Charter has allowed efforts to be made in order to eradicate gender discrimination.

One of the most important efforts in eliminating gender discrimination is the mechanism known as the ‘gender mainstreaming\(^2\)’. The term ‘gender mainstreaming’ was made popular on the world center stage on the Fourth World Conference on Women in Beijing in 1995\(^3\). Gender mainstreaming mechanism was then taken up by the ECOSOC in 1997 which laid down principles regarding this matter. The principles are:

1) Issues across all areas of activity should be denied in such a manner that gender differences can be diagnosed—that is, an assumption of gender-neutrality should not be made.

2) Responsibility for translating gender mainstreaming into practice is system-wide and rests at the highest levels. Accountability for outcomes needs to be monitored constantly.

3) Gender mainstreaming also requires that every effort be made to broaden women’s participation at all levels of decision-making.

4) Gender mainstreaming must be institutionalized through concrete steps, mechanisms and processes in all parts of the United Nations system.

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\(^1\) Buergenthal. *Op cit.* 12

\(^2\) ECOSOC defines gender mainstreaming as “Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.” See *Report of the Economic and Social Council for the Year 1997*, U.N. GAOR, 52nd Sess., Supp. No. 3, U.N. Doc. A/52/3/Rev.1 (1997) 24.

Gender mainstreaming does not replace the need for targeted, women-specific policies and programmes or positive legislation, nor does it substitute for gender units or focal points. Clear political will and the allocation of adequate and, if need be, additional human and financial resources for gender mainstreaming from all available funding sources are important for the successful translation of the concept into practice.\(^1\)

On paper, the principles on gender mainstreaming set forth by ECOSOC may appear promising but for the time being they fall short on implementation and success. Lombardo (2005) argued that despite the gender mainstreaming mechanism, women participation in decision making post such as in United Nations itself is somewhat glacial\(^2\) thus not in line with Article 8 of the Charter. Not only in the United Nations, disparity of women participation in decision making can also be seen all over the world either in the public or private sector. Feminist may say that this is against human rights but in reality the question that need to be asked is does gender equality as mentioned in the Charter means total equality between men and women without taking into consideration points of merit and circumstance? On this issue Islam provides an alternative view. In Islam women are given equal rights with men, tough equal they are however not identical as the Quran prescribed that both man and woman are equal but man have advantage over them\(^3\). The "advantage" that is spoken of here has nothing to do with man's superiority over woman but rather, speaks to the different social roles that males and females fulfill based upon their individual natures\(^4\). Though Islam seems to provide the answer, it is most unlikely that the so-called universal human rights proponents are going to adhere or at least take them into consideration. Here, as argued by Lombardo, the universality of human rights as described in Charter can be argued on the basis that it is universal in the eyes of the West but not taking into consideration other non-western religion and cultural views.

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3 The Quran 2:228
4 Id 4:34
The fifth significance of the Charter on human rights is that the Charter gives the effect of multi-lateral treaty that impose obligation on member states. As a multi-lateral treaty that was signed by the member states, it imposes obligations on them that are binding under international law. This is evident by referring to The Vienna Convention on the Law of Treaties, article 2(1)(a), defines a treaty as "an international agreement concluded between States in written form and governed by international law...." Furthermore in Madellin v Texas\(^1\) the United States Supreme Court mentioned in the positive on the binding effect of the Charter on member states. However, The Charter though binding on member states under general international law they are however limited by domestic law. On this Kirgis (1997) mentioned that treaties, including the United Nations Charter, are binding instruments under international law, subject to limited grounds much like those in domestic contract law for invalidating or terminating them\(^2\).

On the context of human rights the obligation imposed upon member states by the United Nations Charter is under Article 56 read together with Article 55(c). As discussed above, the articles require member states to promote “universal respect for, and observance of\(^3\)….“ human rights. Kindly note that the aforementioned article only obliges member states to promote respect and observance of human rights but not domestic application of universal human rights. To rely alone on the Charter for state’s obligation on human rights is not enough. The Charter only binds the member states so that future work and effort on human rights can be made possible. This was remedied by the subsequent international treaties that address the matter\(^4\).

The sixth significance is that the Charter provides opportunity of propagation and education of the concept universal human rights. This opportunity was provided for under Articles 55(c) and 56 of the Charter. The organization and member states have positively took this opportunity by signing and ratifying various international instruments on human rights. Taking into consideration the Charter and the instruments on human rights together they, as mentioned by Bilder (1969), “….define the content of human rights concepts and

\(^1\) Medellin v Texas 128 S.Ct. 1346 (2008)
\(^3\) United Nations Charter Art. 55 (c)
\(^4\) Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights
establish clearer standards of governmental conduct. They educate both officials and the
general public in these norms….‖¹ Thus the Charter clearly has set forth the foundation by
which the universal human rights and fundamental freedoms can be promoted through
education and this is shown by the establishment of the United Nations Education, Cultural
and Scientific Organization (UNESCO) on 16th November 1945. UNESCO as a specialized
agency under the United Nations was established with promotion of human rights as one of
its core purposes².

6. Obligation of the Member States under the United Nations Charter

In the discussion above it can be concluded that the Charter gave several significance
on the state of human rights. One of it is the concept of internationalization of human rights
that allow departure from the old understanding of domestic or municipal human rights to
universal human rights. Though the understanding of member states on this matter have
changed significantly for the past five decades, the issue that needs to be addressed is whether
this understanding are actually practiced by the states, within their own territory, by their own
volition or by the obligation imposed upon them by the Charter.

To determine whether such positive obligation exists we need to see the expressions
used in the Charter. There is no doubt that there are provisions that refer on this matter but
they are about purposes and principle of the United Nations and the functions and powers of
bodies or organs under the United Nations. The exception can be found in Article 56 that is
the undertaking clause³. The provision provides that the undertaking itself only requires
member states to promote and observe human rights without any discrimination and this in
my opinion the wordings do not have a strong obligatory impact. Thus rather than obligatory,
the provisions sound advisory and supervisory.

¹ Bilder, Richard, Rethinking International Human Rights: Some Basic Questions, Wisconsin Law Review 171
(1969) 205.
² UNESCO Constitution. Art. 1(1) The purpose of the Organization is to contribute to peace and security by
promoting collaboration among the nations through education, science and culture in order to further universal
respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for
the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United
Nations.
³ “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the
achievement of the purposes set forth in Article 55” For human rights one need to read article 56 together with
article 55(c).
a. Kelsen’s View

According to Kelsen (1964) the Charter does not impose obligation on member states on matter of human rights\(^1\). He stated that “the language used by the Charter in this respect does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects”\(^2\). He further stated that “the fact that the Charter, as a treaty, refers to matter is in itself not a sufficient reason for the assumption that the Charter imposes obligations with respect to this matter upon the contracting parties”\(^3\). Kelson’s tone on this matter shows that he was of a strong opinion that the Charter does not impose obligations. He further argued that human rights are well within a state domestic jurisdiction because Article 2(7) of the Charter forbids intervention of United Nations on such matters with the exception that the situation fits “….threats to the peace, breach of the peace…..” as provided in Article 39 of the Charter\(^4\).

There are several reasons why this occurred. First, the Charter does not provide the standard definition of human rights making imposition of obligation impossible. Second, a provision that clearly impose obligation would never be accepted by the signatories during the adoption of the Charter. And third, it was perhaps the drafter’s intention that the provision was worded in that manner so that it will be the foundation of international cooperation on human rights. Thus it can be said that true to the Kelsonian jurisprudential argument of the pure theory of law, the Charter though inspiring does not impose obligations upon the member states since it lacks the binding norm.

Looking at the Charter from Kelson’s perspective, the Charter is viewed not as an authoritative document of human rights but merely as a collective agreement between the contracting states to work together seeking a common ground of understanding on human rights. Nevertheless, this however should not be seen as a failure of the Charter. But it should be seen in a way that the Charter was actually a success story with regard to the fight for human rights because it provided the foundation upon which human rights are defined,

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\(^2\) Ibid
\(^3\) Ibid
\(^4\) Ibid. 30
codified and build upon on an international plane of discussion (which shall be discussed below).

7. Obligatory/Binding Nature of the Charter

On a different perspective, it can also be argued that the Charter does impose legal obligations on human rights on the ground that provisions on such matter recur throughout the Charter thus signifying its predominance. The Article that mentioned “…. the United Nations shall promote…. observance of, human rights….“\(^1\), when read together with Article 56, obliges member states to actively participate on human rights. This participation can either be jointly together with the United Nations or separately.

The obligatory nature of the Charter can be seen in two of the earliest UN General Assembly resolutions. In the Resolution of 44(1) of 1946, the general assembly was of the opinion that the “…treatment of Indians in South Africa should be in conformity with the international obligations under the agreements concluded between the two governments and the relevant provisions of the Charter\(^2\)”. In Resolution of 103(1) of 1946, the General Assembly declares that “…it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations…”\(^3\)

There are also many other court decisions that seem to support this view such as the case of *Oyama et al v California*\(^4\), which revolves around the issue of racial discrimination caused by a law coupled together with negative sentiment of the Americans towards those of Japanese origin. This case gave no huge impact to the abolishment of discriminatory laws in the United States during that time but in its decision, the concept of human rights under the United Nations Charter was quoted and recognized. This is evident in the words of Justice Murphy that “…this nation has recently pledged itself, through the United Nations Charter, to

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\(^1\) United Nations Charter. Art. 55(c)
\(^2\) Resolution on the treatment of Indians in the Union of South Africa, GA Res 1946, UN GAOR, UN Doc A/RES/44(1) (1946)
\(^3\) Resolution on persecution and discrimination, GA Res 1946. UN GAOR, UN Doc A/RES/103(1) (1946)
\(^4\) (1948) 332 US 633
promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion”\(^1\). The same positive tone of the courts with regard to racial discrimination as against human rights can also be seen in the Canadian case of *Re Drummon Wren*\(^2\). In this case, the Ontario Court mentioned that Canada “...is pledged to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”\(^3\). This was followed by the case of *Re Noble and Wolf*\(^4\).

The positive treatment on the obligatory nature of the Charter had allowed states to argue on the international level on violation of human rights issues. For example articles 1, 55 and 56 were mentioned in the *Hostages Case*\(^5\). In this case the United States urged the International Court of Justice to condemn Iran’s seizure of United State’s hostages during the 1979 Iranian Revolution as a violation of fundamental human rights recognized by the International community. The United States citing the above three articles, contended that, “the existence of such fundamental rights for all human beings...with the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected in the Charter of the United Nations”\(^6\).

The latter discussion that argued that human rights are imposed obligations on member States does sound appealing. As appealing as it may sound, in reality States maintain their own human rights affairs strengthened by the doctrine of Sovereignty of State. It can be said that the number of States that truly adhere to the universal standards of human rights are small or perhaps negligible. Even strong and vocal human rights proponents such the United States and her allies violate human rights at home and abroad since it is a widely known fact that in these countries discrimination existed as people are discriminated because of their color, religion, culture, so on and so forth.

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1. Ibid at 673
2. (1945) OR 778
3. Ibid
4. (1949) OR 503
6. Id.
States also seem to rely on the two approaches discussed when arguing on this matter depending upon their interest at the present time. This can be seen in the case of the treatment of Indians in the South African Union. The Union argued that the Charter did not provide definition of human rights thus making the Charter impossible to impose obligations upon member states. Meanwhile Indian representative argued that the mistreatment of Indians constitute a violation of human rights as provided in the Charter.¹

8. Objections to Implementation

In the discussion above, some have argued that the Charter does not establish obligatory nature of human rights provisions. It is believed that one of the reason such obligatory nature unable to be established is because the impediment caused by Article 2(7) of the Charter.

Human rights though internationalized, remain still very much under domestic state jurisdiction. Each state has the right to apply its own set of human rights either by adopting totally the internationally prescribed standards of rights or by their own sui generis standards, perhaps based on the relativist view, albeit respecting the universal notion of human rights. This will cause situation where the observance of human rights differs from one State to another. These differences on the approach on how States perceive human rights provide situations where one state may believe that the other is not practicing human rights up to a standard.

For example, Malaysia practices affirmative action that gives some privilege over the bumiputeras (persons of a Malay race and natives of Malaysia) as provided in the Malaysian Federal Constitution². On this matter Shad (2008) mentioned that many economic, social and educational programmes in Malaysia are structured along ethnic lines³. Some defend it on the basis that it is a much needed affirmative action to balance the imbalances in the country and some may say that Malaysia violates human rights by practicing discrimination via discriminatory laws. On this matter the question that should be asked is that, is it possible for

¹ As quoted in Kelsen. Op cit. 30.
² Malaysian Federal Constitution. Art 153(1)
foreign States through the international arena impose positive obligation on Malaysia to observe universal human rights and be gone with its affirmative actions?

My answer for the above is no. As discussed previously, articles 56 and 55(c) contain the provision where positive obligation on human rights may be derived from. They require member states to promote and observe human rights based on the pledge given by the states. In the event that a state breach that pledge by violating human rights within their own territory a state is said to have breached a treaty which is the Charter itself. The only remedy available for such matter is under international law and now the question is who is going to enforce it? It should be the United Nations but the organization by virtue of Article 2(7) has no authority or jurisdiction to intervene.

Article 2(7) states that, “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

The article provides that the United Nations cannot intervene in any matter within state jurisdiction. The question now is what does it mean by ‘intervene’? Authors such as Lauterpacht and Oppenheim seem to define interventions as the dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Gilmour (1967) mentioned that ‘intervention’ means either “dictatorial interference” or “interference pure and simple”. By referring to the drafting history of the Charter he was of the opinion that intervene means “interference pure and simple” and the drafters have no intention to limit that word to “dictatorial interference”. This shows that at the time of the Charter’s adoption, member states have agreed on the supremacy of state sovereignty thus making any interference with domestic affairs of a state illegal.

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3 Id. 333
Furthermore, in the *Nicaragua case*\(^1\), the International Court of Justice established the fact that the term intervention in the Charter does not mean or in line with dictatorial-interference. Any dictatorial-interference by one State to another is deemed as a violation of international law. In this case it was held that the United States had violated international law by intervening in Nicaragua’s state of affairs by supporting guerrilla rebels and by mining Nicaraguan harbors which are against the provision of Art 2(4) of the Charter.

9. **Conclusion**

In a nutshell, to say that Article 2(7) acts as a major impediment in establishing the obligatory nature of human rights provisions is not of a correct view. The correct view is that the powers of the General Assembly and the ECOSOC and the subsidiary organs are limited to study, discuss and recommend in respect of human rights none which constitutes intervention in the technical sense such as those occurred in the Nicaragua case. It can also be said that since human rights theme recurs throughout the Charter, and acknowledged by States and judicial authorities, human rights has attained transcendence from a matter of State domestic jurisdiction to a higher plane of international law.

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THE RIGHT OF THE SPOUSE OF THE NON-MUSLIM MARRIAGE TO MATRIMONIAL PROPERTY: A COMPARATIVE STUDY BETWEEN MALAYSIAN LAW AND ENGLISH LAW

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Abstract:

The issue on the division of matrimonial property is something which arise when there is a divorce between the parties as the started to distinguished their right and ownership over the property that they own throughout their marital life. Section 76(1) of the Malaysian Law Reform (Marriage and Divorce) Act 1976 has given the Court power to make an order for the division of matrimonial property in divorce proceeding pending decree nisi. This has been highlighted by Family Law Committee of Malaysian Bar in their statement dated 19th October 2010 that “the position on whether or not orders for division of matrimonial property can be made after the granting of the decree nisi, even though applied for before the said grant, remains unclear”, and this statement being issued in contemplation of the case of Manokaram v Ranjid Kaur [2008] 1 MLJ 21. This paper will investigate into the requirements under Section 76 of the Malaysian Law Reform (Marriage and Divorce) Act 1976 which empowers the court in division of matrimonial property by comparing it with the statutory legislation and legal practices in the England in matters relating to the division of matrimonial property. The study is a qualitative based research which involved library research on emerging issues, judicial decisions study and analysis of legal literature by analytically analysing the literature inductively. This paper suggested the need to amend to Section 76 of the Malaysian Law Reform (Marriage

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and Divorce) Act 1976 to ensure smoothness and more efficient division of matrimonial property.

**Keywords:** matrimonial property, English law, divorce, non-Muslim marriage.

1. **Introduction**

Claim for division of matrimonial property forms one of the complicated claims of ancillary matters during divorce. In Malaysia, being a multi-racial has two separate legal systems covering the family and matrimonial matters; non-Muslim which was also termed as civil marriages, and Muslim marriages. For the non-Muslim marriages, the applicable legislation is Law Reform (Marriage and Divorce) Act 1976. Family matters for Muslim marriages are governed by Shariah law which was incorporated in the various states enactment.

Law Reform (Marriage and Divorce) Act 1976 in defining matrimonial property does not provide definition of matrimonial property. Section 76(1) of Law Reform (Marriage and Divorce) Act 1976 which provides the court in Malaysia with power to make a division of matrimonial property in an application for decree of divorce or judicial separation and such application for division should be made during the application for a decree nisi or before the decree nisi being finalised. The Family Law Committee of the Malaysian Bar (2015), however raised a query on the applicable time frame for applying for such division of matrimonial property, they wrote as follows:

“The position on whether or not orders for division of matrimonial property can be made after the granting of the decree nisi, even though applied for before the said grant, remains unclear. Members are therefore advised, for the time being, to err on the side of caution and ensure that the application for division of matrimonial property is heard and ordered at the same time as the granting of the decree nisi and not at a deferred date”.
2. Definition of matrimonial property

Matrimonial property has been interpreted differently in different jurisdiction. According to Majid (1999), matrimonial property is the property acquired by the parties to a marriage by their joint effort at the time when they are husband and wife’. In the case of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109, Shanker J. define matrimonial property as

“… everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset”.

The case of *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fat* [1998] 1 MLJ 359, decided that the word matrimonial assets as understood in Malaysia can be applied in the same context as ‘family assets’ which has been stated by Lord Denning in *Wachtel v Wachtel* [1973] 1 All ER 829. Lord Denning stated that ‘family assets’ is property which was acquired by one or both spouses during their marital time, and to be use and benefitted to them and the children of the marriage, if any. He further stated that the ‘family assets’ can be divided into two parts that are:

i. Capital nature such as the home and furniture in it; and

ii. Revenue-producing nature such as the earning of the spouse.

From the above discussion on definition of matrimonial property, it reflect that the definition of matrimonial property is wide enough to encompass the earning power of the spouse, as the above judicial pronouncement clearly indicate that the matrimonial property shall cover everything which is acquired during the marriage (Ibrahim, N. 2004). Tamby Chik (2003) defines matrimonial property not only to consist of real property but also personal property such as cars, shares, saving, unit trusts and insurance policy. According to the *Kamus Istilah Undang-Undang Keluarga Islam* (Dictionary on Terminology of Islamic Family Law) (Kamaruddin, Z. & Abdullah, R. 2002), matrimonial property is
‘The property which was acquired by the parties by the effort of both parties to the marriage during their conjugal relationship, whereas the property acquired by a party before a marriage, or property acquired by inheritance, is not matrimonial property and the owner of the property has absolute right over them. But, the property which was acquired before the marriage and the inheritance, can become part of matrimonial property if the properties have been substantially improved during the marriage and the value of that properties was increased because of the effort of both parties, so, the party which does not contribute to the acquirement of that property can asked for the remuneration if divorce happened between them’.

Under English Matrimonial Causes Act 1973, the court of England exercises a very wide power in determining what is and is not matrimonial property. The power of the court in determining matrimonial property covers all types of property which was acquired jointly by spouse during their marriage which includes family home, holiday home, furniture bought during the marriage, saving and investment made and built during the marriage, pension fund accumulated during the marriage and insurance policy (The Law Commission No. 343, 2014).

Lord Nicholls of Birkenhead in Miller v Miller and McFarlane v McFarlane [2006] UKHL 24, defines matrimonial property as had been stated in paragraph 22 as:

“Matrimonial property is property acquired during the marriage otherwise than by inheritance or gift. It is the financial product of the parties' common endeavour. The family home, even if brought into the marriage at the outset by one of the parties usually has a central place in a marriage and should be normally treated as a matrimonial property.”

His Lordship also state that the property which was acquired before the marriage might also become matrimonial property if the property is acquired during the premarital cohabitation and engagement but he did not make any distinction between matrimonial family assets and ‘matrimonial business and investment assets’(Miller v Miller and McFarlane v McFarlane [2006] UKHL 24) .
In the case of *Miller v Miller and McFarlane v McFarlane* (2006), it was decided that the matrimonial home was treated as matrimonial property even though the house was bought before the marriage and was brought into the marriage at the effort of one party only (Hodsn, d, 2006).

3. **The division of matrimonial property**

The division of matrimonial property in Malaysia can be divided into two separate legal systems, Law Reform (Marriage and Divorce) Act 1976, governs non-Muslim marriages in Malaysia. This research will focus only on the division of matrimonial property for non-Muslims as provided under the Law Reform (Marriage and Divorce) Act 1976. It is because Section 76(1) of Law Reform (Marriage and Divorce) Act 1976 did provides for the spouse in a divorce petition the right to claim matrimonial property, but the right is given from the presentation of the petition for divorce and up until the pronouncement of decree nisi. If the decree nisi had been pronounced and the parties want to claim division of matrimonial property they cannot do so as this section did not allowed it, and this is the main issue in this research.

Section 76(2) of the Act laid down guidelines for court to observe and consider in division of matrimonial property:

a) “the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

b) any debts owing by either party which were contracted for their joint benefit;

c) the needs of the minor children, if any, of the marriage;

d) and subject to those considerations, the court shall incline towards equality of division.”

In the case of *Sivanes Rajaratnam v Usha Rani Subramaniam* [2002] 3 MLJ 273, Abdul Hamid Mohamad CJA stress out that the division of matrimonial property means the division of matrimonial assets which existing at the time of divorce. In this case, at page 279, he states that:
“Besides (I am speaking generally here) in a marriage, both spouses share everything, both contribute towards the home and family in one way or another, to a bigger or smaller extent. Where both spouses work and earn income, each of them inevitably spends his or her own income for the family. Similarly, where there is income from an asset purchased during the subsistence of the marriage, say rent, even though it may be paid into the account of one spouse, eventually it will go to the family, may be all and may be part of it. No one keeps an account, indeed no one should, as a marriage is not a business venture.”

Rule 61(1) of the Divorce and Matrimonial Proceedings Rules 1980 requires a party to a division of matrimonial property proceeding to make a full and frank disclosure when asking or defending against a claim of matrimonial property. But this duty is still subject to application from the claimant under this Rule by using form 11 or 13 which requires the parties to file an affidavit in answer which containing full particulars of his property. Failure on the part of the claimant to make such application, he or she does not entitles to claim, later on, that there is no full and frank disclosure on the part of defendant (Ibrahim, N. 2012).

It was be evidence in the case of Ananda Dharmalingam v Chantella Honeybee Sargon [2006] 6 MLJ 179, where the court ruled that there must be in the first place the process by which demands were made, documents exchanged, and cross-examination had taken place before the party could rise that there is a lack of full and frank disclosure (Ibrahim, N. 2012).

Compared to Malaysian counterpart, Under English law, the court of England exercises wide power in determining what is considered as matrimonial property. The power of the court in determining matrimonial property is on a discretionary basis with the aim of producing a fair division of matrimonial property. In each case, the court will take into account the circumstances of particular cases, the needs of the parties, the length of the marriage and the earning capacity of each spouse (Bar Council of England and Wales, 2008).

An approach had been introduced by the appellate court to guide in division of matrimonial property in the case of White v White [2001] 1 AC 596. The court stated that in division of matrimonial property, where the assets own by the spouse at the time the
proceeding of division of matrimonial property is made more than what is needed by them, the precept of equality will be applied. The House of Lords rule that

“If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and the child-carer.”

Whatever intention of the Judges in the case of White v White is, the scope of discretion remains very wide. In the case where the assets of the marriage were acquired during their marital life together, the assets should be divided equally between them, but in the case where the assets are limited, the case will be decided based on fact-specific solution, where each case depend on its own facts (Hodson, D. 2006).

4. The power of the court to order division of matrimonial property

Section 76 of the Malaysian Law Reform (Marriage and Divorce) Act 1976 provides for the division of matrimonial property. This section gives power to the court divide matrimonial property upon parties’ application. The spouse to marriage petition for a divorce, generally, at the same time they may apply for the division of matrimonial property. But this Section did not state when a spouse to a divorce proceeding may apply for the division.

According to Section 24(3) of the Matrimonial Causes Act 1973 of England, the court has power to make property adjustment orders upon the grant of decree nisi of divorce which will take effect upon decree absolute. The court has power to redistribute all assets which fall within the criterion of Section 25 of the Matrimonial Causes Act. Section 25 list down the following criteria:

“(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

Whereas, Section 26(1) of the Matrimonial Causes Act 1973 of England provides that the commencement of proceedings for ancillary relief shall start at any time after the presentation for divorce, nullity of marriage or judicial separation. Section 26(2) of the Matrimonial Causes Act 1973 of England further provides that if the application for relief has not been made according to Section 26(1), the application may be presented later with the leave of the court. So, the spouse to a divorce proceeding can make an application of property adjustment order when presenting the application for divorce or when answering the application.

Comparatively, in Malaysia the court does not have the power to allows the parties to claim matrimonial property when the court had already pronounce the decree nisi despite the party claim that there is a misrepresentation of fraud of the other party. But in England, the party can claim division of matrimonial property if he or she can get a leave from the court, which allows them to bring the claim though the frame to file the application for the property adjustment order has expired. It is because, Section 26(2)(b) of the English Matrimonial
Causes Act 1973 give the opportunities to the parties to bring the claim of division of matrimonial property under special circumstances and with the leave of court, but there is no such a provision in the Malaysian Law Reform (Marriage and Divorce) Act 1976, the right of the parties to claim for the division of matrimonial property is excluded when they exceed the time frame allowable to them to make such claim event if they could proof any special circumstances.

5. Conclusion

The division of matrimonial property is something which is importance in a divorce proceeding and it also something which is so trivial in determining whether the rights of the parties are guaranteed. As the parties to the marriage has their own right over the property. The right of one person to matrimonial property is not arising solely on the acquirement of that property. A non-contribution party also may have right over matrimonial property if he could proof that he or she also contributed to the marriage.

There are many literatures on the issue of division of matrimonial property in Malaysia, but none of them touched the power of the court to make an order for the division of matrimonial property under Section 76(1) of the Law Reform (Marriage and Divorce) Act 1976 when the decree nisi has been pronounce or made absolute. And due to this limited legal literature on issue, this research is aims to examine the relevant laws and practices in England in order to produce a law which will ensure the better and fair provision concerning division of matrimonial property between spouses. It is hoped that this thesis will contribute in attempting to answer the research questions posed, to assist government, policy makers, academicians, and the public at large especially divorce couple in striving for their rights after divorce.
References


PENIPUAN DALAM URUS NIAGA TANAH DI MALAYSIA

Harun, N. & Hassim, Z.

Abstrak:


Kata kunci: penipuan urus niaga tanah, analisa kes dan akhbar, modus operandi, cadangan.

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2 Fakulti Undang-undang Universiti Kebangsaan Malaysia, Bangi, Selangor, jady@ukm.edu.my
1. **Pengenalan**


Peningkatan kes-kes penipuan ini turut menimbulkan rasa kebimbangan pemilik-pemilik tanah terhadap keselamatan harta mereka kerana tanah mereka boleh bertukar milik tanpa disedari. Antara faktor penyumbang kepada gejala ini adalah kerana peningkatan nilai hargatanah itu sendiri (Jan, t.t), tanah yang terbiar dan kelemahan-kelemahan pengurusan di pejabat tanah (Shaila, 2010). Mengikut laporan statistik polis antara tahun 2005 hingga Disember 2013 sebanyak 832 kes melibatkan penipuan hak milik tanah yang berlaku di Malaysia (PDRM, 2013). Dalam hal ini, Pejabat Tanah yang terpedaya dengan dokumen palsu tersebut akan terdorong untuk memindahkan hak milik tanah berkenaan kepada pembeli manakala pembeli yang terpedaya ini pula setelah urusan pindah milik ini berjaya dilakukan, terdorong untuk menyerahkan sejumlah wang seperti dipersetujui dalam perjanjian jual beli yang telah ditandatangani dengan penipu (Shuhaimi, 2008).
2. **Konsep penipuan dalam urus niaga tanah menurut kanun tanah negara (KTN).**

Menurut seksyen 5 KTN, urus niaga bermaksud apa-apa transaksi berkenaan dengan tanah beri milik yang dikuatkan di bawah kuasa-kuasa yang diberi oleh Divisyen IV dan apa-apa transaksi yang serupa yang dikuatkuasakan di bawah peruntukan undang-undang tanah terdahulu, tetapi tidak termasuk mana-mana kaveat atau perintah larangan. Dengan erti kata lain, seksyen ini menetapkan tiga elemen penting yang perlu ada dalam sesuatu urus niaga iaitu (1) wujudnya transaksi; (2) melibatkan tanah beri milik dan (iii) transaksi mestilah berbeza daripada kaveat dan Perintah larangan. Oleh itu, jenis urus niaga yang berupaya dikuatkuasakan di bawah KTN adalah seperti pindah milik, pajakan dan tenansi, gadaian dan lien dan esmen (Azlinor, 2008). Namun demikian, kaveat dan perintah larangan tidak termasuk dalam definisi urus niaga menurut seksyen 5 KTN kerana kedua-duanya merupakan sekatan ke atas urus niaga yang terkemudian.

Manakala perihal penipuan dalam seksyen 340(2)(a) KTN menetapkan bahawa:

(2) Hak milik atau kepentingan mana-mana orang atau badan sedemikian janganlah hendaknya menjadi tidak boleh disangkal:-

(a) dalam mana-mana hal penipuan… yang orang atau badan itu, atau mana-mana agen atau badan itu, adalah menjadi satu pihak atau bahagiannya;

Seksyen 340(2)(a) memperuntukkan mana-mana orang atau badan yang telah mendaftarkan hak milik ataupun kepentingannya setelah memperoleh hak milik ataupun kepentingan melalui penipuan, maka, pemilik asal boleh mengetepikan kepentingan tersebut. Di samping itu juga, jika seseorang atau ejennya menjadi pihak atau tahu tentang kewujudan penipuan, hak milik yang diperoleh oleh orang berkenaan akan boleh disangkal. Ini bermakna seseorang yang telah melakukan penipuan tidak akan mendapat perlindungan melalui pendaftaran. Walaupun KTN memandang serius tentang kewujudan penipuan, tetapi KTN tidak menerangkan dengan jelas tentang perlakuan yang bagaimanakah yang dikatakan penipuan seperti yang dimaksudkan dalam KTN. Oleh itu tafsiran kehakiman tentang definisi penipuan dalam bidang kuasa *Torrens* harus diambil kira (Visu, 1996).
Dalam aspek penipuan, terdapat beberapa elemen yang harus dibuktikan sebelum beban bukti dapat dilepaskan. Aspek penting dalam membuktikan bahawa terdapat penipuan adalah bahawa penipuan yang dilakukan adalah merupakan penipuan sebenar (actual fraud). Sistem Torrens menerima definisi penipuan sebenar seperti yang diputuskan oleh Lord Lindley dalam kes Assets Co v Mere Roihi [1905] 1 AC 176 seperti berikut:

“By fraud in these Acts is meant actual fraud- that is dishonesty of some sort, not what is called constructive or equitable fraud-man unfortunate expression and one very apt to mislead, but often used, for want of better term, to denote transactions having consequences in equity similar to those which flow from penipuan …[and]… dishonesty must be brought home to the person whose title is to be impeached or to his agents. Fraud by persons through whom he claims does not affect him unless knowledge of it is brought home to him or his agents.’ (hlm.210)


Definisi penipuan ini juga diterima pakai di Malaysia. Dalam kes PJTV Denson (M) Sdn Bhd lwn Roxy (M) Sdn Bhd, [1980] 2 MLJ 136, Raja Azlan Shah menyatakan bahawa:

“Whether fraud exits is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean ‘actual fraud’ ie dishonesty of some sort’ for which the registered proprietor is a party or privy. “Fraud is the same in all courts, but such expressions as ‘constructive’ are…inaccurate;” but ‘fraud… implies a willful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled.” Thus in Waimiha Sawmiling Co Ltd v Waione Timber Co Ltd [1926] AC 101, it was said
that” if the designed object of a transfer to be cheat a man of a known existing right, that is fraudulent…” (hlm.138).


3. **Modus Operandi (M.O) penipuan tanah**

Antara *modus operandi* atau cara melakukan penipuan tanah yang berlaku di Malaysia berdasarkan kes-kes yang telah diputuskan oleh Mahkamah adalah seperti berikut:

<table>
<thead>
<tr>
<th>No.</th>
<th>Modus Operandi</th>
<th>Urus niaga</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Pemalsuan Surat Wakil Kuasa</td>
<td>Gadaian, Pindah Milik</td>
</tr>
<tr>
<td>2</td>
<td>Pemalsuan Tanda tangan</td>
<td>Gadaian, Pindah Milik</td>
</tr>
<tr>
<td>3</td>
<td>Pemalsuan Memorandum Pindah Milik</td>
<td>Pindah Milik, Gadaian</td>
</tr>
<tr>
<td>4</td>
<td>Penipuan oleh Peguam</td>
<td>Pindah milik, Gadaian</td>
</tr>
<tr>
<td>5</td>
<td>Penipuan Pembetulan Nama Tuan Punya Tanah</td>
<td>Pindah milik</td>
</tr>
<tr>
<td>6</td>
<td>Penipuan Hartanah Amanah</td>
<td>Pindah Milik</td>
</tr>
<tr>
<td>7</td>
<td>Penipuan Perintah Mahkamah</td>
<td>Pindah Milik</td>
</tr>
<tr>
<td>8</td>
<td>Penipuan dalam Sistem Pendaftaran Tanah</td>
<td>Pindah Milik</td>
</tr>
</tbody>
</table>
Manakala berita yang dilaporkan oleh akhbar-akhbar tempatan mengenai *modus operandi* dalam jenayah penipuan dalam urus niaga tanah adalah seperti berikut:

<table>
<thead>
<tr>
<th>No.</th>
<th>Akhbar</th>
<th>Modus Operandi</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Sinar Harian Online, (Warga Emas dakwa Ditipu anak, menantu, 2016)</td>
<td>Pertukaran nama hak milik tanah tanpa pengetahuan mangsa kerana mangsa tidak pernah menandatangani sebarang dokumen hak milik dan menerima balasan wang tunai. Mangsa mendapati tandatangan pada dokumen pertukaran hak milik itu bukan tandatangannya.</td>
</tr>
<tr>
<td>2</td>
<td>Sinar Harian Online, (Kakitangan Pejabat Tanah Dituduh Tipu Urusan Jual beli, 2016)</td>
<td>Penipuan dalam urusan jual beli tanah di mukim Si Rusa Port Dickson. Penipu telah meyakinkan mangsa bahawa pemilik tanah telah mewakilkan kepaddanya untuk urusan penjualan tanah dan telah menyebabkan mangsa terpedaya dan membuat beberapa bayaran wang pembelian.</td>
</tr>
<tr>
<td>3</td>
<td>Berita Harian Online (Noor Aznida Alias, 2016).</td>
<td>Penipuan jual beli tanah yang tidak wujud dengan menggunakan pelan</td>
</tr>
<tr>
<td>No.</td>
<td>Source</td>
<td>Description</td>
</tr>
<tr>
<td>-----</td>
<td>---------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>4</td>
<td>Berita Harian Online</td>
<td>Penipu dalam penjualan tanah. Penipu mendakwa wang pembelian tanah tidak mencukupi untuk urusan penyerahan geran tanah tetapi telah gagal dihubungi apabila kesemua wang telah dibayar.</td>
</tr>
<tr>
<td>5</td>
<td>Sinar Harian Online, Azizan Inche Harun</td>
<td>Pemalsuan tandatangan untuk menarik balik kaveat tanah dilakukan tanpa pengetahuan penduduk kampung terlibat.</td>
</tr>
<tr>
<td>6</td>
<td>Sinar Harian Online, Diana Surya Abd Wahab</td>
<td>Mangsa penipuan dan penyelewengkan urus niaga hartanah seluas 1.8 ekar melalui seorang broker hartanah dan peguam yang dilantik. Pembelian tanah pertanian yang bertujuan untuk pembinaan bangunan dan rumah masih belum selesai disebabkan pemilikan masih belum dipindah hak milik atas alasan proses pindah milik tidak boleh dibuat kerana kos yang tinggi dan terdapat juga kerana kes pengambilan sebahagian tanah tersebut oleh pihak kerajaan.</td>
</tr>
<tr>
<td>7</td>
<td>Sinar Harian Online, Hasniza Hussain</td>
<td>Penipuan jual beli tanah. Mangsa telah membeli tanah dan membuat bayaran penuh pembelian kepada penipu tetapi mendapati tanah tersebut adalah milik orang lain.</td>
</tr>
<tr>
<td>8</td>
<td>The Star Online,</td>
<td>Penipuan dalam jualan lelong tanah di</td>
</tr>
</tbody>
</table>
(Terence Toh, 2013) Bahau pada harga di bawah nilai pasaran. Nombor kad pengenalan pembida yang berdaftar dalam senarai pembida adalah tidak wujud dan ada yang telah mendaftar dengan nama yang berbeza.

9 The Star Online Hak milik tanah telah bertukar kepada pemilik baru dengan memalsukan Perintah Mahkamah.
(Yuen Meikeng, 2013)

10 The Star Online Menyamar sebagai Pembantu Peribadi Pengarah Tanah dan Galian Negeri Perak dan tanah yang hendak dijual adalah tidak wujud sama sekali.
(Police Arrest Conmen Perak Land Deal, 2013)

11 The Star Online Penipuan memorandum hak milik
(Eileen Ng, 2013)

12 New Strait Times (NST) Penipuan dalam menawarkan penjualan tanah rizab hutan yang tidak wujud di Daerah Larut Matang, Perak
Online (Ista Kyra, 2013)

13 The Star Online Modus operandi yang digunakan oleh sindiket adalah untuk meyakinkan mangsa, kebiasaannya pemilik harta, bahawa tanah mereka akan disewakan bagi tujuan pemasangan wayar kabel. Mangsa kemudian akan terjebak untuk memasuki perkongsian dengan salah satu daripada ahli-ahli sindiket bagi membolehkan mereka menjana pendapatan yang lumayan melalui pajakan.
(RSN Murali, 2013)

14 The Star Online Menggunakan Dokumen palsu dan kenyataan palsu sebagai tuan punya
(Qishin Tariq, 2013)
tanah dalam urusan pindah milik tanah.

15 The Star Online
(Simon Khoo, 2013)
Memujuk mangsa untuk menjadi rakan kongsi perniagaan dalam urus niaga tanah yang menguntungkan melibatkan projek-projek seperti penternakan burung walit, pemasangan kabel sambungan, membekalkan makanan kepada anak-anak yatim dan lain-lain. Mangsa-mangsa ditipu sama ada untuk menjual tanah atau membeli plot baru tanah utama bagi usaha sama yang akan dijalankan.

16 Sinar Harian Online
(Mohamad Fakhri Mohd Ali, 2012)
Penipuan oleh sindiket jual tanah di Kedah. Tanah yang ditawarkan adalah bukan di tempat tersebut, sebaliknya di kawasan lain. Penama penjual tanah asal dalam dokumen tersebut juga adalah palsu.

17 The Star Online
(Edmund Ngo, 2012)
Penggodaman dalam Sistem Pendaftaran Tanah Berkomputer

Oleh yang demikian, pelbagai modus operandi yang telah dilakukan oleh penipu bagi menjayakan kegiatan jenayah mereka seperti mangsa membeli tanah dengan penipu dan bayaran penuh pembelian telah dibuat namun mendapati tanah tersebut milik orang lain, menawarkan harga yang lebih murah berbanding dengan harga pasaran kepada mangsa, mengemukakan geran palsu, memalsukan identiti pemilik tanah, penipuan oleh broker tanah dan peguam dan lain-lain. Dengan modus operandi ini mereka telah berjaya memperdaya pihak pejabat tanah sehingga menyebabkan penipuan berlaku dalam urus niaga tanah berjaya dilakukan. Kebanyakan kes hanya disedari oleh pemilik tanah asal apabila mereka hadir untuk membayar cukai tanah, tanah mereka dibangunkan, semasa menyerah borang pindah milik tanah (Borang 14A) dan semasa membuat semakan atau carian di pejabat tanah.
4. **Faktor-faktor berlakunya penipuan dalam urus niaga tanah**

Analisa daripada kajian kes-kes yang diputuskan oleh mahkamah dan berita daripada akhbar-akhbar tempatan maka didapati terdapat pelbagai *modus operandi* dikestan dan dikenal pasti telah berjaya dilakukan oleh penipu dalam melakukan penipuan urus niaga tanah. Oleh yang demikian bolehlah dirumuskan antara faktor-faktor yang mendorong berlakunya penipuan ini adalah seperti berikut:

a. **Faktor manusia**

Daripada analisa kes-kes mahkamah dan akhbar-akhbar tempatan di atas, antara punca penipuan dalam urus niaga tanah berlaku adalah kerana sikap manusia itu sendiri seperti mudah terpengaruh, mementingkan diri sendiri, faktor kerakusan serta sifat tamak manusia itu sendiri. Penipu mencari jalan pintas bagi mendapatkan kekayaan dengan cara segera dan mudah. Pelbagai cara yang digunakan untuk tujuan menipu seperti menyamar sebagai tuan punya tanah, pegawai kerajaan, Pegawai Daerah, Pegawai Pejabat Tanah dan Galian, memujuk mangsa untuk menjadi rakan kongsi untuk membeli tanah dan berjanji keuntungan akan dikongsi bersama, memujuk mangsa untuk memasukkan duit ke dalam akaun penipu kononnya sebagai bayaran pendahuluan dan proses permohonan lalu mereka terus menghilangkan diri dan gagal dikesan serta memperdayakan mangsa untuk mempercayai bahawa mereka telah mendapat kelulusan permohonan tanah dengan meniru tanda tangan pegawai yang berkuasa meluluskannya. Di samping itu, tidak dinafikan sikap manusia yang mudah dipengaruhi oleh harta benda dan kekayaan turut menjadi punca berlakunya penipuan tanah ((Annis, 2009).

Di samping itu juga, daripada analisa di atas juga mendapati kecuaian pembeli dan sikap mudah terpengaruh pembeli juga turut menjadi faktor penipuan dilakukan. Pada peringkat awal, urusan perniagaan yang dibuat adalah dengan memujuk mangsa untuk menyewa atau membeli tanah. Kemudian penipu akan memujuk mangsa untuk berkongsi pembelian tanah dengan cara menggunakan dokumen hak milik palsu. Mangsa yang terpedaya dengan janji-janji manis penipu ini akan mengeluarkan modal untuk pembelian tanah berkenaan. Penipuan juga dilakukan melibatkan tanah yang tidak wujud dalam urusan jual beli tanah. Terdapat juga kes penipu mengemukakan dokumen hak milik tanah palsu.

b. Kelemahan pengurusan di pejabat tanah

Kekurangan pengetahuan dalam kalangan kakitangan pejabat tanah bagi mengenal pasti dokumen yang asli yang dikemukakan. Setiap dokumen yang dihantar hanya dipastikan lengkap dan layak untuk didaftarkan. Sesetengah kakitangan menguruskan perihal perda tanah berdasarkan pengetahuan yang diperoleh daripada pengalaman sendiri atau pun daripada rakan sekerja yang telah lama bekerja. Walaupun mereka mengikuti kursus mengenai pengurusan tanah tetapi ini tidak memadai untuk meliputi keseluruhan aspek mengenai pengurusan dan perundangan tanah. Di samping itu juga, hubungan kakitangan di pejabat tanah dengan pelanggan perlu dihadkan supaya kesempatan tidak diambil oleh pelanggan pejabat tanah (Shuhaimi, 2008).
Keselamatan Dokumen dan kawalan bilik Kebal di pejabat tanah haruslah diperketatkan lagi. Terdapat kakitangan keluar masuk tanpa rekod dan tiada catatan dibuat di atas pengambilan atau kemasukan dokumen. Kebocoran maklumat dan dokumen dari bilik kebal tidak dapat dikesan dan kesempatan ini digunakan sepenuhnya oleh kakitangan pejabat tanah yang tidak amanah. Perkara sebegini tidak harus diizinkan berlaku kerana ia akan memberi tanggapan negatif kepada orang ramai yang menggunakan perkhidmatan pejabat tanah dalam melakukan sebarang urusan urus niaga tanah.

c. Tidak teliti dalam menentukan ketulenan dokumen dan Perintah mahkamah yang dikemukakan


Oleh yang demikian, kakitangan pejabat tanah perlu dilakukan pengetahuan tentang ciri-ciri penting yang kebiasaannya terdapat pada perintah mahkamah seperti nama hakim yang mengeluarkan perintah, nombor rujukan saman, cop timbul mahkamah dan mahkamah yang bertanggungjawab di mana tanah tersebut berada (Mahkamah Tinggi). Oleh itu, menjadi satu kewajaran bagi para pegawai dan kakitangan di pejabat tanah didedahkan kepada jenis atau bentuk penipuan dan pemalsuan yang telah berlaku dalam pentadbiran tanah agar mereka lebih berhati-hati dan berwaspadalah kepada kemungkinan-kemungkinan berlakunya penipuan dan pemalsuan dalam urus niaga tanah.
d. Kelemahan undang-undang dan tidak mematuhi prosedur yang ditetapkan dalam Kanun Tanah Negara (KTN)

Sebelum kerja-kerja pemindahan data kepada sistem pengkomputeran terdapat dua jenis dokumen hak milik dikeluarkan dalam sistem manual yang dipegang oleh pendaftar dan juga tuan punya tanah. Menurut seksyen 8 Jadual Keempat Belas, Dokumen Hak Milik Keluaran Komputer (DHKK) adalah sah untuk dikuatkuasakan apabila dokumen hak milik daftar dalam milikan pejabat tanah dibatalkan, pemilik hendaklah dipanggil untuk mengambil DHKK sebagai ganti geran lama dan geran tanah yang lama akan dimusnahkan. Daripada analisa kes-kes seperti di atas terdapat kes di mana tiada DHKK yang dipohon oleh pemilik tanah kerana pada setiap masa dokumen hak miliknya sentiasa dalam milikannya. Oleh yang demikian DHKK yang dikeluarkan atas nama pemilik baru adalah bertentangan dengan Jadual Keempat Belas KTN, di mana DHKK hanya boleh dikeluarkan kepada tuan tanah setelah tuan tanah menyerahkan dokumen hak miliknya yang asal. Di sini menunjukkan terdapat pencerobohan dalam sistem SPTB apabila nama pemilik baru didaftarkan sebagai pemilik tanah.

Di samping itu juga, pendaftar mempunyai kuasa yang terhad dalam mendaftarkan sesuatu urus niaga tanah menurut KTN. Tugasnya hanya memastikan sama ada sesuatu instrumen itu layak untuk didaftarkan seperti yang diperuntukkan menurut seksyen 298 KTN. Selagi instrumen itu lengkap dan layak untuk didaftarkan maka perlu untuk Pendaftar untuk mendaftarkan urus niaga tersebut. Maka bukanlah menjadi tanggungjawabnya untuk menyiasat sesuatu instrumen itu merupakan penipuan atau urus niaga yang tidak lengkap (Mohd Shukri, 2011).

Tanah-tanah di kawasan strategik yang bernilai tinggi dan terbiar adalah menjadi tumpuan utama para penipu melakukan penipuan tanah. Tuan tanah hanya mengetahui tanah mereka telah bertukar tangan kepada pemilik baru apabila semua urusan pindah milik tanah dilakukan. Sebetulnya, pihak pejabat tanah boleh mengambil tindakan dengan merampas tanah yang tidak diusahakan (seksyen 129 Kanun Tanah Negara). Namun begitu kebanyakan tindakan tidak diambil oleh pejabat tanah menyebabkan banyak tanah-tanah tidak dibangunkan dan terbiar akibat kelemahan penguatkuasaan undang-undang.
e. **Tiada integriti dan akauntabiliti**

Di samping itu, daripada analisa kes-kes di atas juga di dapat antara pegawai dan kakitangan di pejabat tanah telah berkongsi kata laluan (password) sesama mereka. Ini memudahkan lagi kegiatan penipuan berlaku. Oleh itu, adalah tidak mustahil penipuan berlaku adalah hasil daripada kerjasama orang dalam pejabat tanah itu sendiri. Langkah-langkah keselamatan haruslah diperketatkan dalam sistem dan memastikan kata laluan kakitangan sentiasa ditukar agar tidak mudah digunakan oleh kakitangan yang lain.


f. **Peguam yang tidak berhati-hati dalam mengakui saksi sesuatu urus niaga tanah yang disempurnakan olehnya.**

Tidak dinafikan ada sesetengah peguam yang tidak menghendaki pihak yang ingin menyempurnakan instrumen urus niaga untuk tampil hadir dan menandatangani sesuatu surat cara itu di hadapannya. Perkara ini juga memudahkan penipuan berlaku dalam urus niaga tanah. Mengikut seksyen 211 KTN, penyempurnaan mana-mana instrumen urus niaga hendaklah disaksikan oleh pegawai-pegawai atau orang-orang lain yang tersenarai dalam Jadual Kelima. Peguam termasuklah dalam kelangan orang yang boleh menyempurnakan instrumen pindah milik. Menurut Andrew Wong (2011) dalam kajianannya menegaskan terdapat peguam di Malaysia tidak menghendaki pihak yang menyempurnakan sesuatu instrumen untuk menandatangani dokumen urus niaga di hadapannya, walaupun cara begini membolehkan sesuatu instrumen menjadi tidak sah di bawah seksyen 340(2)(b) KTN.
Kebanyakan daripada mereka menyerahkan tugas tersebut kepada kerani mereka untuk mengesahkan identiti klien yang berurusan dengan mereka.

5. Cadangan penyelesaian

Di antara cadangan penyelesaian penipuan dalam urus niaga tanah adalah seperti berikut:


Daripada analisa kes-kes, memang sesetengah peguam tidak mengehendaki pihak yang menyempurnakan sesuatu instrumen untuk hadir dan menandatangani dokumen urus niaga di hadapannya. Dalam Islam, antara elemen pembentukan kontrak dalam transaksi ialah majlis al-aqd. Ia bermaksud sesuatu kontrak mesti dilakukan dalam satu majlis yang mengehendaki pihak-pihak yang berkontrak bersama-sama hadir (face-to-face basis) di suatu tempat dan terlibat dalam perbincangan perniagaan atau transaksi (Nasrul, 2008, Abdulrahman, 2011, Siti Salwani, 2010). Hal ini jika diaplikasikan dalam urusan jual beli harta adalah menjadi satu keperluan bagi pihak-pihak yang terlibat untuk hadir
menandatangani apa-apa perjanjian atau surat cara yang dikemukakan bagi mengelakkan sebarang penipuan identiti daripada berlaku dalam penipuan urus niaga tanah.

Faktor dalaman individu adalah penyebab utama berlakunya jenayah penipuan, setiap individu perlu menanamkan dalam diri beberapa konsep yang dapat menghindari diri daripada perbuatan penipuan. Terdapat lima konsep yang diperkenalkan oleh Abdullah Nasih Ulwan iaitu (1) konsep Mu’ahadah iaitu mengingati perjanjian dengan Allah; (2) konsep Muraqabah iaitu selalu di awasi dan disertai oleh Allah; (3) konsep Muhasabah iaitu tahu kemampuan yang ada padanya, tahu posisi dan peribadinya dalam berinteraksi dalam persekitarannya; (4) konsep Mu’aqabah iaitu memberi hukuman terhadap diri sendiri; (5) konsep Mujahada iaitu bersungguh-sungguh dalam kehidupan optimis dalam bekerja dan berjuang (Kamal Mahyudin, 1998).


Daripada analisa kes-kes dan akhbar-akhbar di atas, penipuan atau frod boleh berlaku menggunakan komputer. Dalam Islam tindakan seseorang memanipulasikan komputer dengan tujuan menipu adalah dilarang kerana tindakan ini akan memudaratkan pihak lain (

6. Kesimpulan

Masalah penipuan akan bertambah kompleks selari dengan perkembangan negara yang pesat dan nilai hartenah yang semakin meningkat. Sehubungan dengan itu, pihak pentadbir tanah dan pihak yang terlibat perlu memainkan peranan yang lebih proaktif dalam mengurangkan ruang-ruang untuk penipuan. Oleh yang demikian tadbir urus yang baik, perubahan dalam diri manusia itu sendiri dan reformasi undang-undang serta ketelusan prosedur tanpa kerenah birokrasi adalah perlu dalam pentadbiran tanah pada masa sekarang bagi menjamin kebajikan dan perlindungan kepada mereka yang berurusan dengan pejabat tanah.
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THE INCONSISTENCY OF THE REGULATIONS ON DIVESTMENT OF SHARES IN INDONESIAN MINING SECTOR

Abstract:
The development of mining activity in Indonesia is more rapid and useful. Yet, the natural resources production still cannot fulfill the national interest of Indonesia. However, Indonesia realize that they are limited in term of funding in the exploration and exploitation of natural resources. By the reason, to run the activities, Indonesia needs to cooperate with foreign parties, because in running a natural resources management required a huge capital, advanced technology, experts and there is a high risk as well. Therefore, to achieve the goal of the state, Indonesia obliged the foreign investment to divest the shares to Indonesia which is regulated in Article 112 of Law No. 4 of 2009 and Government Regulation No. 24 of 2012 which require foreign companies to divest their share until 51%. However, A week before takeoff his position as president, Susilo Bambang Yudhoyono enacted new Government Regulation No. 77 of 2014 which cut the amount of shares that have to be divest by foreign companies to Indonesia from 51% to only 30%. This legal research will analyze the current regulation on divestment of share in Indonesian mining sector and also analyze whether the current regulation on divestment of shares in line with Article 33 paragraph (3) of 1945 Constitution on state control over natural resources. This normative legal research come to the conclusion that the enactment of Government Regulation No. 77 of 2014 is against the Article 33 of 1945 Constitution which requires 'state control' over natural resources to ensure the greatest possible prosperity of the people. In order to achieve the goal of the state which in line with Article 33 of 1945 Constitution, the government of Indonesia have to be firm in regulating the divestment of shares itself by regulate it in the Law level. Thus, the

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president cannot revise it easily and the legal enforcement of this regulation will be more effective and efficient.

**Keyword:** divestment, mining, Indonesia

1. **Introduction**

Mining is one of the businesses priority from the Government of Indonesia before and after the enactment of Investment Act. Indonesia realizes that it is limited in term of funding and technology in the exploration and exploitation of natural resources. Consequently, for solving that issue, In 1967 Suharto’s New Order government introduced Law No. 1 of 1967 on Foreign Investment and Law No. 11 of 1967 on the Basic Provisions of Mining. The political rationale behind these laws was to lay the foundation for a recovery from the chaos of the mid-1960s and to achieve accelerated economic development on which the legitimacy of the new government could be built (Kosim Gandataruna and Kirsty Haymon, 2011:221).

Moreover, those regulation was amended by the government with Law No. 25 of 2007 on Investment and Law No. 4 of 2009 on Mineral and Coal Mining. The reason behind the enactment of those law is to provide the benefits for the society and achieve the national interests. Thus, there are some changes in that regulations, one of them is about the divestment.

The divestment is sold some business units or subsidiaries to another party to obtain funds in order to nourish the company as a whole (Abdul Moin, 210: 332). Another definition about the divestment by Sally Wehmeir, divestment is the act of selling the shares you have bought in the company or taking money away from where you have invested (Salim HS, 2010:32).

Divestment provision regulated in the Article 112 of Law No. 4 of 2009 and Government Regulation No. 24 of 2012 which require foreign companies to divest their share until 51%. However, a week before takeoff his position as president, the President Susilo Bambang Yudhoyono enacted Government Regulation No. 77 of 2014 on the third amendment of the Government Regulation No. 23 of 2010 regarding the Implementation of Mineral and Coal Mining Business Activities. Through this regulation, the government cut
the number of the shares that have to be divested by foreign companies to Indonesia from 51% to only 30%. As we know, the divestment of shares is the great momentum for Indonesia to manage the natural resources as mandated by Article 33 (3) of the 1945 Constitution to control the natural resources.

Based on the background above, this legal research analyzed the current regulation on divestment of share in Indonesian mining sector, whether the current regulation on divestment of shares in line with Article 33 paragraph (3) of 1945 Constitution on state control over natural resources

2. Discussion

Foreign capital investment is realized to be complementary means for the acceleration of economic development of the country (Sudargo Gautama, 2006: 359). By the reason, to run the mining business activities, Indonesia need to cooperate with foreign parties, because in running a natural resources required a huge capital, advanced technology, experts and there is a high risk as well. However, Indonesia cannot depend on themselves to foreign parties anymore, because we have to optimize the natural resources management for the greatest prosperity of the people of Indonesia.

In order to realize that, Indonesia has to involve in every sector of mining activities which were interpreted by the Constitutional Court in term of state control. State to control or sometimes called the right to state control is the only material rights that are explicitly granted to the Indonesia. Right to control the land, water, natural resources, and the branches of vital production should be used solely for the prosperity of the people of Indonesia (Afifah, 2013: 263).

This issue begins with the amendment of Law No 11 of 1967, the new act which is Act 4 of 2009 show that there are some significant changes in mineral and coal mining business activities. The state is no longer as the parties which are inferior to foreign mining companies.

Furthermore, the divestment provisions are one of the issues which are regulated in the Law No. 4 of 2009, those regulations required a divestment after five years of production but did not specifically required the number of shares that has to be divested (Luke Nottage and Simon Butt, 2013: 6). Thus, the government regulations under Mineral and Coal Mining
Act 2009 give the detail number of divestment that has to be conducted by the investor. However, the regulations of the number of divestment has been changed for many times from 2010-2014, namely:

### Table 1

<table>
<thead>
<tr>
<th>Number of Divestment of Shares</th>
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<tbody>
<tr>
<td><strong>Comparison on the Number of Divestment of Shares</strong></td>
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<tr>
<td><strong>of 2010</strong></td>
</tr>
<tr>
<td><strong>of 2012</strong></td>
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<tr>
<td><strong>of 2014</strong></td>
</tr>
<tr>
<td>a. Production Operation IUP and Production Operation IUPK and does not carry out its own processing and/or refining have to divest their 51% of share to Indonesian Participants in tenth years</td>
</tr>
<tr>
<td>b. Production Operation IUP and Production Operation IUPK which carries out its own processing and/or refining activities have to divest their 40% of share to Indonesian Participants in fifteenth years</td>
</tr>
<tr>
<td>c. Production Operation IUP and Production Operation IUPK which conducts underground mining have to divest their 30% of share to Indonesian Participants in fifteenth years</td>
</tr>
<tr>
<td>d. Production Operation IUP and Production Operation IUPK which conducts underground and open pit mining have to divest their 30% of share to Indonesian Participants in tenth years</td>
</tr>
</tbody>
</table>

As stated in the chart, there are some differences among the regulation which is related to the number of shares. To begin with, the Government Regulation No. 23 of 2010
become the starting point of the divestment regulation in the mining sector, the foreign companies only allow having the shares approximately 80%.

By the reason, they have to divest their shares to Indonesia participants at least 20%. This restriction applied to all the types of mining business licenses. This restriction on the foreign investment made by the host country, are basically the authority of the country arising from its sovereignty (Sonarajah, 2004: 97). Unfortunately, two years after the enactment of this regulation, the government issued the new one, which is Government Regulation No. 24 of 2012.

The provisions in the GR No. 24 of 2012 showed a different point of view of policy in the field of mining. The policy became an antithesis to the earlier policy which gives more benefits for Indonesia. Because the foreign investor is obliged to divest 51% of their share to Indonesian participants. As a result of this regulation, in tenth years, Indonesia will be the majority of the shareholder of the mining companies.

In addition, the right to control of natural resources may apply better than before, not only through the licensing of mining as an instrument control but also when Indonesian participants were able to control a majority share of foreign mining companies in Indonesia. Furthermore, in 2014, the government issued the Regulation No. 77 of 2014 to replace the GR No. 24 of 2012, in the new regulation there are a lot of differentiation with the previous one. In the new regulation, the government divided the type of the mining business license which affects the number of shares that they have to divest to Indonesia. By the reason, there are so many critics go to the government, because the government cut the number of shares that have to divest by the type of the license.

Actually, there are no differences for the mining companies which do not carry out their own processing and/or refining, like the previous regulation they have to divest their 51% of share to Indonesian Participants in tenth years. However, for the mining companies which carry out their own processing and/or refining activities or the mining companies which conduct underground mining either open pit mining or not, they have to divest their share 40% conduct production and refining and 30% for the underground mining.

If we take a look at the number of share in the last government regulation, we may see the number of shares to be divest is less than before. Whereas, the government should take
this moment in order to realize the greatest prosperity of the people. By the reason, the promulgation of this regulation will let the government of Indonesia lose the momentum to become the dominant parties in the shareholders.

As we know, there are a lot of benefits that Indonesian will get if they become the majority of shareholder, for instance, they will get profit, dividends, and the important point, Indonesia will have the right to vote in determining the direction and policies of the company, that’s one of them is to achieve the greatest prosperity of the people which is delegated by the Article 33 of the 1945 Constitution. However, the regulation has changed and give the bad impact for Indonesia.

On the other hand, by cutting the number of shares itself, this regulation is not in line with the spirit of Article 33 of 1945 Constitution which was interpreted by the Constitutional Court. As we know, the Constitutional Court has decided that the mining sector is one of the vital production branch that owned by the people collectively, by the reason the people give the mandate to the state to make policy (beleid), perform administration (bestuursdaad), regulation (regelendaad), management (beheersdaad) and oversight (toezichthoudensdaad). The five functions of state authority are integrated to achieve the purpose of the state, namely the prosperity of the people. One of the important point from the Constitutional Court decision is the government have to take a part in the management (behersdaad) of the mining sector itself. The Constitutional Court decision gives the guidance on how the conception of State control over the natural resources may be applied. If the five tasks of the government may not apply in unity, it has to interpret gradually based on the effectiveness to achieve the greatest prosperity of the people (Arief Hidayat, 2015: 9), namely:

a) The state conducting direct management of natural resources
b) The state makes the policy and performs administratively
c) Regulation and supervision functions

From that interpretation, the first step that has to be done by the government is taking a part in the management of natural resources directly, and the divestment mechanism is one of the way to Indonesia to take a part in the management of natural resources generally and mining sector especially. However, there are many obstacles for Indonesia to manage the mining sector directly, moreover after the enactment of PP No. 77 of 2014 which cut the number of shares that has to divest to Indonesian participants. Even though for the mining
companies who did not conduct the production and refining by themselves, they may divest their shares 51%, but for the rest of mining business license, they only oblige to divest 30%-40% of their shares.

Of course, this new regulation will give a bad impact on Indonesian parties because they lost their momentum to control the natural resources directly and get the benefit from it. Even, Adian Napitupulu as one of the DPRs member, gives his critic to the government, in the case of PT. Freeport, that Indonesia potentially will lose the chance of taking a 21% of the share of PT. Freeport which means, they lose almost Rp. 45 trillion of the share values, or potentially lose approximately Rp20 Trillion average profit of PT. Freeport every year (Daurina Lestari, 2016).

In contrast, Mulyadi as one the DPRs member also give his comment against the opinion of Adian Napitupulu, he said that the government divided the type of mining business license and cut the number of shares, because, in underground mining, they need huge capital and high risk as well. By the reason, the government cut the number of shares that have to divest for that type (Samrut Lelossima, 2016). In this case, the author believes that the government should change the regulation on divestment in mining sector like the previous regulation because when the government cut the number of the shares, it against the Article 33 of 1945 Constitution which is related to the economic democracy and state control over natural resources.

The author agrees with the argument that delivers by Prof. Arief Hidayat, which mentions that Article 33 of 1945 Constitution is not against with the privatization. Indonesia will support the private as long as the privatization is not abolished the state control over natural resources. In this case, the government should act as the decision maker in every business activities who involved in vital production branch and/or affects the livelihood of many people. The most important things are, the privatization should conduct in order to protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people. If the privatization in contrary with the interest of Indonesia, that kind of privatization is prohibited (Arief Hidayat, 2015: 9).
From Prof. Arif point of view, the author believes that the government shall control the natural resources. It is clear in his opinion that the government should act as the “decision maker”. Generally, we may say that the word decision maker is related to the task of government which was interpreted by the Constitutional Court.

Specifically, that word also associated with one of task of the government which is management (behersdaad). If we relate that word to the Prof. Arief point of view, it is clear that the government has to involve directly in the management of mining sector, and one of the way to realize it by having good regulation, which gives more opportunity to the government to take over the management, and divestment is one of the best way to make it happen.

However, the current regulation on divestment of shares is not good enough, because it was against the spirit of state control over natural resources which was regulated in Article 33 of 1945 Constitution, and also the interpretation of the constitutional court of that Article. By the reason, the author suggests revising this regulation by the new one which obliges the foreign investor to divest 51% of their shares. Otherwise, we will not control our natural resources and could not achieve the greatest prosperity of the people.

3. Conclusion

The issuance of Government Regulation No. 77 of 2014 has given the significant changes in the provision of divestment in the mining sector. Because through this regulation, the government cut the number of the shares that have to be divested by the foreign companies for several types of mining business license. By having this regulation, the government of Indonesia show the inconsistency regarding the provision on divestment, because the amendment of government regulation has changed for several time in only 4 years which affected the legal certainty for the foreign companies. Moreover, Indonesia will loss the chance to become the majority of shareholders in several types of mining sector.

Whereas, the Article 33 of the 1945 Constitution has given the mandate to the state to control the natural resources for the greatest prosperity of the people. Even, the Constitutional Court decision No. 001-021-022/PUU-I/2003 has given the interpretation on the task of government in vital production branch, and let the government involve directly to the management of natural resources. Therefore, the enactment of Government Regulation No.77
of 2014 has given the significant changes on the divestment regulation by reducing the state control over mineral and coal mining. Which mean, Indonesia will lose the chance to control directly the management of mineral and coal mining industries. Whereas, it is good momentum for Indonesia to control the management, because we cannot realize the greatest prosperity of the people, unless the state may use the opportunity in determining the direction and policies of the company which run the activities in the vital production branch generally, and mineral and coal mining specifically in order to achieve the goal of the state.

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Law No. 4 of 2009 on Mineral and Coal Mining


Internet


THE CURRENT DEVELOPMENT OF THE MEDICAL MALPRACTICE LAW IN INDONESIA

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Abstract:

The law relating to medical malpractice in Indonesia develops rapidly in the last two decades. Started from the Medical Practice Act 2004 and continued with some other legislations. The Medical Practice Act 2004 does not directly touch the medical malpractice issue actually. However, every discussion on medical malpractice law in Indonesia must consider the mentioned Act. The Act introduces the mechanism of disciplinary accountability for doctors through the Medical Disciplinary Tribunal (MKDKI), an independent organ under the Indonesian Medical Council (KKI). The latest progress was the enactment of the Health Professional Act 2014. This Act promotes ADR methods for resolving disputes arising in health service in one side, however it, in the other side, also strengthens criminal liability for particular forms of medical negligence. It seems that the development of the Indonesian medical malpractice law got influences from other countries. This paper aims at exploring the current development of the Medical Malpractice Law in Indonesia and identifying the external influences on it.

Keywords: Medical Malpractice, Medical Malpractice Law, Indonesia.

1. Introduction

Medical malpractice is a central issue under the the subject matter of medical law, especially in Indonesia. As an object of study, medical malpractice issue has a magnetic power. No legal issue within the medical law which has received massive attentions from researchers and authors more than medical malpractice. Medical malpractice is also an attractive issue for the media publicity. There are some analyses to explain this fact. Firstly, medical malpractice constitutes a new legal issue in Indonesia. It has been common that something new will generally attract people to understand and to make exploration on it. Secondly, the phenomenon which is known as medical malpractice has hit the mind of people

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and made them aware against the risk of medical treatment due to human error factor (medical negligence).

Doctor-patient relationship was traditionally created on the basis of the fiduciary principle. Such a relationship is known in local terms as ‘hubungan kepercayaan’ (fiduciary relationship). For the purpose of treatment, patients rely fully on their doctors’ professional capacity. The medical malpractice phenomenon has opened the patients’ mind that their doctors can do wrong while performing medical treatment and they possibly become the victim of a medical negligence.

The term medical malpractice has been known in Indonesia since nineteen eighties and gained its popularity since 2003 when the so-called ‘medical malpractice crisis’ took place in Indonesia. Although the term medical malpractice (known in local language as malpraktik medik) has now been very popular, unfortunately there is no legislation which specifically governs medical malpractice issue. It seems that medical malpractice is a mere sociological term rather than a legal term. It is used in daily communication and found in academic writing, but the term has never been used in legal proceedings. It cannot be found both in legislations and judicial judgments. If it is the fact, why do we talk about medical malpractice law? That is actually the importance of this paper. This paper will answer the question on how medical malpractice cases in Indonesia have been and should be approached based on the existing law. All relevant sources which can be employed to deal with medical malpractice issue compose the so-called medical malpractice law.

2. Sources of medical malpractice law in Indonesia

The meaning of the source of medical malpractice law in this context is any source which develops the body of medical malpractice law. Medical malpractice law in this context is responsible to answer the following questions:

1. What is medical malpractice?
2. What are the elements of medical malpractice?

1 Term medical malpractice became an academic discourse in Indonesia since 1980’s in relation to the criminal prosecution against doctor Setyaningrum. She was alleged for having negligently caused the death of her patient. Prosecution was made based on Section 359 of the Penal Code.

2 In some literatures the term medical malpractice crisis usually refers to the social phenomenon occurring in the United States of America in 1970’s. The use of the term medical malpractice crisis in Indonesian context refers to the massive publicity of alleged medical malpractice cases in media in 2003.
3. What are the legal consequences for doctors who involve in medical malpractice?
4. How to settle medical malpractice dispute?

It can be said that there are three sources of medical malpractice law in Indonesia namely legislation, doctrine, and case law. Legislation is the most important one among the three sources mentioned. It is true that there is no legislation governing medical malpractice issue in Indonesia, however there are several statutes which can be referred when dealing with medical malpractice cases as follows:

a. The Medical Practice Act 2004 (Undang-undang Nomor 29 Tahun 2004 Tentang Praktik Kedokteran);

This Act was enacted on October 06th, 2004 in responding the issue of medical malpractice. The main purpose of this Act (stated in Section 3) is to promote good medical practice in Indonesia. Hence, it can be implied that this Act constitutes a legal instrument to prevent bad practice (malpractice) in the practice of medicine. The most crucial point of this Act in relation to medical malpractice issue is probably the establishment of the medical disciplinary tribunal which is named Majlis Kehormatan Disiplin Kedokteran Indonesia (MKDKI).

b. The Health Act 2009 (Undang-undang Nomor 36 Tahun 2009 Tentang Kesehatan); and

This Act was enacted on October 13th, 2009. This Act provides the legal basis for the injured patients to get compensation [Section 58 (1)]. Besides, this Act also introduces mediation as a mean to resolve dispute arising in health service, including medical malpractice dispute [Section 29].

This Act was enacted on October 17th, 2014. This Act endorses mediation as governed in the Health Act 2009 as a mean to resolve dispute arising in health service [Section 78]. Besides, this Act also provides the legal basis for establishing criminal liability for health care professionals including doctors [Section 84].

What meant by doctrine is juristic or scholarly opinion, especially those given by the prominent law scholars. Doctrines helps to clarify the definition of medical malpractice, its scope and limitation. Doctrines can be found mostly in text books. Formerly, there were two Dutch professors who are influential in the discussion of medical law in Indonesia, Professor Leenen and Professor Van der Mijn. Their opinions on various issues within medical law including medical malpractice are most quoted. Besides, some authors in Indonesia also quote definition of medical malpractice from other western scholars such as William Blackstone (Black’s Law Dictionary).³

Doctrine Four D’s of professional negligence has also frequently been quoted when explaining the elements of medical malpractice⁴. The acronym Four D’s is very popular. Four D’s stands for:

a. Duty of care  
b. Dereliction of the duty of care  
c. Damage  
d. Direct Causation

Another source of medical malpractice law in Indonesia is case law. Judicial judgment on medical malpractice cases, including those available in other countries, are actually very helpful as a reference to approach cases in hand and to make proper judgments. However, it seems that case law plays less significant role in developing the body of medical malpractice law in Indonesia. It is because the judges in Indonesia are not bound by the previous court decision (yurisprudensi). In Indonesian legal system, precedent is not binding but persuasive. In practice, Indonesian judges rarely quote precedents for their judgement. This happen not only in relation with medical malpractice cases, but also occur to other cases in general.

Besides, the number of medical malpractice cases which were decided in the courts are also limited. Some books even quote cases from other countries such as US, UK and Australia. Hence, the function of case law is more an academic reference rather than a judicial reference for judges in Indonesia.

3. Definition of medical malpractice

There is no statutory definition of medical malpractice. Definition of medical malpractice usually refers to doctrines. Definition of medical malpractice can be found in literatures and other sources. According to Sal Fiscina, the word malpractice literally means bad practice. It is formed from two words, 'mal' means bad and 'practice' means work.\(^5\) Medical treatment is considered as ‘bad’ when it deviates from the accepted standard of medical practice.\(^6\)

The meaning of bad practice in medical context can also be understood by referring to the following statement:

“In general speaking, medical malpractice means the failure of medical professionals to provide adequate or appropriate treatment to patients resulting in a personal injury or substantial loss of earning capacity. Medical malpractice is a doctor’s failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances”\(^7\).

According to Black’s Law Dictionary malpractice is any professional misconduct, unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or judiciary duties, evil practice, or illegal or immoral conduct.\(^8\)

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\(^6\) Standard of medical practice in Indonesia is known in various local terms such as standar profesi (standard of profession), standar pelayanan (standard of service), standar prosedur operasional (SOP), etc.

\(^7\) “What is Medical Malpractice?” diunduh dari http://www.medicalmalpractice.com, pada tanggal 17 April 2013 jam 10.00 WIB.

\(^8\) William Blackstone, Black’s Law Dictionary, 5th Ed,
The absence of legislation which specifically governs the medical malpractice issue has little or much created confusion. One of the best example is that many people confuse medical malpractice with medical negligence. To be understood that beside medical malpractice, another term ‘medical negligence’ has also been used both in daily speaking and in academic writing in Indonesia. These two English word have been adopted in Indonesian language. The local term for medical malpractice is *malpraktik medik*, while the term medical negligence is known in local language as *kelalaian medik*.

Even though the statutory definition of medical malpractice is absent, however definition of medical malpractice can actually be inferred from various provisions of the existing legislations. Professional misconduct by medical practitioners in particular or health professional in general has been formulated in several legislations as follows:

**a. The Medical Practice Act 2004**

Section 66 (1) of the MPA 2004 states:

“Any person who knows or whose interest is harmed by doctor or dentist in performing medical practice may make written report to the chairman of MKDKI”

In this provision professional misconduct is formulated as the conduct of doctor or dentist while practicing medicine which harms the patient’s interest (especially physical health).

**b. The Health Act 2009**

Section 58 (1) of the HA 2009 states:

“Every person deserves to insist on compensation against someone, health professional, and/or health care provider who cause damage due to negligence committed while giving health service the the person in question”.

In this provision professional misconduct is formulated as negligence committed by someone, health professional and/or health care provider while delivering health service which causes damage upon the health care receiver.
c. **The Health Professional Act 2014**

Section 77 of the HPA 2014 states:

“Every health care receiver who suffers from damage due to the negligence of the health professional may insist on compensation”

In this provision professional misconduct is formulated as negligence of the health professional which cause damage upon the health care receiver. From the above formulations, it can be concluded that medical malpractice is negligence committed by doctor while performing his profession which causes damage upon the patient. Therefore, the elements of medical malpractice based on the above definition are:

- Doctor’s negligence;
- Patient’s damage; and
- Causal link between the doctor’s negligence and the damage suffered by the patient.

4. **Medical malpractice liability**

Doctors can become the subject of legal liability either civil or criminal depending on the nature of the wrongdoing they committed. Civil liability can be held when doctors committed civil wrongs, while criminal liability can be imposed when they committed criminal offences. In general, civil liability refers to legal provisions in the Civil Code and criminal liability refers to the legal provisions in the Penal Code. There are two forms of civil wrong recognized under the Indonesian Civil Code namely *wanprestatie* (breach of contract) and *onrechtmatige daad* (tort). Contractual liability can be held based on Section 1239 of the Indonesian Civil Code, while tortious liability can be held based on Section 1365 of the Civil Code. Penal code rules several offenses which are directly or indirectly relate to the medical profession. For the purpose of identification, such offenses are usually termed medical offense (*tindak pidana medik*). Among the examples are abortion, euthanasia, and disclosing the patient’s confidential information to the third party.

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9 *Wanprestatie* is the Dutch term for breach of contract. *Onrechtmatige daad* is the Dutch term for tort.

10 Section 348 of the Penal Code (KUHP)

11 Section 344 of the Penal Code (KUHP)

12 Section 322 of the Penal Code (KUHP)
After the enactment of the Medical Practice Act 2004, medical liability should refer to this Act. The Medical Practice Act 2004 governs some administrative requirements for practicing medicine in Indonesia. This act also governs the rights and duties of doctors and dentists. Some ethical duties as recognized under the medical ethics have been made legal duties under this Act such as the duty to keep the medical secrecy (the patient’s confidential information). As a consequence, violation against such duties may render doctors not only to ethical accountability but also criminal liability since such a violation has been defined as an offense.

The Medical Practice Act 2004 also introduces the mechanism of disciplinary accountability. Disciplinary accountability can be established when doctors violate disciplinary rules made by the Indonesian Medical Council (KKI). The Council has formulated 28 forms of medical disciplinary violations. Disciplinary accountability is held by the Medical Disciplinary Tribunal (MKDKI). According to Section 64 butir (a), the tasks of MKDKI are to receive report, to examine and to decide cases on the violation of the medical disciplinary rules by doctors and dentists. The report can be made by the injured patients or by other persons.

Professional misconduct which constitutes the essence of medical malpractice constitutes the violation against the medical disciplinary rules. Bad medical practice, to which the medical malpractice concept refers to, is manifested into any kind of medical treatment which does not comply with the accepted standard of practice (standar profesi, standar pelayanan, standar prosedur operasional, dll). Therefore, medical malpractice cases are basically under the domain of MKDKI. However, MKDKI is not the only institution authorized to examine and to decide medical malpractice cases. Legal policy taken by the Indonesian government is to put MKDKI as the first but not the only gate in relation to medical malpractice liability. The mechanism of the disciplinary accountability held in MKDKI does not close the opportunity to establish legal liability in the courts.

13 See Section 3 of the Rule of Indonesian Medical Council Number 4 Year 2011 on Professional Discipline of Doctor and Dentist (Peraturan Konsil Kedokteran Indonesia Nomor 4 Tahun 2011 Tentang Displin Profesional Dokter dan Dokter Gigi).
15 See Section 66 (3) of the Medical Practice Act 2004 which states that report to MKDKI does not close the opportunity to initiate legal action either civil or criminal litigation.
Medical malpractice bears medical liability, but medical liability is not always due to medical malpractice. Medical liability can also be established due to medical offences such as illegal abortion, euthanasia etc. Medical malpractice liability requires an occurrence which is qualified as medical malpractice. Doctors will be liable for malpractice if it is proven that he, while carrying out the medical treatment, has negligently caused damage upon his patient. Under the Indonesian legal system, negligence constitutes cause of action either for civil proceedings and criminal proceedings. Therefore medical malpractice cases can be brought into either civil court or criminal court.

a. Civil Liability for Medical Malpractice

From the perspective of civil law, medical malpractice can be qualified as onrechtmatige daad (perbuatan melawan hukum) as governed in Section 1365 of the Indonesian Civil Code (Kitab Undang-undang Hukum Perdata). Section 1365 of the Civil Code mentions that any person whose negligence has caused damage upon another is obliged to pay compensation. In order to be compensated, the injured patient has to prove the doctor’s negligence as well as the causal link between doctor’s negligence and the damage suffered by the patient.

Besides referring to section 1365 of the Penal Code, civil suit against doctor due to medical malpractice can be also made based on Section 58 (1) of the Health Act 2009 and Section 77 of the Health Professional Act 2014.

b. Criminal Liability for Medical Malpractice

Criminal prosecution against doctor due to medical malpractice for medical malpractice can be made based on Section 84 of the Health Professional Act 2014. Section 84 of the HPA 2014 governs two types of offense which are applicable for medical malpractice cases. First is a gross negligence which results in death as governed in Section 84 (1), and second is a gross negligence which results in serious injury as governed in Section 84 (1).
The first offense is punishable with a maximum 5 years of imprisonment, and the second offense is punishable with a maximum three years of imprisonment.

5. Medical malpractice dispute resolution

Even though the term medical malpractice has been common and received wide acceptance, however there some scholars who are reluctant with this term. One of the reason is because term medical malpractice is stigmatic for doctors. Doctors who has been associated with this term will be perceived as bad persons. It is probably because many people understand medical malpractice as a crime. Alternatively, those who are reluctant with the term medical malpractice offer to use medical negligence which is considered softer than medical malpractice. Besides, there is also a proposal to use the term medical dispute (sengketa medik) instead of medical malpractice cases. The reason is that it is not clear whether the alleged doctors have really committed medical malpractice or not. It is under the court jurisdiction to make judgment. In many cases, what have been sounded as medical malpractice cases are just a communication of dissatisfaction which was stimulated by poor communication. In such a situation, the use of the term medical malpractice case is detrimental for doctor’s reputation. Hence, it is fair to qualify that complaint as medical dispute not medical malpractice case.

Safitri Hariyani identifies that dispute between doctor and patient occurs when there is a dissatisfaction of patient against doctor in relation with the performance of the medical treatment. This dissatisfaction arises in relation with the damage suffered by the patient which is assumed to have occurred due to the doctor’s negligence.\(^\text{16}\)

Medical malpractice disputes arise usually due to patients’ dissatisfaction against medical treatment they received from doctors or hospitals. They are because the medical treatments in question have been presumed to have caused the patients suffering from damage. Usually before the patients make legal actions, they firstly communicate their dissatisfaction to their doctors or hospitals. The purpose of this communication is to get an

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\(^{16}\) Safitri Hariyani, *Sengketa Medik: Alternatif Penyelesaian Perselisihan antara Dokter dengan Pasien*, Jakarta: Diadit Media, 2005, p 57
explanation on how the doctors carried out the medical treatments and why the patients suffer from damage.

After receiving explanations from doctors or hospitals, those who have been satisfied with they will usually accept the mentioned unexpected outcome. Moreover, if the hospitals, besides providing clear explanation, also show their empathy to the patients, the problems will not grow up becoming disputes. Empathy can be shown by giving no financial charge for the given treatments and/or providing further medical treatments for free. On the other side, when the injured patients are dissatisfied with the hospitals response to their complaints, it may create dispute between the patients and doctors/hospitals in question. Such disputes may also grow up into legal cases in the courts, either civil or criminal cases.

Besides establishing legal liability, the court also facilitate dispute settlement. It is expected when the wrongdoers have been called for liability, the cases will end. Nevertheless, the court is not the only institution which facilitates dispute settlement. There are several mechanisms for settling disputes out side the court which can be employed for resolving medical malpractice disputes. Various mechanisms for settling medical malpractice disputes outside the court will be discussed in the following:

a. Medical Disciplinary Tribunal (MKDKI)

MKDKI stands for Majlis Kehormatan Disiplin Kedokteran Indonesia. MKDKI is an organ under the Indonesian Medical Council (Konsil Kedokteran Indonesia/KKI). Both KKI and MDKDI were established based on the Medical Practice Act 2004. Section 64 (a) of the MPA 2004 governs that MKDKI receives, examines and decides cases of the disciplinary violation by doctor and dentist. When the reported doctor or dentist is found guilty for having violated disciplinary rule, MKDKI may inflict administrative sanction in the form of either written probation, recommendation for the suspension of registration letter/practicing licence, or obligation to take particular medical education and training [Section 69 (3) of the MPA 2004].

It seems that MKDKI is an effective means for establishing professional liability but not effective as a means for medical dispute resolution. The forms of sanction it may impose is probably detrimental for doctors but gives no impact to the injured patients. MKDKI cannot facilitate the payment of compensation whatever the injured patients insist on.
b. Medical Ethics Tribunal (MKEK)

MKEK stands for Majlis Kehormatan Etika Kedokteran. MKEK is an organ under the Indonesian Medical Association (Ikatan Dokter Indonesia /IDI) which functions to enforce the medical ethics among the members of the association. Depending on the degree of violation, MKEK may inflict administrative sanction ranging from written probation, temporary scorsing, dismissal, and revocation of the recommendation for practice not exceeding of three years.

Supposed after the Medical Practice Act 2004 coming to force, MKEK runs the examination of cases based on referral from MKDKI. As governed in Section 68 of the MPA 2004, when the nature of misconduct committed by the reported doctor is ethical violation, MKDKI will refer that case to the professional association (MKEK). Considering the lack of access to MKDKI, in practice the people sometime go directly to MKEK instead of MKDKI. In investigation process, for instance, police investigators oftenly request explanation from MKEK to make sure whether the reported doctor has violated the law or not.

c. Consumer Dispute Tribunal (BPSK)

BPSK stands for Badan Penyelesaian Sengketa Konsumen. BPSK was established based on the Consumer Protection Act 1999 (Undang-undang Nomor 8 tahun 1999 tentang Perlindungan Konsumen. BPSK is an organ under the Ministry of Trade (Kementerian Perdagangan). BPSK is available in districts, except BPSK Jakarta which is under the provincial government.

BPSK basically established for settling consumer dispute, however it, in practice, has also facilitated the settlement of medical malpractice disputes. The number of medical malpractice dispute which has been brought to BPSK is limited. So far only BPSK Denpasar and BPSK Yogyakarta which have ever received and settled medical malpractice dispute. BPSK employs several methods of dispute settlement such as mediation, arbitration and conciliation.

d. Resolving Medical Malpractice Dispute through ADR (Mediation)
The discussion on medical malpractice dispute resolution must consider the ADR methods, especially mediation. Mediation has been adopted by the Health Act 2009 and later been endorsed by the Health Professional Act 2014. Section 29 of the Health Act 2009 states that in case the health professional committed negligence while performing his profession, such negligence must be primarily resolved through the mechanism of mediation. Section 78 of the Health Professional Act 2014 states that in case the health professional has been alleged of having negligently caused damage upon the health care receiver, the dispute arising due to that negligence must be primarily resolved through out of court settlement mechanism as intended by the legislation. Out of court settlement mechanism refers to mediation which is governed in the Health Act 2009.

Based on the above provisions, it is clear that medical malpractice dispute must primarily be resolved through mediation process. There two schemes of mediation the disputing parties may opt, either out-court mediation or in-court mediation/court-connected mediation/court-annexed mediation. The procedure of court-annexed mediation is comprehensively governed by the Supreme Court Decree No 1 Year 2016 on Court-annexed Mediation (Peraturan Mahkamah Agung Nomor 1 Tahun 2016 Tentang Mediasi di Pengadilan)

6. **External influences**

In modern time, the development of law in every country receives influences from other countries. Especially in globalization era, when global communication and interaction between nations is much easier, external influences are unavoidable. The current development of the Indonesian malpractice law has also received influences from other counties, especially the United States of America and the Netherlands. In the following, such external influences will be identified:

a. **American Influence**

Professional misconduct involving the medical practitioners in Indonesia is termed *malpraktik medik* or *malpraktik kedokteran*. These terms were the direct translation of the English term medical malpractice which is commonly used in American medical
jurisprudence. The old definition of medical malpractice which covers the intentional wrongdoing by doctors are still influential up to recent time. Many Indonesian jurists are of the opinion that intentional wrongdoing of doctors is under the coverage of the medical malpractice concept, besides negligence. Therefore, they put medical negligence as a part of medical malpractice concept. Intentional wrongdoing within medical malpractice context is considered as a crime and therefore it is criminally punishable. Such category of medical malpractice is later known as criminal malpractice. The example of this category of medical malpractice is illegal abortion and euthanasia. Some authors qualifies criminal malpractice as the pure malpractice (malpraktik murni).

Many authors refers to the doctrines of Four D’s (Duty, Dereliction, Damage, and Direct Cause) when describing the elements of medical malpractice. This doctrine seems to be adopted from the American medical jurisprudence.

b. The Dutch Influence

As the Indonesian legal system was built in accordance with the Dutch legal system, the Dutch influence on the development of the Indonesian law in general is obvious. In relation to the medical malpractice issue, the influence of the Dutch medical jurisprudence can be seen among others in the following aspects:

i. The doctrine of Culpa Lata and Culpa Levis

The doctrine culpa lata and culpa levis are always referred when discussing the degree of doctor’s negligence. These Latin terms were first adopted from the Dutch literatures. Culpa lata is equal to English term gross negligence. It is known in Dutch as grove schuld. Whereas culpa levis means slight negligence. Under the Indonesian medical jurisprudence culpa lata amounts to criminal prosecution, while culpa levis amounts to civil action.

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ii. The Doctrine of *Resultaat Verbintenis* and *Inspanning Verbintenis*

Indonesian medical jurisprudence recognizes two types of doctor’s obligation in relation to medical treatment namely *inspanning verbintenis* (effort-based obligation) and *resultaat verbintenis* (outcome-based obligation). These concepts were first introduced by a Dutch Scholar, Ph. A.N. Houwing in his book “*De inhoud van de verbintenis en de overmatch*” 1953.

iii. The establishment of the Medical Disciplinary Tribunal

The establishment of the Medical Disciplinary Tribunal (MKDKI) seems to be inspired by such a tribunal in the Netherlands known as *tuchcollege* (disciplinary tribunal). *Tuchcollege* is governed in *External Tuchrecht* (external disciplinary law).

7. Conclusion

From the above discussion it can be concluded that the law relating to medical malpractice in Indonesia has been growing rapidly. Currently Indonesia has sufficient legal instruments for dealing with medical malpractice issue. Medical malpractice cases can be approached through either liability perspective or resolution perspective. Medical malpractice liability can be held in either civil court or criminal court. While the resolution of medical malpractice dispute must primarily employ the mechanism of mediation. The current development of medical malpractice law in Indonesia receives influences from other countries especially America and Netherlands.

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The Health Professional Act 2014 (*Undang-undang Nomor 36 Tahun 2014 Tentang Tenaga Kesehatan*)

The Supreme Court Decree Number 1 Year 2016 on the Procedure of the Court-annexed Mediation (*Peraturan Mahkamah Agung Nomor 1 Tahun 2016 Tentang Prosedur Mediasi di Pengadilan*)

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GENDER FAIRNESS, EQUALITY AND ANALYSIS METHOD: A STUDY ON THEIR ESSENCE AND IMPACT ON ISLAMIC LAW

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Abstract:

This paper aims at exploring the meanings of fairness and equality from the perspectives of both gender activists and Moslem jurists, and also examining the method of gender analysis in reinterpreting and aligning Islamic texts that contradict its gender perspective. For these purposes, a descriptive-analytical approach is employed. It is revealed that from gender activists’ perspective, the meanings of fairness and equality are stressed on the issue that men and women should have the same rights and responsibilities in domestic life as well as in public domain, while they are not understood that way by Moslem jurists. It is also found out that using the gender analysis method to align Islamic texts is not in line with the Islamic principles and will consequently result in laws and points of view that deviate from the mainstream Islamic teachings.

Keywords: gender, fairness, equality, analysis method, Islamic law.

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1. Introduction

It is undeniable that social oppression and unfairness have always been occurring on the face of the earth throughout history. They befall both men and women, even in Indonesia. But because women are believed to be the weak ones, it is they that are often made victims.

To uphold fairness and combat oppression, activists create many theories and analyses. One that is recently favored by a lot of people, including Indonesian Moslem activists, is called gender analysis, a method widely used as a means for feminism movement. It questions social injustice from the aspect of gender relations.

Gender analysis is accepted by and receives approvals from Indonesian Moslem feminists because the fact in the community—from their understanding of gender—shows that gender differences are the cause of gender injustice.

These gender differences between men and women are a result of a very long process. According to activists, they are established in many ways: socially and culturally shaped, spread, reinforced, and constructed through religious teachings and state policies.

The supporters of gender equality among Indonesian Moslems seek not only to combat the unfairness brought about by patriarchal culture or state laws and regulations, but also the injustice believed to be originated from Islam, or thought of as Islamic, or a misinterpretation of the Islamic law. However, is their cause for fairness by adopting gender analysis correct? Or, does the method of gender analysis they have been employing actually need to be criticized as it is problematic, inaccurate, and invalid?

This paper aims at exploring the meanings of fairness and equality from the perspectives of both gender activists and Islamic jurists. Furthermore, it also examines the validity of the gender analysis method in reinterpreting Islamic texts that contradict the method’s gender perspective.
2. Discussion

Before going further, it needs to be clear here the distinction between the terms sex and gender. Sex refers to the biological differences of men and women. These differences are natural, meaning that they are God’s will or decision and thus not exchangeable. For example, men have a penis and produce sperm that can impregnate women, while women have reproduction organs such as womb and birth canal, produce eggs, and have a vagina and mammary glands. These characteristics of men and women respectively are not an issue for gender activists because they are gifts from God that cannot be exchanged.

On the other hand, gender is a term to refer to the fact of being male or female from social aspects. In other words, it refers to a set of socially or culturally-constructed characteristics attached to men and women (Fakih, 2008:8). Men are known to be strong, rational, brave, and robust, while women are beautiful, graceful, emotional, and motherly. These characteristics—according to gender activists—are not natural and thus exchangeable, meaning that they exist in men and women not because of God’s will but rather, they are socially and culturally shaped, spread, reinforced, and constructed by means of religious teachings or state policies throughout a very long time. So they are exchangeable. Men can be beautiful, graceful, and emotional at a certain time and place. Likewise, women can be strong, robust, rational, and brave.

In line with the above meaning, the draft of the Indonesian Gender Equality and Fairness Bill (RUU KKG), under Chapter 1 General Provisions Article 1, defines gender as follows: “Gender distinguishes the roles and responsibilities of men and women and is a result of socio-cultural construction that is impermanent in nature and can be learned, and may be exchangeable at a certain time, place, and culture from one type to another.”

With the above definitions in mind, gender as adopted by activists refers to any characteristic attached to men or women that is exchangeable, which means that it is constructed by society through a very long process, and it is by no means God’s will or decision that cannot be modified or exchanged.
The above understanding is perfectly normal and acceptable for non-religious or secular individuals. But for Moslems, the understanding that men’s and women’s roles and responsibilities are cultural construction and so exchangeable is not right. This is because according to the Islamic belief, men’s and women’s rights, obligations, roles, and responsibilities are religious teachings and divine rules, thus permanent and non-exchangeable. For this reason, any effort to change these rules is considered an act of abandoning the fixed divine revelations. For example, the duty to provide a living for the family is assigned to men. This is not cultural; this is Allah’s will. That a husband may allow his wife to work is clear and not an issue, but the duty remains on his shoulder. Moslems throughout history have accepted it and never once felt any discrimination in it. They do not think this rule represents some kind of marginalization over women or men’s superiority to women as well.

According to activists, these differences are the cause of gender injustice such as marginalization, subordination, stereotyping, violence, and excessive work load and work time (Fakih, 2008:12). The victims of this injustice come from both genders, but especially women.

An example of marginalization over women: their inheritance portion is half that of men; stereotyping: women cannot lead men in prayers and be a caller for prayer or a preacher; violence: women are often at the receiving end of domestic violence of physical, psychological, sexual, and economic nature; excessive work load and time: women often have to work and do chores so they have to do too many things and thus to labor for a relatively longer time.

3. Gender Fairness and Equality

Driven by unfairness on men and especially women, gender activists often bring forward a meaning of gender fairness and equality as “the same rights and obligations between men and women, and equality in roles both in the household and in the society.” This understanding implies that only if men and women hold the same rights and obligations, as well as equal roles and responsibilities, at home and among the community that they can be said to be equal. So fairness and equality here are taken to mean sameness in rights,
obligations, roles, responsibilities, and everything that can be exchanged between men and women. Conversely, if there is inequity against one of the genders in these matters—especially women, it will be called gender discrimination, unfairness, and bias.

Not much different from the above definition, the Gender Equality Bill draft provides the following interpretation of gender equality under Chapter 1 General Provisions, Article 1 Section 1: “Gender equality means the equal condition and position for men and women to obtain opportunities for access, participation, control, and receiving the benefits of development in all areas of life.” It also offers the following definition of gender fairness in Article 2: “Gender fairness is a state and treatment that reflect equal rights and responsibilities between women and men as individuals, family members, community members, and citizens.” The definition of gender equality and fairness is later amended to: “The condition where women and men are equal partners and so receive fair treatment with regards to opportunities for access to resources, control, participation, and receiving the benefits of development” (Gender Equality Bill Draft from the Work Committee Session on 9 December 2013).

The understanding of gender fairness and equality as sameness and parallelism in terms of condition and position between men and women is very attractive and actually receives warm responses among feminists in Indonesia, including Moslem gender activists. This is because it provides them with some kind of a new guideline, parameter, or indicator for viewing things around them. Equipped with this understanding of gender equality, they evaluate the culture they have inherited from generations before them, the applicable laws and regulations, school curricula for children, government policies on certain matters, and even religious teachings—especially Islam—in all areas including rules on both ritual worship and worldly matters. They consider anything in harmony with their parameter fair and equal gender-wise. On the contrary, anything that does not agree with the notion of gender fairness and equality as the same rights and responsibilities between men and women will surely be challenged and resisted because it is believed to be gender bias, which suggests oppression and unfairness.
With regard to Islamic law, Moslem gender activists find many Islamic rules and teachings, which have been believed to be true by the majority of Moslems for hundreds of years, are not in line with the parameter of gender fairness and equality they are fighting for.

This is a thick wall hampering them from disseminating their concept of gender fairness and equality into the Moslem community. Islam, which had existed centuries before gender analysis came about, has its own definition of fairness and equality in men-women relations that is entirely different from that of gender activists.

4. Fairness and Equality in Opinion of Islamic Scholars

According to Islamic scholars, fairness is the opposite of oppression. Fairness does not necessarily mean sameness, and difference does not always mean oppression and unfairness. Fairness in the opinion of Islamic scholars means “putting everything in its proper place” (Ibn Taymiyah, 2000:6/35). In other words, appropriateness, suitability, willingness, and natural predisposition (fitrah) need to be considered when putting someone or something for a certain function. For example, assigning a mason who knows nothing about welding to join two pieces of metal is an oppression to him since it is not his expertise and skills. Another example is assigning a carpenter who knows nothing about machinery to fix a car machine. Certainly, he will not be able to do well and may even cause more damage.

Fairness may also be defined as “giving the proper rights to the suitable ones” or “giving each who has rights, their rights” (Ash-Sharbīnī, 2002: 1/692). This definition is based on the hadith of Abū ad-Dardā’ and Salmān al-Fārisī. Salmān said to Abū ad-Dardā’, his close friend who never missed midnight prayers: “Truly your God has a right to you. You have a right to yourself. And your wife has a right to you. Give each who has rights, their rights” (Al-Bukhārī, 1987:3/49). Based on this hadith, on the authority of Salmān, Allah has a right to be worshipped through midnight prayers, but one’s body has a right to rest and sleep, and one’s wife has a right to intimacy so one should not stay awake late every day even for praying while at the same time neglecting his eye’s right to sleep and his wife’s right to intimacy.
Therefore, fairness means giving men and women their respective rights, even if these rights are not the same between them. Islam awards men with two portions of inheritance while women receive only one. Despite the inequality, this is fair because the one portion for women is fully theirs. As for men, they are given two portions because they have to provide a living for their family too throughout their life. The two portions are not entirely theirs.

Some Islamic scholars define fairness as follows: “Treating the same things as the same and different things as different” (Al-‘Utsaymin, 1413H:5/101). In keeping with this, fairness does not mean absolute sameness but rather, treating in the same way people or things that are indeed the same. Treating different people or things in the same way is not fairness. It is in fact an act of oppression. Likewise, treating the same people or things differently is unfairness.

Moreover, equality according to Islamic scholars is the sameness of men and women in front of Allah. It means that every man and woman has the same obligation to worship Allah and surrender to Him. Besides, every man and woman has the same responsibility for anything they do before Allah. Allah will count everything they do for judgment, that is, good deeds will be rewarded and bad deeds punished.

5. Gender Bias and Misogynic Verses and Hadiths

Such beautiful definitions of fairness and equality from Islamic scholars do not appeal to gender activists. They are more interested in defining fairness and equality as the sameness of men and women in rights and obligations, in roles and responsibilities, in both domestic and public domains.

With this understanding, gender activists challenge Islamic teachings that have been established and believed to be true for centuries by the majority of Moslems, not only in Indonesia but all over the globe. As a consequence of the aforementioned idea of gender fairness and equality, there are too many Islamic teachings that can be considered gender bias and misogynic.
In terms of ritual worship, for instance, women are always marginalized as only men can be a leader of prayer, caller of prayer, and preacher. In addition, women’s rows are always behind men’s in performing prayer.

In domestic life, it is found that the ones holding the right to lead the family are men. The responsibility to provide a living is men’s. Men can practice polygamy, and men’s inheritance portion is twice that of women. Quite the reverse, women must ask their husband for a permission if they want to go out of the house and so must they when they intend to perform a *sunnah* (called for but not obligatory) fast while their husband is around.

With regard to public life, women’s testimony is valued half of men’s. The ones who can be a marriage guardian (*wālī an-nikāḥ*) are men and a caliph must also be a man. Furthermore, men carry the responsibility to fight or go to war against enemies.

6. **Which One is Bias: Religious Texts or Their Interpretations?**

All of these Islamic teachings are bias and misogynic under the measures of gender fairness and equality. The gender activists, however, are afraid to frankly criticize Islam, which is said to have gender-bias laws, because they are Moslems after all. Doing so can result in apostasy on their part.

They will only go as far as saying the Islamic laws in Quranic verses and the hadiths are “believed to be” or “assumed” to be gender bias and misogynic. As written by Sri Suhandjati Sukri: "Knowing the gap between the ideal and the real in gender equality, it appears to be important to carry out some deconstruction of thoughts to carefully discuss and study the hadiths believed to be gender bias" (Sukri, 2002:vi). And Zaitunah Subhan, when touching on the violent texts in the Quran and the hadiths: "We cannot close our eyes on this matter because it is fact that there are a number of religious texts, of Islam in particular, either the Quran or the hadiths of the Prophet PBUH, that can be assumed to provide a basis for legitimacy to look down on and position women below men. This could give a chance for violence towards women to happen in the name of religious dogma" (Subhan, 2004:44).
They will question whether gender unfairness originates from the Islamic texts or from the interpretations. Such a question is posed by Husein Muhammad, which he answers himself: "Does Islam have any contribution to the process of establishing and preserving the patriarchal and gender-bias culture? Those who read the holy texts of the Quran and the hadiths of Prophet Muhammad PBUH with a literal (scripturalistic) approach will find many texts legitimate the authoritative power of men over women" (Muhammad, 2004:238-239). A similar opinion is conveyed by Mansour Fakih, who says that recently religion faces a new test where it is often considered the cause of problems and even a scapegoat for today’s persistent gender unfairness. In a questioning tone, he raises an issue: "Does gender inequality in religion originate in the nature of religion or in the religious understandings, interpretations, and thoughts, which have possibly been shaped by patriarchal traditions and cultures, the capitalism ideology, and also other isms?" (Fakih, 2008:28). He tends to point out that it is our religious understandings that are problematic and need to be revised instead of the texts.

The tendency of gender activists to put the blame on our gender bias perception of Quranic texts is based on a view that understandings and interpretations are human products, thus not holy as Quranic texts. The understandings and interpretations of Islamic scholars can be a “subject of criticisms” because even they are impossible to be free from socio-cultural influences. As mentioned in the book published by PSW-UIN Yogya entitled *Isu-isu Gender dalam Kurikulum Pendidikan Dasar dan Menengah* (Gender Issues in Elementary and Middle School Curricula): “Religious texts do not stand by themselves and are not independent of their contexts. Therefore they cannot be understood unless in their relations with other entities. At this level, we can see the importance of reviewing them with regard to the common understanding and interpretation, both epistemologically and hermeneutically. If such is realized, thus reinterpretation and restudy of the Quran and the hadiths will not be considered abnormal, but rather inevitable. Why so? Because religious understanding requires creativity. So there is no “taboo” in reviewing religious understanding, for who knows if what we have believed to be the true religious dogma—in the words of Peter L. Berger and Luckmann—is nothing but socially constructed” (Abdul Ghafur and Isnanto (ed), 2004:2).
In line with the above thinking, Ridwan, the author of the book *Kekerasan Berbasis Gender* (Gender-based Violence), wrote: "Islamic classical literatures were generally created in the cultural perspective of androcentric society, where men are the measure of all things. Until today these literatures continues to be accepted as the third "holy book" after the Quran and the hadiths. The volumes of books of exegeses and practical rules written hundreds of years ago keep getting reprinted, with some even more frequently than contemporary religious books. Many Islamic classic literatures, when seen from the perspective of modern measures, can be considered strongly gender bias. Of course we cannot blame the authors because their idea of gender equality adopts the paradigm and perception of gender relations accepted in their society’s culture. Studying classical literatures requires the study on the coherent whole of the framework, especially the relations between the author and their socio-cultural background. This is where hermeneutics is needed as a method to read texts accurately and not take them out of their contextual meanings" (Ridwan, 2006:161-162).

In similar fashion, Mansour Fakih, after discussing the identification of strategic religious problems, concludes: "From the above description, it can be concluded that religious interpretations have a strategic position both in preserving gender injustice and, also the contrary, in the effort of promoting gender justice. For the latter, there needs to be some kind of re-studying on the entire religious interpretations and their implications for religious teachings and behaviors. This study involves identifying the roots of the problems and the solution strategies" (Fakih, 2008:140).

In short, to avoid frontal confrontation with the gender bias Quranic texts and hadiths, Indonesian Moslem gender activists call for reinterpretation in order to adjust those texts to their idea of gender fairness and equality. (Ichsan, 2014:58).

7. **Harmonization Method**

To reinterpret and adjust the gender bias and misogynic verses and hadiths to the gender fairness and equality they are fighting for, Indonesian Moslem activists establish the harmonization method. Exercising this method, they try to exploit the principles of human equality, fairness, equality before law, freedom, responsibility, deliberation, husband’s good treatment towards wife (*muʿāsharah bi al-maʿrūf*), altruism, and mutual-respect contained in
several verses and hadiths as a theological foundation in understanding and establishing practical rules concerning human relations. The verses and hadiths that provide practical rules are seen as sociological in nature and thus must be understood in a contextual manner. They contain principles of teachings specific for a certain place and time (Hamidah, 2013:135-139).

In other words, they differentiate Quranic verses and hadiths into two categories. One, the cross-contextual verses and hadiths, i.e. the absolute and universal ones. Two, the sociological verses and hadiths, i.e. the practical ones that respond to the Arab society’s culture at the time when they were revealed or told. The first category is binding for all places and times, cannot be ignored, and should be the foundation for understanding and interpreting the sociological verses and hadiths because these verses and hadiths are not static (Hamidah, 2013:139-140).

Among the main factors behind the creation of the above harmonization method by Moslem gender activists and feminists, namely the new interpretation (istinbāṭ) method in the contemporary Islamic law on women as opposed to the jurisprudence by scholars convention (jumhūr ‘ulamā’) method, is the fact that there are Quranic verses and hadiths of the Prophet PBUH that contradict their idea of gender fairness and equality.

Some Quranic verses and hadiths are undeniably in conflict and in opposition with their notion. But at the same time, according to gender activists, there are also verses and hadiths that support their version of gender fairness and equality. Therefore, harmonization is needed. The method is to use the verses and hadiths supporting gender fairness and equality, which stipulate the principles of human equality, fairness, equality before law, freedom, responsibility, deliberation, husband’s good treatment towards wife (muʿāsharah bi al-maʿrūf), altruism, and mutual-respect, as a foundation for understanding the verses and hadiths specifying practical rules on human relations, which are often not in line with their idea of gender fairness and equality as they were revealed to respond to a specific situation and condition in the past that is very different from ours today.
For example, there are many Quranic verses that order us to be fair in conducts, such as *sūrah* al-Māidah (5):8, *sūrah* al-An‘ām (6):152, and *sūrah* al-Ḥijr (16):90. These verses incorporate universal principles on fairness that must be applied to both one’s self and other people, men and women, and friends and foes. They should be made the foundation and guideline for understanding other verses that specify technical rules, such as those on the allocation of inheritance in *sūrah* an-Nisā’ (4):11, polygamy in *sūrah* an-Nisā’ (4):3, and leadership in household in *sūrah* an-Nisā’ (4):34. This is because these practical rules were given to respond to the situation, condition, and need of the people at the time when they were revealed. People’s situation, condition, and need are always changing and evolving. If such verses on practical rules are understood only by the literal texts, there will be conflicts with the universal verses. In the case of inheritance allocation, for example, men are given twice of women’s portion, as specified in *sūrah* an-Nisā’ (4):11. This obviously contradicts the principles of fairness in *sūrah* al-Māidah (5):8, *sūrah* al-An‘ām (6):152, and *sūrah* al-Ḥijr (16):90. So for this reason, the practical and technical verses must be understood with a consideration of the time and place in which they were revealed and based on the universal principles contained in the other verses as explained.

This is the method for understanding Quranic verses and hadiths offered by Indonesian Moslem gender activists and feminists. This method is very simple. It categorizes verses and hadiths into two groups. One, the cross-contextual verses and hadiths, i.e. those that are absolute and universal in nature. Two, the sociological verses and hadiths, i.e. the practical verses and hadiths that respond to the Arab society’s culture at the time when the verses were revealed and the hadiths told. The first category is binding for all places and times, cannot be ignored, and should be made the foundation for understanding and interpreting the sociological verses and hadiths because these verses and hadiths are not static.

With this method, gender activists believe they have brought modernization to the Islamic law. And with this method, in their opinion, the Islamic law has properly responded the advance of time.
8. Impact of Moslem Feminists’ Method

Using the Moslem feminists’ method and applying it to contemporary issues will result in a great impact on the Islamic law.

Firstly, this method makes no distinction between qaṭʿī and zannī indicants (dalīl). *Qaṭʿī* indicants are those conclusive texts contained in the Quran and the hadiths. They are categorized into two: *qaṭʿī* tsubūt, namely indicants of which origin is certain and undoubted such as all verses in the Quran and the *mutāwatir* hadiths, and *qaṭʿī* dalālah, which is indicants with one certain meaning or interpretation so they are not open to reinterpretation such as the Quranic verse “Wa lilLāhi ʿala an-nāsī ḥijj al-bayṭi man istaṭaʿaʿa ilayhi sabīlan” (And [due] to Allah from the people is a pilgrimage to the House - for whoever is able to find thereto a way) (Āli Ἔμrān (3):97). This particular verse—and all other Quranic verses—is obviously *qaṭʿī* tsubūt, because it unquestionably comes from Allah, and at the same time it is *qaṭʿī* dalālah, which means its ruling on the obligatory performance of the hajj pilgrimage is certain.

Meanwhile *zannī* indicants are texts in the Quran and the hadiths of which interpretations are based on strong presuppositions. *Zannī* indicants are also categorized into two: *zannī* tsubūt, if the origin is based on a strong presupposition such as āḥad hadiths, and *zannī* dalālah, which are indicants that present a meaning based on a strong presupposition so that there could be more than one meanings or interpretations. The Quranic verse “qurūʾ” is an example. Although this verse is *qaṭʿī* or certain from a *tsubūt* point of view, or it undoubtedly originates from Allah, it is also *zannī* dalālah. Its ruling is based on a strong presupposition as the word has two meanings, pure and menstruation, and so it is understandable that a group of Islamic scholars interpret “qurūʾ” as pure and the others as menstruation.

Given that the method of Moslem gender activists and feminists makes no distinction between *qaṭʿī* and *zannī*, it may cause a *qaṭʿī* indicant to be treated as a *zannī*. It may then be interpreted in different ways and its interpretation can change from time to time. The main purpose of the Islamic jurisprudence scholars by categorizing indicants into *qaṭʿī* and *zannī* is so that there will be no difference of opinion on the law concerning a *qaṭʿī* or certain issue.
Everything that has been confirmed as *qaṭʿī* or certain should be and not need to be disputed. If it is disputable, then there will be no certain things in Islam. This would surely cause complications and, at the same time, danger. Complications because things that are already certain would need to be discussed over and over, and danger because Moslems would practice their religion with doubts as the laws keep changing.

If not treating *qaṭʿī* indicants as *ẓannī*, this feminist method will make *qaṭʿī* indicants seem contradicting one another. For instance, there is a *qaṭʿī* text that orders us to always be just while another *qaṭʿī* text tells us to allocate inheritance differently between men and women. The latter is then taken as discrimination and oppression over women.

Secondly, this method replaces the *al-ʿibrah bi ʿumūm al-lafẓ lā bi khūṣūs as-sabab* principle with the *al-ʿibrah bi khūṣūs as-sabab* principle. The principle of *al-ʿibrah bi ʿumūm al-lafẓ lā bi khūṣūs as-sabab* maintains that the understanding of a Quranic verse or hadith shall be built upon the generality of its meaning instead of the specificity of the reason for its revelation. This principle is created by the Islamic jurists to guide our understanding and avoid any misinterpretation of a verse or hadith. Why does it have to be based on the generality and not the specificity? These are the bases of argument: one, the Prophet PBUH himself recited the Quranic verse of *sūrah al-Kahf* (18):54 when he woke up Ali RA and Fatimah to perform midnight prayers. Ali said to the Prophet: “Truly our souls are in the hand of Allah, if He wills it, He will rise us up.” The Prophet turned to him and patted his thigh while reciting (the verse): “but man has ever been, most of anything [prone to] dispute” (QS Al-Kahf (18):54), although it was revealed for the unbelievers that denied the Quran. Two, the companions of the Prophet (*ṣaḥābah*) and the followers after them (*tābiʿīn*) preserved the generality of the general verses and hadiths that were revealed for specific reasons, and they did not limit them to their specific reasons. Some example of this are the verse on ending a marriage due to adultery concerning Hilāl ibn Umayyah, the verse on the *zihār* case (an oath by a husband that means sexual relations with his wife are forbidden for him) concerning Salmah ibn Șakhar, the verse on theft concerning the theft of Șafwān’s shield or shawl, and the verse on inheritance concerning Jābir ibn ʿAbd Allah and the two daughters of Saʿad. Three, laws shall be established based on the texts or the meanings of the texts as revealed by the Law Maker rather than the problems or the reasons that led to their revelations. And
because they are general texts, they should be interpreted in accordance with their generality. Four, that the Law Maker provides a general answer for a specific problem is evidence that He wants such generality (Al-Ghazālī, 1997:2/132 and As-Silmī, 2005:1/247).

Thirdly, as a consequence of all the above, this method will turn the laws upside down. With this method, forbidden matters will become permissible and vice versa. For example, using the new interpretation (istinbāṭ) method in the contemporary jurisprudence on women, Moslem gender activists and feminists go as far as saying that the prohibition against marrying polytheists under sūrah al-Baqarah (2):221 was revealed because the Islamic community at the time of its revelation was still small in number, so it would harm the existence of the community if they married polytheists. Today when the population of Moslems is large, the prohibition automatically becomes irrelevant because such marriage no longer poses harm to the community. In other words, marrying polytheists was forbidden in the past because it was considered dangerous, while today Moslems may do that because the danger is not there anymore. This interpretation is based on the principle of al-ʿibrah bi khusūṣ as-sabab explained above.

9. **Validity of Moslem Gender Activists’ Method**

This is the impact brought by the method employed by feminists. Maybe it is what they want. To keep up with the advance of time, the Islamic law must be bent down to reality and the spirit of the time itself, instead of the Islamic law being seen as a measure or guidance for reality and time, which often deviate from it. The following part discusses the results of an examination on the method.

Firstly, this method is established upon the mere assumption that there are contradictions between Quranic verses and hadiths that support gender fairness and equality by providing principles of human equality, fairness, equality before law, freedom, responsibility, deliberation, husband’s good treatment towards wife (muʿāsharah bi al-maʿrūf), altruism, and mutual-respect, and Quranic verses and hadiths that oppose gender fairness and equality such as those concerning polygamy, inheritance, men’s leadership in household, women’s testimony, and men’s leadership in some practices of worship (congregatory prayer, preaching, calling for prayer, etc.).
It is acceptable to say that more indicants is stronger than less. What is intolerable, though, is how feminists make qat‘ī indicants seem in conflict with one another so there appear to be contradictions. No predecessor (salaf) and latter day (khalaf) scholar ever identifies a contradiction among the qat‘ī verses and hadiths. This is because such contradictions between qat‘ī indicants are non-existent and impossible (Al-Ghazālī, 1997:2/412), because there is only one truth in the qat‘ī indicants (As-Silmī, 2005:1/313), and because violating a qat‘ī indicant is a sin (Al-Ghazālī, 1997:2/376).

Among the examples are the verses ordering us to be just such as sūrah al-Māidah (5):8, sūrah al-An‘ām (6):152, and sūrah al-Ḥijr (16):90. These verses do not contradict the ruling on inheritance allocation in which men’s and women’s portions are not equal as specified in sūrah an-Nisā’ (4):11. It is not possible that Allah orders us to be just then He himself gives an unjust ruling by specifying that men’s portion of inheritance is twice that of women. This allocation of inheritance according to Allah’s order shows that fairness does not necessarily mean sameness in Islam. The unequal allocation is fair because men’s obligations and responsibilities in the family are not the same as those of women. According to the Islamic law, if a man intends to marry a woman, he is required to pay the bride price and after the marriage, he must provide a living for his family. The allocation is unfair only if seen from the materialistic perspective of gender fairness and equality. Feminists call for sameness and parallelism in everything, including inheritance allocation.

Because the verses are not in conflict with each other, what happens here is a different understanding of fairness between gender activists and Islamic scholars. As illustrated previously, in the opinion of gender activists, fair means sameness between men and women in all things not natural, such as in roles, rights, obligations, and responsibilities. Therefore, they believe that the allocation of inheritance must be the same for both genders in terms of quantity. On the other hand, according to Islamic scholars, fair means putting something or someone in their proper position. Fair may also be understood as giving someone or something that has a right, their right. Fair, thus, does not have to mean sameness. Islam giving men two portions compared to women’s one is because a man’s financial obligations and responsibilities are greater than a woman’s.
As for the argument that maqāṣid ash-sharīʿah or the objective of the Islamic law is achieving humans’ wellbeing, it is also obviously correct (Hamidah, 2013:141). The effort to do so, nevertheless, shall not violate the Quran and the hadiths. It must be subject to the two holy texts.

Secondly, the method of feminists subjugates the Quran and the hadiths to reality and the spirit of the time without considering whether the current situation is leading to goodness or badness. Any verse and hadith that is not in line with the current situation, because it cannot be revoked, must be reinterpreted and adjusted. And one of the ways to reinterpret the holy texts is by adopting the principle of al-ʿibrah bi khuṣūṣ as-sabab for only with this principle that the Quran and the hadiths can be “adjusted” to the now. However, it is the now that should actually follow the Quran and the hadiths. The two sources of Islamic laws should be seen as a guideline and a benchmark whether the current situation is good, so it is acceptable, or bad and misleading, so it must be forsaken. The Quran and the hadiths should be the measure and the determiner, not the object to be measured and determined by the current situation, which may in fact be detrimental. This is because they are the hudan or guidance to mankind (QS Al-Baqarah (2):185).

Thirdly, gender activists adopt the principle of al-ʿibrah bi khuṣūṣ as-sabab in their method upon the following thinking: if the reasons are not to be the ground for understanding Quranic verses and hadiths, why are they mentioned in various texts concerning different issues? It cannot be denied that asbāb an-nuzūl and asbāb al-wurūd are a factor in determining a law, but they are not the determiner and they in fact have other functions, namely helping understand the bases for Islamic laws and helping interpret unclear meanings. Also, the reasons are there to provide a history of the revelation of Quranic verses and the occurrence of hadiths so it can be known which comes earlier or later and thus, which is the replacement (nāsikh) and which is replaced (mansūkh) (As-Silmī, 2005:1/248).

In addition, if the principle of al-ʿibrah bi khuṣūṣ as-sabab is used, there will be many verses and hadiths that have to be ignored (ihmāl) because they do not have the asbāb an-nuzūl and the asbāb al-wurūd. There will be many verses and hadiths that have to be nullified (ʿadam al-iʿmāl) because they are only suitable for the situation and condition in which they were revealed or occurred, which is very different from today’s situation and condition. This
suggests that such verses and hadiths are local and temporal, not global and universal. Knowing this, the claim that the feminist method is necessary to enable Islam to keep abreast of the times and be universal is thus false. What truly happens is quite the contrary, where qat‘ī verses and hadiths are left out for the sake of adjusting to the potentially harmful current situation. And more importantly, according to Islamic scholars, religious laws are not derived from the context; they are extracted from the text (Al-Ghazālī, 1997:2/412 and As-Silmī, 2005:1/313).

10. Closing

In Indonesia, Moslem gender activists persistently fight for gender fairness and equality amidst a Moslem-majority community. Sadly, their effort to promote fairness and combat oppression is made by not conforming to the laws of the Quran and the hadiths. To avoid frontal confrontations with Quranic verses and the Prophet’s hadiths, they challenge Islamic scholars’ understandings and interpretations of the verses and hadiths. Moreover, they adopt a method to harmonize the verses and hadiths that support their idea and those that oppose. The purpose, nevertheless, is the same: fighting for their understanding of gender fairness and equality as sameness and parallelism between men and women in both domestic and public domains. Upon analysis, this method is found to overlook the principles established by Islamic scholars for understanding Quranic verses and hadiths.

From a rational point of view, whether it is realized or not, seeing the positions and roles of men and women as the same clearly denies the biological differences between the two, including the differences in innate character, capacity, as well as strength and weakness. And that is in fact a form of unfairness because two kinds of people with different capacities and characteristics are forced to give the same performance and even to compete to be the best.

Islam, as a religion that honors the natural characteristics of things, treats humans, both men and women, in accordance with each own capacities. Islam sees men and women as partners that should help one another as God’s servants, without having to assign them the same rights, obligations, roles, and responsibilities.
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THE ANALYSIS OF INDONESIAN INTENTION TO JOIN TRANS-PACIFIC PARTNERSHIP BASED ON THE PRINCIPLES OF DEMOCRATIC ECONOMY SYSTEM

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Abstract:

Presiden Jokowi’s intention to join Trans-Pacific Partnership (TPP) is becoming a long polemic up to now. The opposing group against the issues by delivering several negative arguments, while the supporter standing with the benefits. The article aims to elaborate the possibility of Indonesia to involve in the TPP in the perspective of national economic system. By using a doctrinal method, it can be concluded as follows; firstly; the President is not forbid to enter into international agreement. Secondly, according to the Article 11 of 1945 Constitution, to enter into the international agreement, President should have an approval from the Parliament. Thirdly; the President is allowed to do the international agreement, including the TPP, if the content of agreement is accordance with the Principles of Democratic Economy system as stated on the Article 23 Paragraph (1), Article 27 Paragraph (2), Article 28 C Paragraph (1), 28H Paragraph (1), Article 31, Article 33 and Article 34 of the 1945 Constitution. Basically, the idea to join TPP can be proceeded by the Government of Republic Indonesia, however President Jokowi needs to do several requirement beforehand. The first requirement is related to the ratification of agreement by the President which requires the approval from Parliament of Indonesia, since the impact of the agreement will affect the national economic sector. The second is the President should review again the document of TPP, comprehensively. Whether or not the agreement trade deal is contradict with the Indonesian economic system as stated in the Constitution. The third, President also needs to hear the opinion of experts and other sources, especially from the resisting groups. Last of all, President should

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guarantee and make the people believe that the ratification of the TPP will be not negatively impacted the Indonesian economic situation.

**Keywords**: Trans-Pacific Partnership, Indonesian Economic System, 1945 Constitution.

1. **Preliminary Background**

   Into the third millennium, the world has changed rapidly, it creates complex implication, namely the emergence of interdependence among nation-states in almost all dimensions of life. The rapid change as mentioned above is so-called as globalization.

   In economic sector, globalization impact on free movement of goods and services among states around the world and will minimize the protection or monopolistic within a country. However, in facing globalization is a necessity due to shy away from globalization in the present times is an impossibility.

   Economic globalization is defined as an economic life in an open and globally, regardless of territorial boundaries between country to country. Economic globalization is closely related to free trade, or in economic globalization, free trade tries to create wider trading area and to eliminate barriers that lead to international trade which is not running smoothly.

   In facing economic globalization era, each state will pursue a variety of the best way, so that the state is able to achieve much benefit in trying to improve the welfare of its citizens, and instead of trying to suppress a bit loss, even if it is able, it totally eliminates the negative impact, by establishing various forms of economic cooperation with other states.

   Similarly, Indonesia, economic globalization has also been motivated Indonesia to compete grabbing foreign trade market, especially for marketing agricultural products, marine products, textile products, minerals, and other excellent products of Indonesia. To obtain optimal results in the economic field, Indonesia has established cooperation with some other states, such as bilateral cooperation in the Joint Task Force on Economic Cooperation.

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(JTF-EC), and several regional cooperations such as APEC, AFTA, ASEAN, GATT/WTO, and others.

At the moment, Indonesia was planning to participate in economic cooperation of Trans-Pacific Partnership (TPP). The discourse that Indonesia wants to join the Trans-Pacific Partnership has been stated by President Jokowi in his meeting with US President Barack Obama, at the White House Washington, DC, November 26, 2015.

The two main reasons that pushed President Jokowi stated his desire to join the free trade agreements in the Pacific region, namely first that the Indonesian economy is an economy that is open, so that Indonesia can establish economic cooperation with any country, and secondly, Indonesia with a population of 250 million people is the country with the largest economy in Southeast Asia. Of course, the statement by President Jokowi welcomed by President Obama, even International media, New York Times and The Guardian mentioned it as the victory of President Obama embracing an important ally in the Pacific region to balance the economic competition of the United States with China.

Indonesia is claimed to be an important ally, because this country has the economy of US$ 1 trillion, let alone Indonesia also included a group of 20 (G-20), the community of the major economies in the world.

However, a statement by President Jokowi joining the TPP has surprised many people, because the attitude of Jokowi previously considered less likely to join the Trans-Pacific Partnership. The attitude in question can be seen from the assertion of Jokowi while attending a high-level meeting of the leaders of APEC (Asia Pacific Economic Cooperation) in Beijing in mid-November, 2014. It was Jokowi said that Indonesia did not want to just be a mere market for the economic interests of large countries, such as America and China. In the meeting, President Jokowi asserted that Indonesia is not willing to join the Trans-Pacific Partnership (TPP) or the Free Trade Area of the Asia-Pacific (FTAAP), until the economic integration from both provide great benefits and real for Indonesia.

In connection with the above explanation, the idea of Jokowi to join TPP gets a mixed response from various elements of society in Indonesia. In terms of procedure, for example, Jokowi is considered to violate the rules of the country because it has to convey the
idea that will likely have a big impact on the Indonesian economy without communicating with the legislative first. Then from the content, President Jokowi also considered inconsistent, impetuous in taking decisions, because before the statement was disclosed, Indonesia has never been reviewing about the Trans-Pacific Partnership comprehensively and deeply.

A different attitude, namely a positive response that was also presented by some people, who think that joining Indonesia into the Trans-Pacific Partnership will provide great benefits for improving the welfare and prosperity of the people of Indonesia.

Polemics about whether or not Indonesia joins the TPP continues to roll until today and become a very interesting issue for discussion. All the pros and cons raised, of course guided by good faith and a form of public awareness of the progress of the nation and the country. Nonetheless, criticism, rejection or support to the Government’s policy, should be accompanied by arguments referring to the foundation of the state Constitution, so that the entries submitted are not subjective, but is based on clear benchmarks and can be answered.

Problem Formulation

Based on the above explanation, the problems that need to be addressed in this paper is: How do the views of the National Economic System of the discourse for Indonesia join into the Trans-Pacific Partnership?

Theoretical Basis

The theory used in this paper is the theory of authority, combined with the theory of stufenbau by Hans Kelsen. The authority is essentially a power given to state equipment to run the government. In running the government, basically President Jokowi has the authority to establish cooperation with any country that is seen to improve the welfare of the nation. However, based on the theory of stufenbau, policies issued by President Jokowi must not conflict with the state Constitution, namely 1945 Constitution, which was hierarchically in a higher position.

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Writing Method

This paper writing is using doctrinal approach, namely by reviewing the literature related to the themes and a variety of laws and regulations as well as the print and electronic media that support the substance of writing.

2. An overview of the Trans-Pacific Partnership

Trans-Pacific Partnership, which in Indonesian translated into Kemitraan Trans Pasifik, and discussed hereinafter abbreviated as TPP is a trade pact between the countries in Asia Pacific, whose members include 12 countries, namely the United States, Japan, Brunei, Chile, New Zealand, Singapore, Australia, Canada, Malaysia, Mexico, Peru, and Vietnam. TPP has been agreed by the 12 member states in Atlanta, Georgia, on October 5, 2015. 12 countries that joined the TPP must represent about 40 % of Gross Domestic Product (GDP). Although TPP agreed by 12 countries, but the charge of TPP agreement does not automatically could be implemented by the agreed countries. The reason for the realization of the agreed content, still required ratification by each of the participating countries, to comply with the regulation of participating countries in the provisions of TPP.

Unfortunately, the TPP negotiation process takes place very closed. TPP documents and details of the deal were never made public. Even based on the recognition of members of the US Senate, Ron Wyden, a majority of members of the US Congress could not access documents TPP negotiations. Instead of 600 representatives of corporations like Halliburton, Chevron, PhRMA (Pharmaceutical Research and Manufactures of America), Comcast, and Motion Picture Association of America are free to access and give input to the TPP negotiation process. Luckily, WikiLeaks managed to divulge some content that is agreed upon in the TPP3.

Confidentiality agreement of TPP has drawn sharp international criticism, besides the maneuvers are not uncommon in this era of globalization, lack of transparency is also inviting the presumption of the existence of a hidden agenda of the United States, and does not provide legal certainty to the citizens of the member countries.

Based on the information released by WikiLeaks, it is known that the final outcome of TPP negotiations agreed on several issues related to eliminating trade barriers in a wide range of products, including agriculture, dairy products, industrial new car, the latest technology, medicine advanced and a number of other products, as well as adjustments in regulations environment and regulations concerning employment.

TPP also regulates intellectual property rights, the privatization of public services, deregulation of all the rules that hinder investment and the free circulation of goods and services and requires member states to privatize state enterprises. In the TPP scheme, the investor may bring an action to TPP member countries to the Court. Therefore, TPP is equipped with Investor State Dispute Settlement (ISDS). ISDS is an international legal instrument in which investors can file a lawsuit against the government of a country if investors judge that the relevant government policies discourage the investment of TPP member countries.

Based on the contents of the agreement, the TPP would force member states to do the following; First, TPP member countries must dismantle all tax rules and rules of export/import impede entry and exit of goods/services. It has been disclosed by the United States, that there are at least 18000 tax rules in the 11-member of TPP which will be demolished to facilitate the entry of US goods\(^4\). Secondly, member states should eliminate 98 % rate for a variety of products, such as milk, meat, sugar, rice, horticultural products, sea food, manufactured products, natural resources and energy. Third, TPP member countries had to eliminate all policies that seek to protect domestic products, including a ban of campaigns on buying local products.

US trade representatives, Mickael Froman, as quoted by Reuters news agency, said that Indonesia must abolish import tariffs on goods products of TPP member countries if Indonesia wants to join the free trade bloc. Further, according to Mickael Froman, Indonesia also have to abolish a number of barriers, such as the existence of local content requirements on foreign products\(^5\).

\(^4\) Ibid
\(^5\) www.bbc.com, Accessed on October 6, 2015, at 8.54 p.m.
Fourth, the TPP member countries are required to open all sectors of its economy to foreign investors, including public services such as education and health, and the need for public goods such as electricity, water and others. Fifth, the TPP member countries required to abolish the privileges of State Own Enterprises (SOEs) and treated the same as private companies. Sixth, TPP member countries also have to deregulate all the rules that hinder or impede the freedom of investment, including eliminating rules that protect the rights of local workers, and protection of the environment.

Seventh, the TPP member countries must also conduct the privatization of the health care sector. Intellectual Property Rights (IPR) protection is given through TPP, large medicine companies would be free to determine the price of medicines to maximize their profits and limit access to the circulation of generic medicines. Eighth, the TPP member states must also be prepared receiving complaints of foreign investors, because investors were given the authority to conduct a lawsuit against the state through the ISDS, if the policy of the concerned country impeded the investment of TPP member countries.

In another perspective, TPP agreement also has a positive impact that needs to be taken into consideration. When viewed from the interests of consumers, in fact, suppression of import taxes on free trade will give benefit namely the cheaper price of a products with more varied product selection and better product quality. Then for domestic producers that has good competitiveness, acquisition cost of export had a positive impact for the expansion of overseas markets and minimize the cost of marketing the product, then the acquisition cost of imports will also be useful to relieve producers in obtaining raw materials that is needed with cheaper price, so that the cheapening of raw materials can minimize production costs.

3. The national economic system

The economic system is a system to regulate and establish economic relations between people with a set of institutions in an order of life. An economic system is composed of elements of the human as a subject, economic goods as objects, as well as the institutional set up and interweaving in economic activities. Institutional devices shall include economic institutions (formal and informal), how to work, relations mechanisms, laws and regulations
of the economy, as well as the rules and other norms (written or unwritten) that have been selected and accepted or determined by the community in concerned place order of life.

National economic system is the economic system that is currently applied to the state of Indonesia as stipulated and specified in the Constitution, namely the 1945 Constitution.

According to Article 33 of the 1945 Constitution, Indonesian economic system is called as the system of economic democracy. Article 33 of the 1945 Constitution which consists of five verses affirms that:

i. The economy is structured as a joint venture based on family principles.
ii. Production branches which are important for the country and dominate the life of the people controlled by the state.
iii. Earth, water and natural resources contained in it are controlled by the state and used for the greatest prosperity of the people.
iv. The national economy shall be organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainability and environmental insight, independence and by keeping a balance between progress and unity of national economy.
v. Further provisions on the implementation of this article are regulated by law.

The provisions in Article 33, as already stated above, Paragraph (1), (2) and (3) is the original script before the amendment, while paragraph (4) and (5) are the result of the fourth amendment. Thus, according to Jimly Asshiddiqie, the “economic ideology or democracy based economy adopted by the founders of the nation, continue to hold onto, with additions required to promote the general welfare, as aspired to in the fourth Paragraph of the Preambule of 1945 Constitution.

Asshiddiqie further revealed that the Article 33 of the 1945 Constitution, there are a number of important things that need to be explained, namely, first, the statement “The economy is structured as a joint venture based on family principles”. According to Asshiddiqie, the statement can be viewed from three aspects, namely the definition of micro, macro understanding and joint ventures as a principle.

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According to him, in the sense of a micro or small, with the understanding of the joint company, it can be attributed to the cooperative as a form of joint ventures. However, if the micro sense is used, then there will be confusion about the contents of the verse, because it seems the overall arrangement of the Indonesian economy is identical with the cooperative as a form of joint ventures. Because it was better to look at it from in the macro side or the wider sense, ie the context of a systematic arrangement of the Indonesian economy as mentioned above.

It is therefore, Widjojo Nitisastro interpretation was very precise which states that “the economy is structured as a joint venture is no more point to the notion of the national economic system as a joint venture of all elements of the Indonesian people. The understanding of this togetherness, not only with regard to the concept of enterprise, but is furthermore associated with the concept of economic actors who are not only executed by the wake-up company.\(^8\)

Second, the words “principle of the family”, this statement refers to understanding of the spirit of togetherness, spirit of mutual cooperation, and cooperation. According to Asshiddiqie, the weakness of this paragraph is that if the important thing is cooperation, not competition. Whereas, in the era of globalization and free trade, something needs to be established in addition to cooperation is also competition. If Indonesia wants to excel at the regional or global trade economy, Indonesia should be able to compete with other countries, and in the same time also cooperates with other countries. Cooperation can be in a variety of ways, such as in trade, investment, production or cooperation in technology development.\(^9\)

Third, in Paragraph (2) of Article 33, there is a phrase “controlled by the state”, according to Asshiddiqie, the sense of the sentence is mastery in a broad sense, which includes the notion of ownership in the sense of the public and civil, including the power to control and to manage the business field directly by the Government and government officers who are burdened with the specific task. Therefore, owner of sectors or branches of

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production that are important for the state and lives of many people should be the Government.\footnote{Ibid, P. 272.}

Fourth, in Paragraph (4) of Article 33, there are several concepts that need to be understood, namely the Indonesian economy is organized based on economic democracy, with the following principles: (i) togetherness, (ii) the efficiency of justice, (iii) sustainable, (iv) environmental, (v) independence, (vi) the balance of progress, and (vii) the unity of the national economy. With the implementation of all these principles together, it is expected the Indonesian economy can grow rapidly continuously, thus providing welfare for all people in all regions of the country, and can excel in global competition, does not depend entirely on imports and foreign capital (both investment and debt), do not damage the environment and ensure the unity and integrity of the nation of Indonesi\footnote{Ibid}.\footnote{Ibid, P. 272.}

Furthermore, it should be stressed that the Government of Indonesia in running the national economy, of course, does not only refer to the provisions of Article 33. Several other Articles of the 1945 Constitution relating to economic governance should also be a reference. Some of the Chapters, such as Article 23 Paragraph (1) which states that “Budget revenues and expenditures as a form of state financial management is determined annually by law and carried out openly and responsibly for the welfare of the people.” Then Article 27 Paragraph (2) which states that “Every citizen has the right to work and a decent living for humanity.”

The next Chapter relevant to the management of the national economy, that is Article 28C Paragraph (1), Article 28H Paragraph (1), Article 31 and Article 34. Article 28C Paragraph (1) affirmed that “Everyone has the right to develop themselves through the fulfillment of basic needs, entitled to education and to benefit from science and technology, arts and culture, in order to improve the quality of life and for the welfare of mankind.” Whereas Article 28H Paragraph (1) is also set concerning human rights, states “Everyone has the right to live physical and spiritual prosperity, reside, and get a good living environment and healthy, as well as the right to health services.”
As for Article 31 provides guidelines that “(1) Every citizen is entitled to education. (2) Every citizen is obliged to follow basic education and the government must finance it. (3) The Government shall manage and organize a national education system that enhances faith and piety and good character in the context of the intellectual life of the nation, which is regulated by law. (4) The State prioritizes education budget at least twenty percent of the budget revenue and expenditure and of budget revenue and expenditure to meet the needs of national education.

And lastly described by Article 34 which is also very important as a mandate for state officials, with a charge as follows: (1) The poor and neglected children who are maintained by the state. Paragraph (2) The State shall develop social security system for all people and empower the weak and unable accordance with human dignity. The state is responsible for the provision of health care facilities and decent public service facilities.

4. Discourse of joining TPP for Indonesia, the national economic system perspective

Based on the description of the TPP, as previously discussed, at least there are some concerns that Indonesia joins the TPP. Some things to watch out for when Indonesia took part in the TPP of which is indicative of the occurrence of negative impacts as follows:

i. Indonesia will lose its role in exercising control over the public sector.

ii. In Indonesia, foreign domination will occur in the procurement of goods and services of the Government.

iii. SOE will be barren for the national interest.

iv. Indonesian citizens will lose access to medicines at low prices.

v. Food sovereignty and farmer’s sovereignty would be threatened, and smallholder’s conditions will be getting worse.

vi. The loss of the state’s role in providing protection against labors (workers) in the country.

vii. The competitiveness of Small and Medium Micro Enterprises became worse off due to crushed by the power of large companies.

viii. Indonesia will be positioned on par with foreign companies of the TPP member countries and will continue to be a defendant in ISDS.
Based on a review of the national economic system, it can be affirmed that the President of Indonesia, is not basically prohibited conducting cooperation with foreign parties, including joining the TPP, as long as such cooperation, both procedurally and substantively, is in accordance with the provisions of the constitution.

In the procedure, the President may conduct international cooperation, including joining TPP, subject to the Parliament’s approval. Article 11 of the 1945 Constitution Paragraph (1) and (2) has mandated that: (1) the President with the approval of the House of Representatives to declare war, make peace and agreements with other countries. Paragraph (2) “the President in making other international agreements, arising from extensive and fundamental to the lives of people related to state financial burden or requiring changes or creation of laws to the approval of the House of Representatives.”

In the substance, the President also allowed to establish cooperation in the field of economy with other countries, including joining the TPP, the whole content of the agreement in line with the principles of democracy economic management as stipulated in Article 33 of the 1945 Constitution, does not interfere the sovereignty of the state in providing basic services and protection to its citizens, especially people who are in a marginal position, positive impact on the welfare of the people, increase the productivity of Small and Medium Micro Enterprises, reducing poverty and unemployment, as has been confirmed in Article 23 Paragraph (1), Article 27 Paragraph (2), Article 28C Paragraph (1), Article 28H Paragraph (1), Article 31 and Article 34 of the 1945 Constitution.

Thus Indonesia under President Jokowi can continue his idea to join the TPP, but first it needs to conduct some of the following:

i. The President must seek the approval from the House of Representatives, besides the agreement which will have a big impact on the Indonesian economy, TPP agreement also requires that the ratification process must be approved by the legislative.

ii. The President and his staff had to review and study the TPP agreement document deeply and comprehensively, and the results of the study need to provide assurance that the TPP document does not conflict with the principles of constitutional economy.
iii. Indonesia does not follow the TPP since the beginning of its formation, so that Indonesia did not have a chance on the concept of TPP negotiations. Because it takes a smart step and strategies so that Indonesia in joining the TPP, positioning Indonesia became one of the member states that have high bargaining power and does not occupy an inferior position in the view of the TPP member countries.

iv. The President will also need the input from various parties, especially those who do not support the joining of Indonesia in the TPP. The President needs to prove that the fear of many negative impacts of the cooperation with the TPP is unwarranted and the fear is not true.

5. Conclusion and recommendation

Based on the discussion and study in previous chapter, the conclusion can be formulated as follows:

a. President of Indonesia, is not basically prohibited from cooperation with foreign parties, including joining the TPP, as long as such cooperation, both procedurally and substantively, is in accordance with the provisions of the constitution.

b. In the procedure, the President may conduct international cooperation, including joining TPP, subject to the Parliament’s approval. Article 11 of the 1945 Constitution.

c. In the substance, the President also allowed to establish cooperation in the field of economy with other countries, including joining the TPP, the whole content of the agreement in line with the principles of democracy economic management as stipulated in Article 33 of the 1945 Constitution, does not interfere the sovereignty of the state in providing basic services and protection to its citizens, especially people who are in a marginal position, positive impact on the welfare of the people, increase the productivity of Small and Medium Micro Enterprises, reducing poverty and unemployment, as has been confirmed in Article 23 Paragraph (1), Article 27 Paragraph (2), Article 28C Paragraph (1), Article 28H Paragraph (1), Article 31 and Article 34 of the 1945 Constitution.
Recommendation

Indonesia, under President Jokowi can continue his idea to join the TPP, but first, it is recommended to do the things, as follows:

a. The President must seek the approval from the House of Representatives, besides the agreement which will have a big impact on the Indonesian economy, TPP agreement also requires that the ratification process must be approved by the legislative.

b. The President and his staff had to review and study the TPP agreement document deeply and comprehensively, and the results of the study need to provide assurance that the TPP document does not conflict with the principles of constitutional economy.

c. Indonesia does not follow the TPP since the beginning of its formation, so that Indonesia did not have a chance on the concept of TPP negotiations. Because it takes a smart step and strategies so that Indonesia in joining the TPP, positioning Indonesia became one of the member states that have high bargaining power and does not occupy an inferior position in the view of the TPP member countries.

d. The President will also need the input from various parties, especially those who do not support the joining of Indonesia in the TPP. The President needs to prove that the fear of many negative impacts of the cooperation with the TPP is unwarranted and the fear is not true.

References

Books:
MODELS OF ELECTION OF THE HEAD OF REGIONS AFTER THE 1998 POLITICAL REFORM IN REALIZING LOCAL DEMOCRACY IN INDONESIA

Satriawan, I.* & Salim, A.**

Abstract:
Local election is one of the important of democracy in Indonesia. After the 1998 political reform Indonesia has tried to find out some model of local election. The research aims to evaluate the implementation of local democracy in the election of the Head of Regions (Governor, Regents, Mayors) after the 1998 political reform in Indonesia. The research is a normative legal research with statute approach. The data used is secondary data. The data is taken through library research which consists of primary legal source, secondary legal source and tertiary legal source. The result of research shows that there are 4 models of Local Election of the Head of Regions after the 1998 political reform, they are as follows: 1) Indirect local election, 2) Direct election. Direct election has some various models such as direct local election without independent candidate, direct election with independent candidate and direct election with simultaneous election. The practice of simultaneous local election also shows

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some negative impacts such as more social conflicts, lack of security staffs to secure the elections, more disputes brought to the Constitutional Court. The research recommends that the DPR and Government have to evaluate further the model of simultaneous local election in a better schedule such as conducting local election based on particular zones.

Keywords: models of local election, local democracy, head of regions

1. Introduction

Legal reform in Indonesia has given an impact on lower level of government, the local government. In a wider perspective, political reform is implemented in various fields to create a legitimate, democratic, honest, clean and dignified government. One of the important changes in the amendment of the 1945 Constitution is a regulation of the local government. In the 1945 Constitution before amendment, local government was only regulated in one general section. But after the amendment of the 1945 Constitution, the local governance has been set out in a more detail regulation. One of the details of such arrangements is about local election that shows that the position of head of the region in local government becomes an important part of democratization of Indonesia. Election of the Head of Regions is alternative to answer a chaotic and a poor electoral process indirect election of the Head of Regions and Vice-Head of the Regions through the DPRD with enactment of Law Number 22 of 1999 on Local Government.

The local election system through representatives who have been run in a long time in Indonesia is still not able to accommodate the aspirations of the people. Society is not

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3See, Article 18 (4) of the 1945 Constitution before amendment and Article 18 (4) of the 1945 Constitution after amendment. The results of both amendments were the formulation of the 1945 Constitution, Article 18 (4) which contains a new paragraph 3 of Article 11 under Chapter and Regional Government. Prior to the amendment of Article 18 consists only of one section and explanation.

4See Part VI of the 1945 Constitution on Local Government Act 18 (4) which reads: "Governors, Mayors as the respective heads of provincial governments, district, and municipal elected democratically".

5Mustam Arif, Direktur Eksekutif Jurnal Celebes "*Isu Lingkungan di Kota Makassar*", 1http://www.antaranews.com/berita, accessed on April 1, 2015 at 09.00 a.m.
satisfied with the representation model through local parliament in the election of the Head of Regions. Additionally, the DPRD was given authority which tends to be excessive. Therefore, then Law Number 22 of 1999 on Regional Government was replaced by Law Number 32 of 2004 on Regional Government and amended again by Law Number 12 of 2008 on the second amendment of Law Number 32 of 2004 on Regional Government. The amendment of the law has also caused changes to the mechanism of the local elections from an indirect election to a direct election. Law Number 12 of 2008 has also made a new variant of the model of the local elections by allowing independent candidates to participate in local elections. Law Number 32 of 2004 and Law Number 12 of 2008 on Regional Government were made to answer the development of the state, dynamics of constitutional system, and demands for the implementation of regional autonomy.

However, the direct regional elections held since the promulgation of Law Number 32 of 2004 in conjunction with Law Number 12 of 2008, has also been facing problems from period to period. Indonesia seems still in the process of trial and error of finding model of local democracy.

Recent developments of the implementation of the local election in 2010 shows that there are many local election disputes brought to many the Constitutional Court. During 2010, local election disputes were dominant cases registered in the Constitutional Court. The numbers of cases were 230 cases or 73.72% of all cases registered by the Constitutional Court.\(^7\) In the local election 2010, there were 244 local elections in all regions in Indonesia, both at the level of provinces, cities, and districts. Among those local elections 94, 26% brought to the Constitutional Court for disputes.\(^8\)

In the light of building a better local democracy, the government has initiated a new policy in the implementation of the local election, that is election of the head of regions with simultaneous local election. Thus, it is expected the future of election of the head of regions can be held with more effective and efficient, especially related to the use of time, energy and cost of local elections. The implementation of simultaneous local election, can be regarded as an improvement of model of local democracy in the development of the electoral system of

\(^8\)Ibid, p. 18.
the Republic of Indonesia, especially in the local elections. Based on the previous background, the study will answer two central issues, they are: First, how is the model the local elections (governor, regent, mayor) and the deputy after the 1998 reform in Indonesia in realizing local democracy? What are the strenghts and weaknesses of the various models of local election?

2. Local democracy in Indonesia
   a. Democracy in Indonesia

   Indonesia is a democratic state based on the rule of law, as stated in the 1945 Constitution. As practiced in other modern countries, Indonesian democracy is also based on the philosophical and fundamental norms of the nation, Pancasila, as stated in the preamble of the Constitution.9

   In Indonesia, democracy has been an option of the nation since the Indonesian people declared its independence in 17 August 1945. In the fourth principles of Pancasila, it is stated that "Democracy, led by the inner wisdom consultative/representative" became the basis of recognition of the sovereignty of the people embodied in the basic principles in democratic mechanisms. Almost all notion of democracy refers to the meaning that "at the last level is the people who give the rules for the basic problems of their life, including in assessing the policy of the state, and therefore the state policy determines the life of the people".10 For this reason, democracy is accepted and implemented in almost all countries, with variations and adjustments to the character of each country.

   The same thing also expressed by Abdul Razak that:

   Indonesian state is built on the pillars of a constitutional democracy that it contains two main principles, namely the principle of popular sovereignty and the rule of law. The logical

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9DahlaTha’in, 1994, Pancasila Yuridis Ketatanegaraan, Yogyakarta, UUP AMP YKPN, p. 98.
consequence of the principle of popular sovereignty requires it to be accepted that the competencies of the government comes from the people as sovereign.\textsuperscript{11}

With a government that adheres to this system, the highest power belongs to the people. Everyone has the same rights and opportunities to achieve democratic rules. Therefore, the implementation of the country to be formulated in the form of law, which is based on the participation and interest of the people

b. Implementation of Local Democracy in Indonesia

In Indonesia, local democracy is a sub-system of democracy that provides opportunities for local governments in developing the life of local government in relations with the people in their environment.\textsuperscript{12} Therefore, local democracy is the implications of decentralization undertaken in these areas as a manifestation of the democratic process in Indonesia.

In terms of regional sovereignty, local democracy is built to provide a portion of which have accrued to the local people in the legitimation of the executive elite. During this time the people of the area gives sovereignty only in the legislative area by legislative elections. So \textit{trias politica} refers to the concept of separation of powers Montesquieu its top three state agencies to local government context in the executive and legislative regions, while in the concept of institutional of the judiciary refer to institutional center. This is related to the pattern of the central government to regional relations in the principle of decentralization. Sovereignty of the people within the concept of the system of government can be divided into national and local democratic hierarchy of procedures for political recruitment.

Political goal of regional autonomy (decentralization) is to create a more equitable relationship and open between central and regional governments within the concept of the Unitary State. Unity can be entered in the politics of decentralization in governance by giving

the opportunity and freedom to the region to run the regional government. Goals like this, is not something easy to do. Indonesia 's own experience in determining the pattern of decentralization with an assortment of legislation. The goals and achievements are structuring of government and social relations in accordance with the characteristic of Indonesia as a nation.

3. Regional head election after the political reform

a. Election of the Head of Regions Based on Law Number 22 of 1999

In the Law Number 22 of 1999, the election of the head of regions is conducted through Local Parliament (the DPRD) as regulated in Article 34 of Law Number 22 of 1999. Law Number 22 of 1999 provides explicitly regulation on the implementation of the functions of the Head of the Regions and the DPRD. In the conception of the Law, the DPRD is no longer a part of government, but rather placed as a legislative institution which is equal to local government. Through the Law, the DPRD was given sole authority to elect the Head of Regions, ask the accountability of the Head of Regions and even dismiss the Head of Regions and/or Deputy Head of Regions assess if the DPRD has sufficient reasons for it.13

The reasons behind the local elections conducted through the DPRD referred to the 1945 Constitution. Considering Law Number 22 of 1999 was made before amendment of the 1945 Constitution and promulgated on May 7, 1999, by the first before amendment of NRI 1945 was held on October 19, 1999.

The election of Head of Region and Deputy Head of Region is conducted directly by free, confidential, honest and fair principles. Each member of the DPRD may vote for one pair of candidate of Head of Regions and Deputy Head of Region from candidates who have been assigned by the Chairman of the DPDR. The candidates of the Head of Region and Deputy Head of Region with the most votes in the election, will be designated as Head of

13See, Article 19 of Law Number 22 of 1999 on Regional Government.
Regions and Deputy Head of Region by the DPRD and then signed by the President. Furthermore, elected Head of Region will be inaugurated by the President or other officials who is delegated by the President.

The term of office of the Head of Regions is for 5 (five) years. Heads of Regions and Deputy Head of Region can be re-elected only for one more term. Heads of Regions and Deputy Head of Region, in running the government based on policies established together with the DPRD, and in implementing the duties of Head of Regions has to be responsible for the DPRD.

b. Election of the Head of Regions Based on Law Number 32 of 2004

The democratic process in the region began to appear with a significant change in the Law Number 32 of 2004 which formulate direct election models. Of the 240 articles in the Law, there are 63 articles which regulate the election of the heads of regions. In Law Number 32 of 2004 regarding Local Election arrangements made directly adjusted from article 56-119 under the title of the Election of Head of Regions and Deputy Head of Regions.

The local elections for governor and vice governor and the selection of Regent and Vice Regent and the election of Mayor and Deputy Mayor organized by an independent body, namely the Regional General Election Commission (election commission). The heads of regions and deputy head of regions held democratically by the principles of direct, public, free, confidential, honest and fair.

The election of Governor, Regent/Mayor is conducted by an independent organ, the name is Election Commission, as stipulated in Article 66 ayat (2) of Law Number 32 of 2004

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14See, Act 40 of Law Number 22 of 1999 on Regional Government.
15See, Act 42 (1) of Law Number 22 of 1999 on Regional Government.
16See, Act 41 of Law Number 22 of 1999 on Regional Government.
17See, Act 44 (1) and (2) of Law Number 22 of 1999 on Regional Government.
18Susie Berindra, Search of an Ideal Leader, taken from http://kompas.com/kompascetak/0604/28/Politik hukum/2630087.htm, accessed on December 1, 2015 at 2:10 pm, stating that when the 1998 reform, demands from the public for the government to hold a re-election several governors. The reason, the governors elected by Parliament was involved in corruption, collusion and nepotism. In addition, the governor was elected when the Suharto regime in power. However, the current interior minister, Hamid Syarwan, resist the desire of the people firmly.
20See, Act 22E (1) Constitution of NRI 1945
which states that "In the organization of the election of Governor and Vice Governor, District Commission is part of the organizers of elections set by the Provincial Election Commission and Article 57 paragraph (1) provides that the Election Commission is accountable to the DPRD. However, the Constitutional Court has nullified the article so that the Election Commission is not accountable to the DPRD in carrying out local elections.

c. **Election of the Head of Regions Based on Law Number 12 Year 2008**

The local election by Law Number 12 of 2008 is held directly which regulated in Article 56 of Law Number 12 Year 2008 which states:

"(1) The head of regions and deputy head of regions selected in the candidate pairs held democratically based on the principles of direct, public, free, confidential, honest, and fair.

(2) The pair of candidates as referred to in paragraph (1) proposed by a political party, coalition of political parties, or individuals who are supported by a number of people who fulfill the requirements as set in this Law."

As a follow up of the Constitutional Court’s decision by the Constitutional Court Decision No.5/PUUV/2007 that the right to file individual candidates themselves into head of region candidate, then Law Number 12 of 2008 regarding the Second Amendment to Law Number 32 of 2004 in Article 59 paragraph (1) that allows a couple of independent candidates in the local election with the support of numbers of people. This is an attempt to strengthen democracy at the local level in Indonesia. In addition, the 1945 Constitution also guarantees the right to vote and be elected in Article 28D Paragraph (1) and Paragraph (3) of the 1945 Constitution, which states “every citizen has the right to obtain equal opportunities in government”.

d. **Election of the Head of Regions Based on Law Number 8 of 2015**

In Law Number 8 of 2015, model of election of head of region is getting better. Local election which through representation by the DPRD as stipulated in Law Number 22 of 1999,
then with the promulgation of the law on local government, Law Number 32 of 2004 *in conjunction with* Law Number 12 of 2008, the model of local elections changed by direct election by the people. Article 56 paragraph (1) of Law Number 32 Year 2004 on Regional Government states that "the Governor and the Deputy Governor, the Regent and Vice Regent, Mayor and Deputy Mayor selected in pairs through direct elections". It is regulated in Article 24 paragraph (5) which states that the head of region and deputy head of region the area as referred to in paragraph (2) and (3) are elected directly by the people in the regions concerned. Then in the current law of local government current, Law Number 23 of 2014 has provided a separate regulation in the elections of head of region for each area the territory of the Republic of Indonesia as stated in Article 62 of Law Number 23 of 2014 that the "provisions on the local elections shall be regulated by law". Then Law Number 1 of 2015 is promulgated and amended by Law Number 8 of 2015 concerning the Election of Governor, Regent, and Mayor conducted also directly in accordance with Article 1 of Law Number 8 of 2015. The mechanism for electing governors, regents, and mayors held in accordance with Article 3 of Law Number 8 of 2015 which states "The elections held every five (5) years simultaneously throughout the territory of the Republic of Indonesia". The implementation of Elections of Head of Regions are still using the principle of elections based on the principle of direct, public, free, confidential, honest, and fair.21

The simultaneous local elections have been scheduled by the Law as follows:

a. The first schedule is on December 2015 (for the end of the term of office in 2015 and the first half of 2016).22 The schedule is set on Wednesday, December 9, 2015 by Presidential Decree No. 25 Year 2015 concerning Election Day for Local Election 2015 as the National Holiday.

b. The second schedule is held on February 2017 (for the end of the term of office of the second half of 2016 and throughout the end of the tenure 2017).23

c. The third schedule is held on June 2018 (to the end of the term of office in 2018 and the end of the term of office in 2019).24

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21See, Act 2 of Law Number 1 Year 2015 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 Year 2014 on the Election of Governors, Regents and Mayors Act into law.
22See, Act 201(1) of Law Number 8 of 2015.
23See, Act 201(2) of Law Number 8 of 2015.
24See, Act 201(3) of Law Number 8 of 2015.
d. Direct election with simultaneous local election in the entire territory of the Republic of Indonesia will be held in 2027.\textsuperscript{25}

The new model of direct election with simultaneous local election which is regulated in Law Number 8 of 2015, presumably can be a correction to the elections that have taken place since 2005, which is considered as less substantial impact on the realization of good governance, resulting less-developed regions. In addition to those laws related to the implementation of the elections, political parties and election organizers must also increase its commitment to the success of direct election with simultaneous local election which considering that simultaneous local election cannot be separated from the positive role of the election institution, political parties and the society.\textsuperscript{26}

4. Election Of The Head Of Regions And Local Democracy In Indonesia

a. Effect of Election of the Head of Regions Model Towards Local Democracy

Election of the Head of Regions directly by the people through elections provided in Article 24 paragraph (5) and Article 56 of Law Number 32 of 2004 on Regional Government in conjunction with Law Number 12 of 2008 on the amendment of Law Number 32 of 2004 in conjunction with Article 1 (4) of Law Number 15 of 2011 on the Election. In this model a couple of candidates Head of Regions and Deputy Head of Regions is nominated by political parties or coalition of political parties that meet the requirements, and a couple of pairs of independent candidates who meet the requirements to enter the competition through elections to be elected directly by the people.

With the removal of the authority of the DPRD for the election of Head of Regions and Deputy Head in the Law Number 22 of 2003 concerning the Composition and MPR, DPR, DPD and DPRD, has become the reason for implementation of a direct election for the Head of Regions. It is stated in the explanation of sub paragraph 4 of Law Number 32 of 2004 that the Head of Regions is the Head of the Regional Government which is elected democratically. Democratic election of the head of regions, bearing in mind that the duties and authority of the according to Law Number 22 of 2003 concerning the composition and

\textsuperscript{25}See, Article 201(7) of Law Number 8 of 2015.

Status of People's Consultative Assembly, Legislative Assembly, Regional Representative Council, and the Regional People's Representative Assembly, stated among other things that the DPRD has no longer duty and authority to elect the Head and Deputy Head of Regions. Therefore, then the democratic election in this Law is done by the people directly.

In amendment of Law Number 12 of 2008 in conjunction with Law Number 32 of 2004 on Regional Government, Article 59 paragraph 1b, it is mentioned that the candidate of head of regions can also be submitted from independent candidates supported by numbers of people.

The issuance of Law Number 1 of 2015 on Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 on the Election of Governors, Regents and Mayors as Law which was amended by Law Number 8 of 2015 on the Amendment of Law Number 1 of 2015 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 on the Election of Governors, Regents and Mayors into law, and the promulgation of Second Government Regulation in lieu of Law Number 2 of 2014 on the Amendment of Law Number 23 of 2014 concerning local government along with an explanation. This regulation contains two important points, namely: to remove tasks and authority of the DPRD to propose the appointment and dismissal of the Regent/Mayor and/or Vice Regent/Deputy Mayor to the Minister of Home Affairs through the Governor as the representative of the Central Government for approval the appointment and/or dismissal. This regulation has also directly eliminated legal uncertainty in the society.

The local elections should be included in the broad concept for the realization of a democratic local government. The shifting of the local elections from the representative system into a direct local election must be regarded as an effort to improve democratic local government. There are three reasons that justify that there is an influence of democratic local government which elected by the people on the performance of the local government, namely:

- Democratic local government can open more space for people to directly participate in political activities at the local level (*political equality*);
- Democratic local government prioritizes serving the public interest (*local accountability*);
o Democratic local government can improve the quality of social and economic development that based on the needs of local communities (*local responsiveness*).

After analyzing the regulation on local elections in the previous paragraphs, the meaning of democratic elections conducted in a direct election is the manifestation of the concept of democracy that has been mandated in Article 1 (2) of the 1945 Constitution which is considered closer to the essence of democracy. Thus, it can be argued that the model of direct election is part of realizing of democracy at the local level. This model must also be able to resolve the weaknesses of the practice of democracy in the past.

b. **Advantages and Disadvantages of Direct Election**

Local election, whether it is a direct or indirect election, has some advantages and disadvantages. Some advantages are as follows:27

i. People can participate directly in electing a leader in the region, so that it is in accordance with democratic principles.

ii. The elected Head of Region have stronger legitimacy, so that they can carry out their program more easily.

iii. Prevent the transactional politics in the DPRD.

However, there are also some disadvantages of direct election. They are as follows:28

i. The election will take a longer time and so that it is not effective and efficient.

ii. The election is not efficient because it uses a very much budget.

iii. There is no relevancy in terms of the position of governor in order to make the process of filling the post of Deputy Governor as the Central Government through direct elections. This is because regional autonomy is not at the provincial level, but at the level of district/municipality.

iv. There will be more potential and horizontal conflicts in communities large due to different supporters of candidate.

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Regarding the realizing of simultaneous local election, there are also some advantages and disadvantages of the simultaneous local election. They are as follows:

There are some advantages of the implementation of simultaneous local election: 29 First, the budget will be more efficient. The election costs that should be spent twice (the first budget to finance elections Regent/Mayor and the second budget to finance the election of the Governor) can be combined for one election only. The problem, of course, the budget will not only be the burden of the provincial budget, but also the Regency/Municipality budget.30

Second, there will be influence of the candidate of the Head of Region to the support of votes for the local parliament. Having this formula, the Head of Region will get enough political support in the DPRD.

Third, coalition of political parties that support the elected governor/regent/mayor are likely to maintain their coalition to compete in the local election of Governor/Regent/Mayor. As a result, there will be a more hierarchical and coordinated of government in different level in running the power.

Fourth, simultaneous local election will create more rational voters. This occurs because there will be a limited number of candidates, so that voters can vote carefully the candidate. This situation also because the coalition of political parties will be more clear and consistent.

Fifth, the Election Commission will easily manage and organize the implementation of the simultaneous local election. This is because the Election Commission will handle the process of local elections in one schedule.

29Ibid, p. 533.
30This has been done by the South Kalimantan Provincial Election Commission that held a general election in June 2005 when they combined with 7 Regency/City. They simply divided the budget by means of 60% is financed by Regency/City which carries out elections, and 40% funded by the provincial budget. Similarly, the Election Commission of North Sulawesi, held general elections in June 2005 combined with 3 Regency/City and to make distributions budget is financed 79.1% District/Municipial and Provincial Budgets 22.9% funded. West Sumatra Provincial KPU hold elections simultaneously with 10 District /City in June 2006, did the distribution of the budget by way of fees PPK, PPS, until the budget is borne KPPS Regency/City while operational costs borne by provincial budget. Bengkulu Provincial KPU had to organize a general election simultaneously with 5 Regency/City in June 2005, the distribution of the budget in a way all the costs of Governors’ election and Election District/City financed by local budgets. The district/city in last four provincial elections that are not held in the Regency/City, all fees charged to the provincial budget.
The simultaneous local election has also some disadvantages. They are as follows:\textsuperscript{31}

First, there will be more potential conflict and violence due to large numbers of population with heterogeneous society in term of groups, ethnic and religion.

Second, the simultaneous local election will need more security staffs to maintain the process of local election. The strength of the security forces were inadequate since the security forces will fully concentrate in each region.

Third, lack of political support from legislative organ on the elected government. Direct election with simultaneous local election can also produce the Governor and Regent/Mayor that they are not from a political party or coalition of political parties that dominant in parliament.

Fourth, there will be lack of synchronization between the policy of the Governor and Regent/ Mayor because they are from different political or coalition of political parties.

Fifth, the Election Commission and its staff will face difficulties in term of burden of management because the Commissioners have to supervise all regions in Indonesia.

Sixth, the Constitutional Court will receive many local election disputes from candidates who lost in the simultaneous local election. Based data of local election in December 2015, there are 144 local election disputes brought to the Constitutional Court.\textsuperscript{32} As a result, the Constitutional Court faced a heavy works to trial and decide the disputes.

5. Conclusion

Based on the above discussion, it can be summarized some conclusion as follows: First, there are several models of the local elections after political reform in 1999, namely:

i. Indirect Election. Based on Law Number 22 of 1999, Election of Heads of Regions and Deputy Head of Regions is elected by Parliament through and not simultaneous.

\textsuperscript{32}Election of the Head of Regions, taken from \url{http://infopilkada.kpu.go.id//}, asseced on February, 14, 2015 at 09.00 a.m.
ii. Direct Election. There are several variations of direct election models, namely:

a. Direct election without independent candidate and not simultaneous schedule. Based on Law Number 32 of 2004 Election of Heads of Regions and Deputy Head of Regions is elected by the people, there is no independent candidate, and and the implementation of the local election is not simultaneous.

b. Direct election with independent candidates. Based on Law Number 12 of 2008 Election of Head of Regions and Deputy Head of Regions held directly by the people, and the Law allows independent candidates to compete in the local election, and the implementation of the local election is not simultaneous.

c. Direct election with simultaneous local election. In this model, the local election is conducted by allowing independent candidates and using simultaneous schedule.

Second, the development and changes on the model election of Head of Regions and Deputy Head of Regions are influenced and determined by the pattern of the legislation specified in the applicable regime. In fact, the experience of Indonesia shows that the effort to modify the models of the local election is part of ways to develop and realize democracy at local level.

Third, the model of local election through a democratic election does not mean the election has to use a direct election. Democracy can also be run through a representative system chosen by Parliament. Democracy at the local level can be achieved by both models in accordance with the social conditions and any provisions in the Constitution.

Suggestions

Based on the problems that have been discussed, the study recommends that the government, with other competent institutions need to evaluate comprehensively the concept of a local election that will be held simultaneously, so that the implementation of local democracy can be realized in accordance with the essence of democracy itself.
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Satriawan, I. & Prasojo, B.P.**

Abstract

Minister of Home Affairs, Tjahjo Kumolo recently unveiled a plan to increase annual funding to a maximum of IDR 1 trillion (US$76.75 million) for each political party, a plan that could be feasible within five years, after the 2019 elections. The increasing of state funding for political parties is expected to support political parties a pillar of democracy and repair the image of politicians. The support currently allocated by the state is about IDR 108 per-valid vote to every party, and cannot comply with the need of huge political cost of political parties. The research aims to assess whether the political party funding allocated by the Government through National State Budget may strengthen the political party. The research is doctrinal research which uses a qualitative method. This paper provides an in-depth analysis and a critical examination on political party in details pertaining to the role of the Political party in Indonesia, the needs to increase the government allocation, and the challenges of the increasing of the allocation. The result of research shows that the funding of the political party through the National State Budget may strengthen the political party in Indonesia. Besides allocating the National State Budget for funding the political party annually, Indonesia should also strengthen the supervision of political party in terms of the accountability of the use of fund in carrying out its functions annually. Political Parties should have a clear commitment, transparency of income and expenditure and there should be firm sanctions on the political party that violates the laws.

Key words: political party, funding, democratic practice, political corruption

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1. Introduction

In Indonesian General Election 2014, political parties had spent very spectacular costs. Partai Demokrasi Indonesia Perjuangan spent around IDR 404 billion\(^1\), Partai Nasional Demokrat spent IDR 225 billion\(^2\), Partai Kebangkitan Bangsa spent IDR 61 billion\(^3\), Partai Keadilan Sejahtera with IDR 120 billion\(^4\), Partai Golongan Karya with IDR 402 billion\(^5\), Partai Gerakan Indonesia Raya with IDR 454 billion\(^6\), Partai Demokrat with IDR 307 billion\(^7\), Partai Amanat Nasional spent IDR 271 billion\(^8\), Partai Persatuan Pembangunan spent IDR 155 billion\(^9\), Partai Hati Nurani Rakyat spent IDR 362 billion\(^10\), Partai Bulan Bintang with the very small amount in around IDR 1,2 billion\(^11\), and Partai Keadilan dan Persatuan

\(^1\) See Hasil Audit Laporan Penerimaan dan Pengeluaran Partai Politik Peserta Pemilu 2014 Partai PDIP, downloaded in [http://kpu.go.id/koleksigambar/4_PDIP_%28OK%29_.pdf](http://kpu.go.id/koleksigambar/4_PDIP_%28OK%29_.pdf), at Tuesday, 26 October 2015, 11:42 A.M.
\(^2\) See Hasil Audit Laporan Penerimaan dan Pengeluaran Partai Politik Peserta Pemilu 2014 Partai Nasdem, downloaded in [http://kpu.go.id/koleksigambar/1_PARTAI_NasDem_%28OK%29_.pdf](http://kpu.go.id/koleksigambar/1_PARTAI_NasDem_%28OK%29_.pdf), at Tuesday, 26 October 2015, 11:42 A.M.
\(^3\) See Hasil Audit Laporan Penerimaan dan Pengeluaran Partai Politik Peserta Pemilu 2014 Partai PKB, downloaded in [http://kpu.go.id/koleksigambar/2_PKB_%28OK%29_.pdf](http://kpu.go.id/koleksigambar/2_PKB_%28OK%29_.pdf), at Tuesday, 26 October 2015, 11:43 A.M.
\(^4\) See Hasil Audit Laporan Penerimaan dan Pengeluaran Partai Politik Peserta Pemilu 2014 Partai PKS, downloaded in [http://kpu.go.id/koleksigambar/3_PKS_%28OK%29_.pdf](http://kpu.go.id/koleksigambar/3_PKS_%28OK%29_.pdf), at Tuesday, 26 October 2015, 11:45 A.M.
Indonesia spent IDR 8 billion\textsuperscript{12}. Those spectacular costs are wasted for participating in a General Election. The huge cost wasted is used for carrying out the activities of political parties, such as doing political campaign, political socialization and etc.

Political parties are pre- eminent institutions of modern democratic governance. The political parties play a central role in deepening and fostering democracy in both establishing as well as emerging democratic politics. This is aptly captured by the assertion that “political parties created democracy and modern democracy is unthinkable save in terms of the political parties”\textsuperscript{13}. The relevance of political parties in the organization of modern politics and governance is not a recent phenomenon of contemporary societies. Political parties have been part and parcel of political organization since the creation of the nation state.

According to Diamond\textsuperscript{14}, the importance of political parties lies in the functions they perform in modern democracies by linking citizens to government. In carrying out the tasks, the political party needs very huge funds. The funds, in dominant, are donated by the rich entrepreneurs, then the political party seems like “owned” by some people, and it will influence the objectivity and the performance of government, either when the candidates elected as the people representative or when the government want to make decisions and regulations. Not surprisingly, the policies, rules and products of elected officials seem "pro" to some interest groups. It becomes very ironic when Indonesia as the third largest democratic country in the world, after the USA and India, will disturb the democracy itself.

One way to ensure the political party as the pillar of democracy still remained in its corridor is by realizing how political party may be supported by the government, so that the party can carry out its function as the commander of democracy. The support can be in the form of restructuring the financial system of the party, while the legal sources of the fund is restricted to avoid the conflict of interest, so that the interests from the party barons may not influence the neutrality of the Government as well. In that way that it may be done through political party funding from the National State Budget. Based on the background explained above, the

\textsuperscript{12} See Hasil Audit Laporan Penerimaan dan Pengeluaran Partai Politik Peserta Pemilu 2014 Partai PKPI, downloaded in http://kpu.go.id/koleksigambar/15_PKPI_28OK%29.pdf, at Tuesday, 26 October 2015, 11:55 A.M.


study will assess whether the idea of political party’s funding from the National State Budget may strengthen the political party in performing its functions?

2. The Position of Political Party in Democratic System

Some conceptual works of scholars explicitly reviews the conceptual diversity of theoretical framing of democracy. Michael J. Sodaro, for example, defines democracy\(^\text{15}\) as: “The essential idea of democracy is that the people have the right to determine who governs them. In most cases they elect the principal governing officials and hold them accountable for their actions. Democracies also impose legal limits on the government’s authority by guaranteeing certain rights and freedoms to their citizens.”

Some scholar argued that the political party shall become very fundamental pillar in running the democracy, as like Schattscheider quote in 1942, “Political parties created democracy”. Schattscheider also gives an addition, “Modern democracy is unthinkable save in terms of the parties”.\(^\text{16}\) It is also in line with the statement of Yves Meny and Andrew Knapp, “A democratic system without political parties or with a single party is impossible or at any rate hard to imagine”.\(^\text{17}\)

According to Miriam Budiardjo, a political party has four functions, including:\(^\text{18}\)

a. political communication;

b. political socialization;

c. political recruitment; and

d. conflict management.

In a general sense, political education is the way how a nation transferring political culture from generation to generation.\(^\text{19}\) The purpose of political education can be observed from several aspects. First, the purpose of political education, observed from the cognitive aspect, is to build the knowledge of citizens about the basic concepts of politics and government. Second, from the affective aspects, the purpose is to establish the character of citizens in favor of the democratization and self-identity as a sovereign people. Third, from


the psychomotor aspect, the education is to build the intellectual and moral skills in creating a democratic Indonesia.

The other function of political parties is a means of political recruitment. Party is established to be a legitimate vehicle for selecting cadres at the level of head of state-level and a certain position. The last function of the parties is regulating and managing conflicts in society (as a means of conflict management). As a regulator and manager of the conflict, the party serves as a means of interest aggregation which distribute variety of different interests through institutional channels of party politics. Therefore, in the category made by Yves Meny and Andrew Knapp, conflict management functions can be associated with the integration function of political parties. Political parties aggregate and integrate diverse interests it by channeling their best to influence the policies of state politics.\textsuperscript{20}

3. The Current Issues of Political Party in Indonesia

The fund is still a major problem that hinders the implementation of the party functions optimally. Generally, in well-developed democratic countries, there are three policies to overcome the financial problems of political parties: (1) force the political parties to be transparent and accountable financial management; (2) limit the amount of donations to political parties, and; (3) provide financial assistance to political parties from the state budget, or financial subsidies to political parties.\textsuperscript{21}

Financial assistance given by the Government to the party currently is only 1.32% of the total need for parties annually, calculated based on the needs of the middle-party PAN in 2014 with the need of £ 51.2 Billion per year. The amount of financial assistance of political parties of IDR 108 per vote is considered as too small by a political party. But the total need of the political party per-year has never been known, because the political parties have never opened in this matter.\textsuperscript{22}

\textsuperscript{20} Meny dan Knapp, op cit.
\textsuperscript{21} Didik Supriyanto and Lia Wulandari, 2012, BANTUAN KEUANGAN PARTAI POLITIK: Metode Penetapan Besaran, Transparansi, dan Akuntabilitas Pengelolaan, Jakarta: Yayasan PERLUDEM. p
Table 1. Financial Assistance for Political Parties 2014 (Rp 108 per-vote)

<table>
<thead>
<tr>
<th>Partai Politik</th>
<th>Jumlah Kursi</th>
<th>Jumlah Suara</th>
<th>Jumlah Subsidi (IDR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>PDIP</td>
<td>109</td>
<td>23.681.471</td>
<td>2.557.598.868,-</td>
</tr>
<tr>
<td>Partai Golkar</td>
<td>91</td>
<td>18.432.312</td>
<td>1.990.689.696,-</td>
</tr>
<tr>
<td>Partai Gerindra</td>
<td>73</td>
<td>14.760.371</td>
<td>1.594.120.068,-</td>
</tr>
<tr>
<td>Partai Demokrat</td>
<td>61</td>
<td>12.728.913</td>
<td>1.374.722.604,-</td>
</tr>
<tr>
<td>PAN</td>
<td>49</td>
<td>9.481.913</td>
<td>1.024.015.068,-</td>
</tr>
<tr>
<td>PKB</td>
<td>47</td>
<td>11.298.957</td>
<td>1.220.287.356,-</td>
</tr>
<tr>
<td>PKS</td>
<td>40</td>
<td>8.480.204</td>
<td>915.862.032,-</td>
</tr>
<tr>
<td>PPP</td>
<td>39</td>
<td>8.157.488</td>
<td>881.088.704,-</td>
</tr>
<tr>
<td>Nasdem</td>
<td>35</td>
<td>8.402.812</td>
<td>907.503.696,-</td>
</tr>
<tr>
<td>Hanura</td>
<td>16</td>
<td>6.579.498</td>
<td>710.585.784,-</td>
</tr>
<tr>
<td><strong>Jumlah</strong></td>
<td></td>
<td><strong>13.176.393.876,-</strong></td>
<td></td>
</tr>
</tbody>
</table>

Source: Ministry of Home Affairs Office

As the election machine, the main function of a political party is trying to win the votes as much as possible. But in carrying out this function, political parties face a difficult situation, because to win the election they need a lot of money. Yet at the same time the party will be diminishing membership dues. To deal with this problem, political parties have to look for donations. However, because of the number of members who are able to contribute are limited, political parties received donations from individuals and non-members. Finally, in order to meet the growing need of political parties receiving donations from legal entities, particularly business institutions or companies.23

Moreover, the political parties ignore the principle of transparency and accountability in financial management of political parties. The law – which is made by the cadres of political parties in the parliament and government – has not been set completely. As a result, data in October 2014, shows that public trust to political parties and the House of Representatives is in the range of 40 percent.\textsuperscript{24} The negative perception of this community seems to correlate with what was envisaged and visible to the public on the behavior or information to the public about the political parties and politicians. Indonesian Corruption Watch (ICW) highlighted the openness of political parties in financial governance as an acute problem in the management of central and local level. The political parties do not show the financial statements are usually due to non-cadre contributors, who want his identity disclosed because they usually do not just donate money to one party. The fundamental problem of financial information disclosure political parties also appear from nothing official information and documentation (PPID) owned by political parties.\textsuperscript{25}

4. The Comparative Survey

In facing the party's dilemma situation described above, since the 1970s gradually, the countries of Western Europe apply two policies: first, to restrict individual and company donations to political parties; second, provide financial assistance or financial subsidies to political parties, both for operational activities of political parties, and campaign activities. In order for the policy was running well, the political parties are required to make annual financial reports of political parties and campaign finance reports after the election is finished. Both reports are an instrument to force the political parties to uphold the principles of transparency and accountability in financial management of political parties.\textsuperscript{26}

In analyzing how to strengthen democracy and political parties in Indonesia, Indonesia can review and make a comparative study with the countries that have managed to improve the quality of democracy through the funding of political parties by the state budget, namely Federal Republic of Germany.

\textsuperscript{25} Ibid.
\textsuperscript{26} Ingrid van Biezen, 2003, Financing Political Parties and Election Campaigns Guideline, Strasbourg: Council of Europe Publishing.
In Germany, political parties receive considerable public support. The basis for this support lies in the Constitution of the Federal Republic of Germany where parties are defined as central institutions of a democratic political system. The party’s internal organization shall conform to democratic principles. Parties shall publicly account for the sources and the use of their funds and for the assets.\textsuperscript{27}

The present form of party finance is governed by the amendment of the Law on Parties in 1994. This legislation stipulates the following: Each party which obtained more than 0.5\% of the votes in the last elections to the European Parliament or to the German Bundestag or more than 1\% of the votes in elections to the parliaments of the states (Bundesländer) is entitled to state funding.\textsuperscript{28} These public funds may, however, not exceed 50\% of the party’s total income. State funds are paid on an annual basis and there are two decisive factors that determine the calculation of the amount granted:\textsuperscript{29}

i. The average of votes obtained in the last three elections; for each vote obtained, the parties receive 0.85 € (59p) per year up to the first 4 million of votes and 0.70 € (48p) for each additional vote.

ii. A complementation of other party income (from member contributions, donations, contributions payable by MPs) at a ratio of 0.38 € (26p) state finance to 1 € of own income.

This price index shall be based, with a weighting factor of 70 percent, on the general consumer price index and, with 30 percent, on the standard monthly salaries of employees of central, regional and local governments.\textsuperscript{30} The burden placed on the taxpayer by this system is rather limited: Since the mid of 1990s an upper limit of € 133m\textsuperscript{31} has been imposed on the total amount of public party funding; this equals an annual sum of 1.66 € (1.115 £) per German citizen.

\textsuperscript{27} Article 21 (Political Parties) Par. 1, Germany Basic Law
\textsuperscript{29} Article 18 (3) of Political Parties Act 1992
\textsuperscript{30} Article 18 (6) of Political Parties Act 1992
\textsuperscript{31} Article 18 (2) of Political Parties Act 1992
In 2004, the major German parties received the following subsidies from public sources:\(^{32}\)

<table>
<thead>
<tr>
<th>Parties</th>
<th>Subsidies</th>
</tr>
</thead>
<tbody>
<tr>
<td>CDU/CSU</td>
<td>€ 55.8m (£ 38.7m)</td>
</tr>
<tr>
<td>SPD</td>
<td>€ 43.77m (£ 30.3m)</td>
</tr>
<tr>
<td>Liberals (FDP)</td>
<td>€ 9.6m (£ 6.7m)</td>
</tr>
<tr>
<td>Green Party</td>
<td>€ 9.55m (£6.6m)</td>
</tr>
<tr>
<td>Left Party</td>
<td>€ 8.52m. (£ 5.9m)</td>
</tr>
</tbody>
</table>

The funding shall be paid in installments on the amount to be determined by the President of the German Bundestag. Such payments shall be calculated on the basis of the amounts allocated to each party in the previous year. The installment shall be paid on 15 February, 15 May, 15 August and 15 November.\(^{33}\) At the end of the calendar year (accounting year), the party’s Executive Committee shall, truthfully and to the best of its knowledge and belief, publicly account for the origin and use of funds and the party’s assets in a statement of accounts.\(^{34}\)

Their statements of accounts shall be signed by the chairperson and an Executive Committee member responsible for financial matters and elected by the party convention, or by an Executive Committee member elected by a body responsible, under the statutes, for the party’s financial matters. These Executive Committee members shall, by their signature, affirm that the information in their statements of accounts has been given truthfully and to the best of their knowledge and belief.\(^{35}\)

The statement of accounts must be audited by a certified auditor or an auditing firm in accordance with the provisions of the Political Parties Act. If the President of the German Bundestag has concrete evidence that any information contained in a party’s statement of accounts is inaccurate, he/she shall give the party concerned an opportunity to comment. The

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\(^{33}\) Section 20 (1) of Political Parties Act 1992

\(^{34}\) Section 23 (1) of Political Parties Act 1992

\(^{35}\) Ibid.
President may require the political party to have its certified auditor or auditing firm, its sworn accountant or accountancy firm confirm that its comments are correct. The political party shall permit the certified auditor appointed by the President of the German Bundestag to access and inspect the records and supporting documents required for the audit.

If a statement of accounts contains inaccuracies, the political party concerned shall correct that statement and, as decided by the President of the German Bundestag, shall resubmit part or all of its statement of accounts. This resubmitted statement must be confirmed by an audit certificate issued by a certified auditor or an auditing firm, a sworn accountant or an accountancy firm. The statement of accounts shall consist of an accountancy summary prepared on the basis of an income/expenditure tabulation complying with the provisions of the present Act, a related asset and liability statement, and an explanatory part. The statement of accounts shall provide information on the origin and use of funds and on the party’s assets.

All items of income shall be entered in full in the appropriate place and shall be included in the asset and liability statement. Income accounting shall cover:

i. membership dues;
ii. contributions paid by elected office-holders and similar regular contributions;
iii. donations from natural persons;
iv. donations from legal persons;
v. income from business activities and participating interests in companies;
vi. income from other assets;
vii. receipts from organized events, distribution of printed material and publications and from other income-yielding activities;
viii. public funds;
ix. any other receipts;
x. grants received from party branches; and
xi. total income, as an aggregate of nos. 1 to 10.

36 Section 23 (2) of Political Parties Act 1992
37 Section 23 (3) of Political Parties Act 1992
38 Section 23 (5) of Political Parties Act 1992
39 Section 24 (1) of Political Parties Act 1992
40 Section 24 (4) of Political Parties Act 1992
Expenditure accounting shall cover:

a. personnel-related expenditure;
b. operating expenditure
   i. on day-to-day business,
   ii. on general political work,
   iii. on election campaigns,
   iv. on asset management, including any interest accruing therefrom,
   v. other interest,
   vi. other expenses;
c. grants payable to party branches; and
d. total expenditure, as an aggregate of no. 1 to 3.

The asset and liability statement shall cover:

1. assets owned:
   A. capital assets:
      I. tangible assets:
         1. real estate,
         2. branch office furnishings and equipment,
      II. financial assets:
         1. participating interests in companies,
         2. other financial investments;
   B. working assets:
      I. receivables from party branches,
      II. amounts receivable under state-provided partial funding,
      III. money holdings,
   IV. other types of assets;
   C. total of assets owned (sum of A and B);
2. accounts payable:
   A. reserve funds:

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41 Section 24 (5) of Political Parties Act 1992
42 Section 24 (6) of Political Parties Act 1992
I. reserves for pensions,
II. other reserves/provisions;
B. liabilities:
I. amounts owed to party branches,
II. repayment obligations with regard to state-provided partial funding,
III. amounts owed to credit institutions,
IV. amounts owed to other lenders,
V. other liabilities;
C. total debits (sum of A and B);
3. Net assets (positive or negative).

An explanatory part shall be appended to the asset and liability statement which must cover the following items, in particular:\footnote{43}
a. A list of the participating interests in companies including the following information for each case: name and address, the share and the amount of the nominal capital and, in addition, the share in the capital, the equity capital, and the results recorded by these companies during the last business year for which an annual financial statement has been prepared.
b. Designation of the main products of media enterprises if the respective political party has any participating interests in such enterprises;
c. At five-year intervals, a valuation of the real estate property and of the participating interests in enterprises as stipulated in the Property Valuation Act.

The sum of contributions made by natural persons up to the amount of 3,300 euros per person and the sum of those contributions by natural persons which exceed the amount of 3,300 euros shall be shown separately in the statement of accounts.\footnote{44} The statement of accounts shall be preceded by a summary as follows:\footnote{45}
A. receipts by the political party as a whole as listed, and the total income;
B. expenditure by the political party as a whole as listed, and total expenditures;

\footnote{43}{Section 24 (7) of Political Parties Act 1992}
\footnote{44}{Section 24 (8) of Political Parties Act 1992}
\footnote{45}{Section 24 (9) of Political Parties Act 1992}
C. indication of surpluses or deficits;
D. assets owned by the political party as a whole as listed, and their total;
E. debits of the political party as a whole as listed, and their total;
F. net assets of the political party as a whole (positive or negative);
G. total income, total expenditure, surpluses or deficits, and the net assets of the three organizational tiers: national-level [“federal”] branch, Land branches and their subordinate regional/local branches.

The number of members as of 31 December of the accounting year shall be indicated.46 Political parties are entitled to accept donations. Donations of up to 1,000 euros may be made in cash. Party members who receive donations on behalf of their party shall immediately pass them on to an Executive Committee member who, under the party statutes, is responsible for the party’s financial matters.47

The following shall be excluded from the right of political parties to accept donations:48

i. donations from public corporations, parliamentary parties and groups and from parliamentary groups of municipal councils (local assemblies);
ii. donations from political foundations, corporate entities, associations of persons and from estates which under the statutes, the foundation charter or other dispositions governing the constitution of such entities, and by the actual business conducted by such entities, are exclusively and directly intended for non-profit, charitable or church purposes;
iii. donations from sources outside the territorial scope of this Act unless:
   a. these donations accrue directly to a political party from the assets of a German as defined by the Basic Law, of a citizen of the European Union, or of a business enterprise, of whose shares more than 50 per cent are owned by Germans as defined by the Basic Law or by a citizen of the European Union or whose registered office is located in a Member State of the European Union;

46 Section 24 (10) of Political Parties Act 1992
47 Section 25 (1) of Political Parties Act 1992
48 Section 25 (2) of Political Parties Act 1992
b. they are donations transferred to parties of national minorities in their traditional settlement areas from countries which are adjacent to the Federal Republic of Germany and where members of their ethnic group live; or

c. it is a donation not exceeding 1,000 euros made by a foreigner;

iv. donations from professional organizations, which were made to the latter subject to the proviso that such funds be passed on to a political party;

v. donations from enterprises that are fully or partly in public ownership or are managed or operated by public agencies if the state’s direct participation amounts to more than 25 per cent;

vi. any donations exceeding 500 euros each, which are made by an unidentified donor or which evidently are passed on as a donation by unnamed third parties;

vii. donations evidently made in the expectation of, or in return for, some specific financial or political advantage;

viii. donations solicited by a third party against a fee to be paid by the political party and amounting to more than 25 per cent of the value of the solicited donation.

Single donations in excess of 50,000 euros shall be reported immediately to the President of the German Bundestag. The latter shall in a timely manner publish the donation, together with the donor’s name, as a Bundestag printed paper.49 Beside the donations from person, there is also membership dues which shall only be those regular money payments that a member makes in accordance with the pertinent provisions of the party statutes. Contributions paid by elected representatives shall be regular money payments made by a holder of an elected public office (elected representative/official) in addition to his/her membership dues.50

The audit shall apply to the party’s national-level [“federal“] branch, its Land branches and to at least ten lower-level regional/local branches as selected by the auditor. The audit shall verify compliance with the relevant legal provisions. The audit method used shall be aimed at ensuring that inaccuracies and infringements of legal provisions will be detected if the audit is performed with due professional care.51

49 Section 25 (3) of Political Parties Act 1992
50 Section 27 (1) of Political Parties Act 1992
51 Section 29 (1) of Political Parties Act 1992
The auditor may require the Executive Committees and the persons duly authorized by them to furnish clarifying information and documentary proof needed for diligent performance of his/her auditing duty. To this end, the auditor shall also be allowed to examine the records used for compiling a statement of accounts, the accounting books and written documents as well as the cash holdings and existing assets.52

The auditor shall confirm by means of a certificate that, as established by an audit properly performed to the extent required and based on the party’s account books and documents and on the clarifying information and documentary proof furnished by the Executive Committees, the statement of accounts complies with the provisions of the present Act.53

A certified auditor or sworn accountant may not be an auditor if he/she:54

i. holds an office or discharges a function within or for the given political party or has per-formed such duties of an office or such a function during the past three years;

ii. has, in addition to his/her auditing duties, also taken part in bookkeeping or in the drafting of the statement of accounts submitted for auditing;

iii. is a legal representative, an employee, a member of the supervisory board or a partner of a legal or natural person or of a partnership, or the owner of an enterprise if such legal or natural person or partnership or one of its partners or the enterprise concerned is not allowed, under number 2, to be the auditor for that political party;

iv. employs a person for the audit who, under numbers 1 to 3 above, is not allowed to be an auditor

In Germany, when the parties do not obey the rule of the political parties funding, either administratively or technically, will arise the sanction both in administrative and criminal for the forbidden action. In administrative matters, there will be sanction for the following actions:

i. If contributions and donations were untruthfully stated in the statement of accounts and, as a result, the amount of public funds to be allotted to the political party was wrongly determined, the President of the German Bundestag shall revoke the decision made pursuant

52 Section 29 (2) of Political Parties Act 1992
53 Section 30 (2) of Political Parties Act 1992
54 Section 31 (1) of Political Parties Act 1992
to Section 19a paragraph 1 on the amount of public funds to be disbursed.\textsuperscript{55} In the revocation notice, the President of the German Bundestag shall, by an administrative act, set the amount to be reimbursed by the political party\textsuperscript{56};

ii. If the President of the German Bundestag detects inaccuracies in the statement of accounts, the political party shall be liable to pay twice the amount of the wrongly stated sum. If inaccuracies in the asset and liability statement or in the explanatory part refer to real assets or to participating interests in companies, the party’s liability shall amount to 10 per cent of the value of the assets not included or listed inaccurately. The President shall determine the party’s liability to pay the respective amount by an administrative act\textsuperscript{57};

iii. A political party which, in contravention of Section 25 paragraph 2, has accepted donations and not remitted them to the President of the German Bundestag shall be liable to pay three times the amount of the illegally obtained sum of money; donations already remitted shall be deducted from the payable amount. A party which fails to publish donations in its statement of accounts in accordance with the provisions of the parties’ act shall be liable to pay twice the amount of the sum not disclosed as prescribed by the present Act. The President shall, by an administrative act, determine the party’s liability to pay the respective amount.\textsuperscript{58} By agreement with the Presidium of the German Bundestag, the President of the German Bundestag shall, at the beginning of the following calendar year, transfer the funds received within a calendar year to institutions serving charitable, church, religious or scientific purposes.

Furthermore, the act regulates that:

1. whosoever, with the intent of concealing the origin or the use of the party’s funds or assets or evading the obligation to render public account:
   a. causes inaccurate data on the party’s income or assets to be included in a statement of accounts submitted to the President of the German Bundestag, or submits an inaccurate statement of accounts to the President of the German Bundestag; or

\textsuperscript{55} Section 31a (1) of Political Parties Act 1992
\textsuperscript{56} Section 31a (3) of Political Parties Act 1992
\textsuperscript{57} Section 31b of Political Parties Act 1992
\textsuperscript{58} Article 31c (1) of Political Parties Act 1992
b. as a recipient, divides a donation into smaller amounts and enters them into the books or has them posted by others; or

c. in violation of Section 25 paragraph 1, 3rd sentence, does not remit a donation;
shall be liable to imprisonment of up to three years or to a fine. No one shall be subject to a penalty as stipulated under the 1st sentence of this paragraph if, under the conditions set forth in Section 23b paragraph 2, they report the fact on behalf of the party pursuant to Section 23b paragraph 1 or help to report the fact.⁵⁹

2. Whosoever, as an auditor or an auditor’s assistant, gives a false report on the result of the audit of a statement of accounts, fails to disclose relevant facts in the audit report or issues an audit certificate containing false information shall be liable to imprisonment of up to three years or to a fine. If offenders act against payment or with the intent of enriching themselves or a third person or of harming another person, the penalty shall be imprisonment of up to five years or a fine.⁶⁰

5. The Role of the National State Budget in Strengthening the Political Party

Law No. 2 of 2011 on Political Parties states that the financial resources of a political party comprised of three sources, namely membership dues, donations and subsidies from the lawful state and local budgets. Donations legitimate given by various entities - which incidentally is a great company - are likely to contribute to the purpose can perform the control of the government, thus simplifying the acquisition of resource-rich under the control of state-owned enterprises to be taken advantage personally and enrich themselves at the expense of people and the quality of governance.

This is what should be avoided by Indonesia to prevent the entry of interest groups that destroy and degrade the quality of democracy in Indonesia. One way to overcome this problem is to maximize other sources of funding and reinforce the filter influx of illegal funds. Maximizing the role and functions of the state budget is an alternative way that can be done after looking at other countries that have successfully improved the quality of democracy by maximizing state funds. There are several reasons why the budget to alternative sources of funds both for the strengthening of political parties.

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⁵⁹ Article 31d (1) of Political Parties Act 1992
⁶⁰ Article 31d (2) of Political Parties Act 1992
In consideration of Law No. 3 Year 2015 on State Budget Amendment 2015 (a) stated "Budget of the State prepared according to the needs governance management, in order to achieve Indonesia that is safe and peaceful, fair and democratic, improving people's welfare and balancing progress and national economic unity."

In its consideration, the budget is drawn up in line with the needs of state administration. Implementation of democratic state within the meaning of Article 1 (2) UUD 1945 has made implications that the elections and the party system as one of the characteristics of a democratic state should be one of the priorities in the administration of the state. Therefore, the shape of the state administration should be one of his priorities is to finance (although partial) political party in Indonesia. The political party that creates democracy, and if the main pillars of democracy is brittle without reinforcement through funding from the greatest financial resources in the country, then democracy in Indonesia would be crippled.

In its objectives, the state budget is intended to achieve Indonesia that is safe, fair and democratic, and improve the welfare of society and maintain the balance of the Indonesian economy. According to Marcus, there is a correlation between the levels of corruption with the issue of party funding. Corruption begins lot of fundraising for party funding. If the party funding system remains in use, the tendency for corruption also survives and rises without insurmountable.

In line with point (a) consideration of the Political Parties Act No. 2 of 2011 that, "In order to strengthen democracy and the implementation of an effective party system in accordance with the mandate of the Constitution of the Republic of Indonesia of 1945, required strengthening the institution of and improving the function and role of Political Parties. Funding is intended to strengthen political party funding to perform its functions, which can become a tool of repairing and strengthening the institution of political parties become the party with good quality and effective, a strong institutional and clean, good recruitment tool, able to carry out the mandate of democracy with more wise and mature, fostering cadres which could lead to a better Indonesia.

61 The view was conveyed by the Political Researchers from the Australian National University, Marcus Meitzner, while giving his advice to the Ministry of Home Affairs in Jakarta, Monday, April 27th 2015, accessed in http://politik.news.viva.co.id/news/read/619138-berapa-angka-ideal-dana-parpol-dari-apbn,- at Sunday, 13 March 2016, 11:56 A.M.
The form of strengthening and funding to political parties that will be implemented by Indonesia could be modeled on the political party management methods has applied in Germany. First, the number of allocation of funds are in the range 1/3 of the needs of political parties per year, which amount is determined based on the number of votes the party obtained at the national level and the price per vote is determined based on the national minimum wage. The partial funding system also enhance the independence of political parties in the process and encourage the parties to be able to maximize other funding sources without relying entirely on a single funding source.

There are some steps that must be done by Indonesia to increase funding for political parties is as follows: Changing the formula for determining the price of a vote and make the Minimum Wage as Benchmark: vote for better pricing associated with the unit which is already familiar economic calculation, so that it can be accepted by common sense. In some countries, the pricing of voice using the minimum wage is a benchmark. Because the minimum wage may change each year and are different in each region, then the price of a vote could change every year and are different in each region.

Application of the principle of transparency requires that political parties are open to all political party financial management processes. There are obligations that must be run by a political party, such as opening the list of contributors and financial reports on a regular basis that record all income and expenditure of political parties throughout the year. The purpose of opening the list of contributors and financial reports to the public is to examine the principle of accountability that ensures the responsibility of political parties in the process of receiving and spending of political party funding is rational ethically and do not break the rules.

6. Conclusion

Based on the analysis above, the research concluded that the funding of the political party through the National State Budget may strengthen the political party in Indonesia. This implication can be seen in countries that in advance implemented a system of funding the political parties, namely the Federal Republic of Germany. Germany has successfully helped political parties to function properly through state subsidies, and helped to avoid the inclusion of the interests of groups and become independent party.
Besides allocating the National State Budget for funding the political party annually, Indonesia should also strengthen the supervision of political party in terms of the accountability of the use of fund spent over the party in carrying out its functions annually. Parties should clearly commit transparency of income and expenditure spent by the parties per year in complete, and apply firm sanctions on the party that violates, both administrative and criminal.

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CONSTITUTIONAL DEMOCRACY AND ADJUDICATION:
A COMPARISON OF CONSTITUTIONAL ADJUDICATION INSTITUTIONS
IN MALAYSIA AND INDONESIA

Satriawan, I.*, Mokhtar, K.A.” & Nur Islami, M.””

Abstract

The experience of some countries shows that parliamentary sovereignty creates problems of hegemony of majority which has the potential to ignore minority. One of democratic responses to the evil of the majority is the emergence of the concept of constitutional democracy. The tyranny of majority against the rights of the minority is warded off by constitutional safeguards enforced primarily by the court. This is one of the reasons why Malaysia and Indonesia adopt the doctrine of constitutional supremacy when they achieved independence in 1957 and in 1945 respectively. In spite of close proximity in terms of territory and sharing cultural and historical heritages the two countries have fundamental structural constitutional differences. This paper aims at comparing constitutional adjudication as one of the mechanisms of constitutional democracy in both countries. The establishment of the Indonesian Constitutional Court in 2003, and the functions of the superior courts in Malaysia are part of realizing the goal of the rule of law state and democracy. The courts have the objectives of striving for a dignified life of the nations, and perform as actors of exercising judicial review. The courts in both countries play the role as check and balance mechanisms of the main organs in their constitutional and political systems. Each country has a different model of constitutional adjudication. Malaysia follows the common law

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model which functions the superior courts as organs of the constitutional adjudications, while Indonesia follows kelsenian model by establishing a separate new court, namely the Constitutional Court. This paper intends to observe the establishment, role and power of constitutional adjudications institutions of both countries. The development and experiences of the institutions in both countries not only shed more lights of constitutional democracy within the two countries, (but also influenced) the process of democratic consolidation in the region.

**Keywords**: constitution, constitutional adjudication, constitutional court, democracy

1. **Introduction**

Throughout the history of mankind, the idea of higher and more fundamental law to which all acts of the state must conform has had long tradition. With the emergence of written constitutions in the modern era, the constitution was understood to be the embodiment of such higher and more fundamental law. This provided the theoretical basis for the system of constitutional adjudication which allows for the overruling of operations of the state that do not conform to the constitution. The experience in particular countries shows that parliamentary sovereignty also create problem of hegemony of majority which has potentiality to ignore minority. Therefore, the concept of constitutional democracy emerged to control the tyranny of majority.

Malaysia and Indonesia adopted the doctrine of constitutional democracy since they declared their independence in 1957 and in 1945. This doctrine emphasizes that parliament as the representative of the will of people is subjected to the supremacy of the constitution as the supreme law of the nation. The establishment of the Constitutional Court in Indonesia in 2003 and the function of the superior courts in Malaysia is a part of realizing the concept of constitutional democracy state.

Among the countries of Asia, Korea in 1988 became the first to adopt the system of a specialized constitutional court. In 1990s, many others followed suit: the Central Asian states of

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855 Annual Report, Twenty Years of Constitutional Court of Korea, 2008, at 65.
Uzbekistan, Kazakhstan, Kyrgyzstan as well as Mongolia and Thailand all established constitutional courts. Since the political revolution of 1989, the Central and Eastern European states have embraced judicial review as a means of promoting the supremacy of constitutional values and protecting fundamental rights. Nearly all Central and Eastern European nations have established constitutional courts modeled after the constitutional courts in Western Europe. After the fall of the Soviet Union, for instance, newly democratizing states in Eastern Europe such as Hungary, Romania, Bulgaria, Slovenia, Lithuania, Slovakia, Albania, the Czech Republic, and Russia opted for this system as they drew up new constitutions. In Africa, a constitutional court was established in South Africa after its constitutional revision in 1996. Similarly, in Latin America, Colombia and Chile have established constitutional courts.

In August 2003 Indonesia also established its constitutional court as the result of the Amendment of 1945 Constitution. The emergence of the constitutional courts in Indonesia was the resultant of political reform and judicial history of the country. Meanwhile, Malaysia functions the superior courts as institutions which facilitate the citizen to bring constitutional adjudication to the courts. This paper will elaborate the establishment, the role and the power of the constitutional adjudication institution in both countries. To deepen the description, the paper will compare the constitutional adjudication in both countries.

2. Constitutional Democracy and Constitutional Adjudication

Historically, constitutional adjudication is much older and more deeply entrenched in the United States than in Europe. Judicial review as a part of constitutional issues has been implemented continuously in the United States since the Supreme Court’s landmark decision in Marbury v. Madison, 5 U.S. 137 (1803). While constitutional review in Europe, however, is

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856 The Kazakhstan later replaced “constitutional court” with “a constitutional council”.
858 Annual Report, 20 Years of Constitutional Court of Korea, 2008, at 66.
859 Ibid.
largely a post–World War II phenomenon. In pre–World War II in Europe, democratic constitutions could typically be revised at the discretion of the legislature. They prohibited review of the legality of statutes by the judiciary and they did not contain substantive constraints, such as rights, on the legislative authority. The rule of legislative supremacy meant that conflicts between a statute and a constitutional norm were to be either ignored by judges, or resolved in favor of the former. One of the remarkable political developments of the twentieth century has been the development of constitutional democracy in Europe after World War II. The defeated powers in the western part of continent adopted new constitutions that embrace notions of individual rights and limited government. In other words, since the end of World War II, ‘a new constitutionalism’ has emerged and widely diffused. Human rights have been codified and given a privileged place in the constitutional law and quasi-judicial organs called constitutional courts have been charged with ensuring the normative superiority of the constitution. Such courts have been established in Austria (1945), Italy (1948), the Federal Republic Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985), and after 1989, in the post-Communist Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, the Baltic’s, and several states of the former Yugoslavia.

3. The Conceptual Ground of Constitutional Adjudication

Kelsenderives the origins of judicial power to review legislation from argument of constitution as the supreme law of a country. He emphasizes that the supremacy is not real unless there is review. Without review, the constitution is not truly binding. Troper also argues that constitution is a supreme as positive law and to safeguard the supremacy of constitution, it

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863 Alec Stone Sweet, n. 9, at 31.
necessitates review.\textsuperscript{865} In his conclusion, Tremblay stated that the supremacy of the Constitution entails judicial supremacy. The courts determine the constitutional standards and examine whether the regimes can meet the standards.\textsuperscript{866} Judicial Review is justified for its role in correcting ‘malfunctions’ in democratic government that entrench the powerful or disregard minorities.\textsuperscript{867} Lord Woolf also states that judicial review needs to be set in the context of mechanism which seeks to achieve broader political accountability.\textsuperscript{868} The bases of constitutional adjudication in democratic countries are as follows:

### 3.1 Constitutional Adjudication as Insurance

The conventional move to solve the problem of courts in democratic theory is to celebrate the role of judicial review in democracy as a check on majority power. Judicial power in this view can facilitate the democratic process by clearing out obstacles to its advancement. Such obstacles can emerge, for example, through majority impositions on the electoral process: It may be in the narrow self-interest of permanent majorities to disenfranchise political minorities, who then have no recourse through ordinary legislative processes. In such instance of systemic failure, the courts can clear the channels of the political process by striking statutes. By serving as a counter-majoritarian institution, judicial review can ensure that minorities remain part of the system, bolster legitimacy, and save democracy from itself.\textsuperscript{869} In other words, constitutional adjudication can perform as the protector of minorities’ interests from hegemony of majority in the legislation process.

\textsuperscript{865} Ibid.


\textsuperscript{868} See further Lord Woolf and et al, \textit{De Smith’s Judicial Review}, Sweet and Maxwell, 2007, at 6. In this book, the writers further explain that in some cases, the courts have regarded Parliament’s ability to call ministers to account for their decisions as a reason to be wary of intervening to scrutinize the lawfulness of an impugned action or omission, or at least as a fact shaping the development of the common law.

\textsuperscript{869} Ibid, at 21-22.
Judicial review can be a part of effective insurance in warning the politicians to perform his duty as the representative of people, to guarantee the fundamental rights of citizens and to work checks and balances mechanism between the judiciary and parliament. Having this function, judicial review can be considered as an important vehicle to maintain the quality of democracy in the light of the spirit of the constitution as the supreme consensus of the nation.

### 3.2 Constitutional Adjudication as State Mediator or Facilitator

The existence of the Constitutional Court could be understood from two aspects, namely political aspect and legal aspect. From the political aspect, the Constitutional Court is an effort to construct checks and balances mechanism among state institutions in the light of principle of democracy. This is in line with the powers of the Constitutional Court which has authority to review acts enacted by parliament and also decide disputes among state institutions. Parliament sometimes enacts laws which lead conflicts among state institutions. Therefore, through its authority, the constitutional court may settle the disputes among state institutions. Democracy, in theory and practice, is based on principle of majority rules. However, this principle could be also a threat for democracy because majority also has potentiality to abuse powers if it is not controlled or limited. Therefore, it should be a rational limitation to guarantee the working of democracy itself. In this sense, judicial review-through the Constitutional Court is one of mechanism to overcome the weakness of traditional democracy.

The development of modern states in a few decades has prompted complexity of the concept of separation of powers. This situation could create conflicts among state institutions. Hence, the Constitutional Court, through its powers, has important role in settling the disputes among the state institutions. By having this authority, the court may perform significant role in ensuring the working of effective democracy.

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871 Ibid.
872 Ibid.
3.3 Constitutional Courts as Strategic Actors

The development of constitutional review has transformed the role of and the function of the law courts, a development that some European legal scholars refer to as ‘the constitutionalization of the law’, or the ‘constitutionalization of the legal order’. Sweet further asserted that by constitutionalization, (1) constitutional norms come to constitute a source of law, capable of being invoked by litigators and applied by ordinary judges to resolve legal disputes, and (2) the techniques of constitutional decision-making become an important mode of argumentation and decision-making in the judicial system.873

This study is drawn on positive theories of courts and law that see the law as the product of interactions among various political institutions. Courts are assumed to maximize their substantive values and in doing so can be considered rational institutions in the broad sense of attempting to reach their goals. However, courts are not the only law-making institutions in a political system, so their ability to achieve particular outcomes is in part dependent on the preferences of other actors. For example, a legislature can overrule a judicial interpretation of a particular statute by passing a subsequent statute. In some systems, there exists a special procedure by which the court’s constitutional decisions may be reviewed by other branches of government. Executive agencies can refuse to implement judicial decisions. Political branches can also affect judicial decisions through the appointment process. Through these various mechanisms of interaction with political actors, courts participate in constitutional “dialogues” with other forces, dialogues that create a shared understanding of what the constitution says over time.874 In simple words, it may state the court could be a part of important actors in the political dialogues with other political branches in the light of finding the true meaning of the constitution.

An old proverb says that when elephants fight, the grass gets trampled and so is it with political conflict and democracy. When a political conflict becomes severe, democracy can be trampled by political institutions run amok. By transforming a political conflict into constitutional dialogues, courts can reduce the threat to democracy and allow it to grow. To play

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873 Alec Stone Sweet, n.9, at 114.
this important role of contributing to democratic stability and deliberation, courts must develop their own power over time. Accordingly, to ensure the quality of the courts in function its role in balancing the powers in the political dialogues, independency and impartiality of the courts should be preserved.

4. The Constitutional Democracy and Constitutional Adjudication in Malaysia

The doctrine of separation of powers involved a system of “check and balance”. Each branch of government is given specific powers of oversight (check) over the other branches of government, and powers to restrain the actions of the other branches of government. The aim is to ensure a balance of power between the three arms of government. This helps to prevent one branch of government from usurping power or taking over functions from the other branches of government. In *LohKooiChoon V Govt. of Malaysia* it is stated that:

“The constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that … no single man or body shall exercise complete sovereign power, but it shall be distributed among the executive, legislative and judicial branches of government.”

Art 4(1) of the Malaysian Constitution proclaims the Constitution to be the "supreme law" of the Federation and that a law which is inconsistent with the Constitution "shall, to the extent of the inconsistency, be void". Because the Constitution embodies fundamental liberties, the protection of such liberties is entrusted to the judiciary.

The judiciary exercises the potent power of judicial review. Judicial review has been described as ‘the power of a court to review a law or an official act of a government employee or agent for constitutionality or for the violation of basic principles of justice’. The court has the power to strike down the law, to overturn the executive act/decision, or order a public official to

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875 Ibid, at 247.
act in a certain manner if it believes the law or act to be unconstitutional or to be contrary to law in a free and democratic society.

4.1 The Framework of Constitutional Adjudication
The system of the Government in Malaysia is closely modelled on that of Westminster Parliamentary system with its own peculiarities. Malaysia has a written Constitution that spells out the function of the three branches of the Government namely; the Executive, Legislative and Judiciary. Article 39 of the Federal Constitution vested the executive authority of the Federation in the YDPA and exercisable by him or by the cabinet. Article 44 vested the legislative authority of the Federation in a Parliament. Article 121 deals with the judicial power of the federation. Judicial Review is an important tool for the judiciary’s exercise of check and balance on the Legislature and the Executive.

4.2 The Powers of the Superior Courts
The judicial power of the Federation is contained in Part IX of the Constitution. In the hierarchy of courts; we have the subordinate courts which comprise of the Sessions Court and Magistrates Court and the superior courts which comprise of the High Court, Court of Appeal and the Federal Court.
The Federal Court of Malaysia is the highest judicial authority and the final court of appeal in Malaysia. The country, although federally constituted, has a single-structured judicial system consisting of two parts - the superior courts and the subordinate courts. The subordinate courts are the Magistrate Courts and the Sessions Courts whilst the superior courts are the two High Courts of co-ordinate jurisdiction and status, one for Peninsular Malaysia and the other for the States of Sabah and Sarawak, the Court of Appeal and the Federal Court.

The Federal Court, earlier known as the Supreme Court and renamed the Federal Court vide Act A885 effective from June 24, 1994, stands at the apex of this pyramid. Before January 1, 1985, the Federal Court was the highest court in the country but its decisions were further appealable to the Privy Council in London. However on January 1, 1978, Privy Council appeals in criminal and constitutional matters were abolished and on January 1, 1985, all other appeals i.e. civil appeals except those filed before that date were abolished.

The setting up of the Court of Appeal on June 24, 1994 after the Federal Constitution was amended vide Act A885 provides litigants one more opportunity to appeal. Alternatively it can
be said that the right of appeal to the Privy Council is restored, albeit in the form of the Federal Court.

In Malaysia we do not have a Constitutional Court. Most constitutional cases begin at the High Court. In certain circumstances constitutional cases is heard only by the Federal Court. Section 20 of the Courts of the Judicature Act deals with reference of constitutional question by subordinate court to the High Court. Section 30 provides ‘Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court’. Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen. Section 84 of the Courts of the Judicature Act which deals with reference of constitutional question by High Court to the Federal Court states that ‘where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.'
The superior courts have the jurisdiction to hear constitutional cases. Of all courts, the decision of the Federal Court is the most important because it is the highest court of the land. Being the court at the apex of the hierarchy in the common law system of Malaysia the Federal Court plays a dual role; as the most authoritative interpreter of the Constitution and also as the highest appellate tribunal relating to all matters including constitutional matters. Therefore, the Federal Court can be regarded as the constitutional court of the country. Being so, it plays a pivotal role in the defence of fundamental liberties as provided in Part II of the Constitution.

The jurisdiction of the Federal Court is spelt out in Article 128. It has an exclusive jurisdiction in regard to:
[a] any question whether law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case maybe, the Legislature of the State has no power to make laws; and

[b] disputes on any other question between States or between Federation and any States.

It also has jurisdiction to determine any question as to the effect of any provision of the Constitution referred to it by the lower court and to remit the same to the other court to be disposed off in accordance with the determination.

The Federal Court is also conferred the advisory jurisdiction under Article 130 of the Constitution under which the Yang Di-PertuanAgong may refer to the Federal Court any question as to the effect of any provision of the constitution which has arisen or appear to him likely to arise. His Majesty has done so only once in The Government of Malaysia v. Government of the State of Kelantan31968] 1 MLJ 129.

4.2.1 Review of Primary Legislation / Check on the Legislature

Art 4(1) of the Malaysian Constitution proclaims the Constitution to be the "supreme law" of the Federation and that a law which is inconsistent with the Constitution "shall, to the extent of the inconsistency, be void". Because the Constitution embodies fundamental liberties, the protection of such liberties is entrusted to the judiciary.

The court in Malaysia can declare invalid legislation enacted by the Federal Parliament or the legislature of a State. The Federal Court in Ah Thian v. Govt. of Malaysia\(^{877}\) had explained the legal position as quoted below:

“The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please. Under our Constitution written law may be invalid on one of these grounds:

(1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or

\(^{877}[1976]\) 2MLJ 112.
(2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or

(3) in the case of State written law, because it is inconsistent with Federal law, article 75.

The Court has power to declare any Federal or State law invalid on any of the above three grounds.

The Court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any Court in the land and in any proceeding whether it be started by Government or by an individual.

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, cl (3) of article 4 provides that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:-

(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.
Secondly, cl (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a Judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, cl (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other Court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest Court in land.”

As explained above the procedure and power to declare law made by the legislature invalid based on ultra vires are stated in art. 4(3) and (4) which need to be read together with article 128(1).

4.2.2 Review of Action and Decision / Check on the Executive

The Courts are the only recourse for the individual against any state abuse or misuse of power. Chief Justice Hidayatullah of the Indian Supreme Court called the Judiciary ‘the upholders of the rule of law’ and ‘the best protection against the despotism of the people’s representatives’.\footnote{M. Hidayatullah, \textit{A Judge’s Miscellany} (First Series) (Tripathi, 1927) p. 98.}

The Court’s exercise of control over the executive is mainly through the issue of the prerogative writs. In a lecture titled ‘Misuse of Power’ Lord Denning said:

In order to ensure this recourse (i.e. to law), it is important that the law itself should provide adequate and efficient remedies for abuse or misuse of powers from whatever quarter it may come. No matter who it is - who is guilty of the abuse or misuse. Be it government, national or local. Be it trade unions. Be it the press. Be it management. Be it labour. Whoever it be, no matter how powerful, the law should provide a remedy for the abuse or misuse of power, else,
the oppressed will get to the point when they will stand it no longer. They will find their own remedy. There will be anarchy.\textsuperscript{879}

The safeguards provided to the individual against encroachment of his rights and privacy by the Executive. The task in ensuring that government keeps itself within the law and not act arbitrarily towards its citizens is chiefly the task of the Courts. Lord Diplock described it as ‘\textit{a first priority in the preservation of the rule of law and the maintenance of the quality of life in a democratic society}.’\textsuperscript{880}

Administrative law and judicial review are indivisible aspects of the concept of rule of law. Its importance lies in maintaining the balance between state rights and rights of the individual. In this context, Lord Hewart described the rule of law as ‘\textit{the predominance of law, as opposed to mere arbitrariness, in determining or disposing of the rights of individuals}’.\textsuperscript{881}

Judicial review enables a person aggrieved by an administrative decision or action to seek review by a court of the lawfulness of that decision. Judicial review is brought before a court, and the court determines whether the decision complained about is unlawful and of no effect. The court then exercises its discretion regarding whether or not to grant relief. The court has no power to review the decision "on its merits" and determine whether or not it was the decision the court would have made. The court only has the power to review the decision to see whether the decision-maker made the decision lawfully.

Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged under statute to perform public acts and duties. This jurisdiction evolved in common law and was exercised by the issue of the prerogative writs of mandamus, certiorari and prohibitions. They are now regulated by statute namely Paragraph 1 of the Schedule to the Courts of Judicature Act, 1964 and procedurally by rules of Court, that is Order 53 of the Rules of the High Court, 1980.

\textsuperscript{881} Lord Hewart, \textit{The New Despotism} (Ernest Benn Ltd., 1929) p. 23.
The court cannot when exercising its judicial review jurisdiction, subject to the legislative provisions to the contrary, substitute or replace the decision of the public authority with its own. In the context of judicial review of administrative actions in Malaysia, the appellate courts have cautioned against unjustified judicial interference with administrative decisions if this is done with a view of substituting those decisions with some others which the courts may feel fairer or more reasonable on merits. After a finding that a particular decision cannot stand in law, the court will then remit the matter to the authority for reconsideration. The court in the exercise of its judicial review jurisdiction is not to substitute its decision for that of the authority. However there is one qualification: the non-decision substitution feature of judicial review is subject to contrary legislative intention.

Consequential of Rama Chandran[1997] 1 AMR 433; [1997] 1 MLJ 145 is that when a decision is attacked on account of unreasonableness or illegality, review jurisdiction extends to merits examination. An examination of merits of a decision followed by finding that no reasonable person or body similarly circumstanced could have come to the conclusion in issue and the making of the decision that ought to have been made in the first place is consistent with the proper exercise of judicial power.

In Petronas NasionalBhd v Nik Ramli bin Nik Hassan, [2003] 4 CLJ 625 Steve Shim CJ (Sabah & Sarawak) noted that the majority decision in Rama Chandran developed the principles that the courts have:

1. the power to review the decision of a tribunal on the merits;
2. the power to substitute a different decision in place of the tribunal's decision without remitting it to the tribunal for a re-adjudication; and
3. the power to order consequential relief.

As mentioned earlier there is an exception to the non-substitution of decision principle. This is derived from a series of decisions, exemplified by that of the Federal Court in R Rama Chandran v The Industrial Court of Malaysia. [1997] 1 AMR 433; [1997] 1 MLJ 145. The substitution is permissible if this is permitted under the relevant legislation. The issue whether a substitution is or is not appropriate in any given case, remains a matter of construction. In this
case the Federal Court was able to determine the sum that would represent a fair compensation that a claimant was entitled to.

In *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* the use the appropriate procedure for use in judicial review has been discussed. The appellant’s main contention before the Federal Court was that the procedure under O 53 of the RHC was not a mandatory procedure — a person aggrieved with the decision of a public body could therefore seek relief by way of writ or originating summons.

The Federal Court in dismissing the appeal explains that judicial review provides a means by which judicial control of administrative action is exercised. In Malaysia, supervisory jurisdiction by the High Court over administrative or public bodies is found in O 53 of the RHC. The stringent conditions imposed by O 53 of the RHC are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration. It should be noted that not every decision made by an authoritative body is suitable for judicial review. There must be sufficient public law elements in the decision made. In the instant case, the appellant’s claim was based solely on public law. There was no trace of private law involvement. Neither did the circumstances justify an exception to the general rule. Thus, the appellant’s writ was rightly struck off as an abuse of the court’s process.

As can be observed above Order 53 must be invoked when the defendant or one of the defendants in the action is the government or a public authority. It has been said that the purpose of Order 53 is “to provide certain protections to the public body or authority when their public act or decision is being challenged”. The current Order 53 came into effect on 21 September 2000. It has been said that the new Order 53 was introduced to cure the mischief of its precursor, which was much narrower and more restrictive. In addition, it has also been noted that the creation of Order 53 in the Rules of the High Court 1980 is to provide certain protections to the public body or authority when their public act or decision is being challenged, for example, the

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884 *SivarasaRasiah v BadanPeguam Malaysia &Anor* [2002] 2 Malayan Law Journal 413.
time limit within which the challenge to the public act or decision must be made.\textsuperscript{885} Regardless of the reasons for its introduction, it was observed that there are “stringent mandatory requirements” under the new Order 53.

One such additional requirement, as noted above, is the fact that a plaintiff representing a group of persons seeking judicial review and any form of relief from the court is required to make the application “promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant”.\textsuperscript{886} Although the court has the discretion to extend the period of 40 days, it can only do so if the court “considers that there is a good reason for doing so”.\textsuperscript{887} This requirement poses as an obstacle to a potential representative action against the government or any public authority. For instance in \textit{TR Lampoh AK Dana & Ors v Government of Sarawak}, a representative action brought by a group of natives alleging that their native customary rights over certain communal native customary lands had been impaired and abridged by the act of the defendant was struck out on the ground that the plaintiffs were out of time.

Besides the limitation period of 40 days, a plaintiff intending to commence a representative action is also required to obtain leave from the court in accordance with the requirement in Order 53 rule 3(1). The application must be made \textit{ex parte} to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.\textsuperscript{888} The plaintiff is also required to give notice of the application for leave not later than three days before the hearing date to the Attorney General’s Chambers and must at the same time lodge in those Chambers copies of the statements and affidavits.\textsuperscript{889}

Another barrier faced by potential plaintiffs is the fact that in granting leave, the Judge may impose such terms as to costs and as to the giving of security as he thinks fit.\textsuperscript{890} Finally, the

\textsuperscript{886} Order 53 rule 3(6) of the Rules of the High Court 1980.
\textsuperscript{887} Order 53 rule 3(6) of the Rules of the High Court 1980.
\textsuperscript{888} Order 53 rule 3(2) of the Rules of the High Court 1980.
\textsuperscript{889} Order 53 rule 3(3) of the Rules of the High Court 1980.
\textsuperscript{890} Order 53 rule 3(4) of the Rules of the High Court 1980.
plaintiffs in the representative action must also be able to demonstrate to the satisfaction of the court that they are “adversely affected by the decision of the public authority”.

The Issues facing Constitutional Adjudication in Malaysia

Following the abolition of the final appeal from the Malaysian courts to the Judicial Committee of the Privy Council from 1 January 1985, the Malaysian judiciary had taken a more activist line than previously in constitutional matters. According to the Lord President at the time, Tun Mohamed SallehAbas, the judges, now that they were master of their own household, felt that they had the responsibility to ‘chart a new judicial course’. In doing so they recognised that they had to proceed slowly, listening to all the arguments, and having regard to the nature of the country, and to the litigants before them. It does not appear that they had any preconceived philosophy to be implemented, but simply a heightened sense of the importance of their role in a new situation in which they had final authority when it came to legal interpretation. It should be mentioned here that the judiciary had not sought, especially in the years following the Rukun Negara amendments (from 1971) to challenge the executive in crucial matters of Government policy. Still less did they have any political agenda. They were indeed accused by lawyers and others of being timid and of not protecting constitutional rights as conceived by the Constitution.

The judicial crisis was sparked off in 1988 when the then Prime Minister Datuk Seri Dr Mahathir Mohamad tabled a Bill in Parliament to amend Articles 121 and 145 of the Federal Constitution. The Bill sought to divest the courts of the “judicial power of the Federation”, giving them only such powers as Parliament granted them. The Attorney-General was also empowered to determine venues for cases. Tun SallehAbas, who was the Lord President then, made a statement defending the judiciary’s autonomy. He also convened a meeting of 20 Supreme Court judges in Kuala Lumpur and a decision was made to address a confidential letter to the Yang di PertuanAgong and various state rulers. The letter read: “All of us are disappointed with the various comments and accusations made by the honourable prime minister against the judiciary, not only outside but within the Parliament.”

Two months later, Salleh was suspended and High Court of Malaya Chief Justice Tan Sri Abdul Hamid Omar was appointed acting Lord President. Salleh was brought before a tribunal
for misconduct. In response, he filed a suit in the High Court challenging the constitutionality of the tribunal. Five judges of the Supreme Court convened and granted Salleh an interlocutory (interim) order against the tribunal. This order was later set aside and in August 1988, Salleh was officially removed from the post of Lord President.

The five Supreme Court judges who granted Salleh the interlocutory order – Tan Sri Azmi Kamaruddin, Tan Sri Eusoffe Abdoolcader, Tan Sri Wan Hamzah Mohamed Salleh, Tan Sri Wan Sulaiman Pawan Teh and Datuk George Seah – were suspended. In October, Wan Sulaiman and Seah were sacked while the other three judges were reinstated.

If 1988 was an unmitigated disaster for the judiciary, it also heightened awareness of constitutional issues generally and in particular inculcated vigilance in relation to judicial appointments and performance, placing the Bar, which had been strong in defence of the judiciary, firmly in a position of civil-society leadership in relation to these issues. The Bar established a standing committee to monitor the erosion of judicial independence, published a declaration of judicial independence for the benefit of the public, and conducted public talks across the nation to explain the basis of constitutionalism, and how the concept of judicial independence was essential to constitutional democracy.

Eventually The Judicial Appointments Commission (JAC) was established on the 2 February 2009 with the coming into effect of the Judicial Appointments Act 2009 [Act 695]. In accordance with the provision of Act 695, “the main role of the Commission is to uphold/the Commission has been tasked with upholding” the continuous independence of the judiciary through the selection of superior court judges. On the 9 February 2009, the Prime Minister of Malaysia appointed nine (9) Commissioners as provided for under Section 5 of Act 695.

5. Constitutional Adjudication in Indonesia

The discussion below shall elaborate on the establishment and the framework of constitutional adjudication in Indonesian constitutional system. There are some state organs that need to be mentioned initially in order to comprehend the framework of constitutional adjudication in Indonesia, namely, DPR (House of Representatives), President, and Constitutional Court. The DPR and the President are relevant to be discussed since both organs have authority in the
enactment of laws which can be reviewed by the Constitutional Court. The Supreme Court is also discussed to clarify the different authority of both the Constitutional Court and the Supreme Court in term of judicial review.

5.1 The Main Organs in the Constitutional Framework

5.1.1 The House of Representatives (DPR)

The DPR is a legislative organ which has the authority to enact laws. To enact laws, the DPR has to discuss together with and approved by the President. Besides, there are some functions of the DPR namely 1) legislative function, 2) budgeting function and scrutinizing function. Members of the House of Representatives shall be elected through general elections and the candidates are nominated by a political party. Substantively, structure and function of the Regional House of Representatives (both provincial and district) are the same as the structure and function of the House of Representatives at national level. However, they are different in term of the scope of authority. The House of Representatives has authority at national scope and there are Regional House of Representatives at provincial level and district level.

The House of Representatives is an organ which functions as political representatives because they exercise legislative function. Since the members of the House of Representatives are from political parties, they articulate every issue from political perspective. Through the House of Representatives, people’s political interests are accommodated in the daily management of state. The quality of political accommodation lies in the hand of quality of members of the House of Representatives.

In relation to the role of the House of Representatives in law-making, at least there are four roles of the House of Representatives namely (a) propose bills, (b) discuss bills proposed by the President, evaluate the existing laws, and assess the government-policies on executing the bills. The House of Representatives may have significant roles in developing the quality of legislation through these four roles.

891 Article 20A (1) of the 1945 Constitution of Republic of Indonesia
5.1.2 The President

The President and Vice President shall be in office for a term of five years and may subsequently be re-elected to the same office for one further term only. The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution. In exercising his/her duties, the President shall be assisted by a Vice-President. The President shall be entitled to submit bills to the House of Representatives. Besides, the President may issue government regulations as required to implement laws.

5.1.3 The Supreme Court

The Supreme Court of the Republic of Indonesia is the independent judicial arm of the state. It maintains a system of courts and sits above the other courts and is the final court of appeal. It can also reexamine cases if new evidence emerges. The Supreme Court has oversight over the high courts (Pengadilan Tinggi) of which there are about 20 throughout Indonesia and district courts (Pengadilan Negeri) of which there are around 250 with additional district courts being created from time to time. The Supreme Court is the final court of appeal following appeals from the district courts to the high courts. The Supreme Court can also reexamine cases if sufficient new evidence is found. Constitutional matters, however, fall within the jurisdiction of the Constitutional Court of Indonesia, established in 2003. According to the Constitution, candidates for Supreme Court Justices must have integrity and be of good character as well as be

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892 Article 7 of the 1945 Constitution. The limitation for two period of presidency was the result of First Amendment of the 1945 Constitution. The limitation was due to bad history of long period of Soeharto as President. More than 30 years in the presidents had lead Soerharto became a very authoritarian and bureaucratic regime which had violated fundamental rights of citizen through any restrictions, punishment, and corruption.

893 Article 4 (1) of the 1945 Constitution of Republic of Indonesia.

894 Article 4 (2) of the 1945 Constitution of Republic of Indonesia.

895 Article 5 (1) of the 1945 Constitution of Republic of Indonesia.

896 Article 5 (2) of the 1945 Constitution of Republic of Indonesia.

897 In late 2011, the chief justice of the Supreme Court, Harifin A. Tumpa, said that the Indonesian government could only aim to establish district courts in 400 of the nation's 530 provinces, regencies (kabupaten) and municipalities (kotamadya).

experienced in law.\textsuperscript{899} Candidates are proposed to the House of Representatives by the Judicial Commission. If the House of Representatives approves them, their appointment is then confirmed by the president. As of mid of 2011, there were a total of 804 courts of various kinds in Indonesia.\textsuperscript{900} There are about 50 justices sat in the Supreme Court while other high and lower courts across Indonesia employed around 7,000 judges.

Regarding the judicial review, the Supreme Court shall have authority to review legislations lower than the laws such as Government Regulation, Presidential Regulation and Provincial Regulation and Regency/Municipality Regulation.\textsuperscript{901} These are ‘the judicial review’ exercised by the Supreme Court, while judicial review of laws exercised by the Constitutional Court is also popularized specifically as the ‘constitutional review’.

5.1.4 The Constitutional Court
The Constitutional Court of Republic of Indonesia is a new state organ in the Indonesia constitutional system as the result of the Third Amendment of the 1945 Constitution.\textsuperscript{902} As a constitutional organ, the Constitutional Court of Republic of Indonesia is designed to be the guardian as well as the sole interpreter of the constitution through its decisions.

\textsuperscript{899} In practice, other qualifications are required as well. In 2011 the chief justice of the Supreme Court, Judge Harifin Tumpa, issued a circular stating that any judges who intended to apply for the position of Supreme Court judge needed to have 20 years experience at the district court level and three years experience at the high court level.\textsuperscript{900} Sebastiaan Pompe, The Indonesian Supreme Court: A Study of Institutional Collapse. Ithaca, NY: Cornell Southeast Asia Program, 2005, at 75.
\textsuperscript{901} See Art 7 (1) of Law No. 12 of 2011 on Legislation Making. In this article, it is stated the hierarchy of legislation in Indonesia, as follows:
  a. 1945 Constitution (UUD 1945);
  b. Decree of People’s Consultative Assembly (TAP MPR);
  c. Laws/Government Regulation in Lieu-Law (Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang);
  d. Government Regulation (Peraturan Pemerintah);
  e. Presidential Regulation (Peraturan Presiden);
  f. Provincial Regulation (Peraturan Daerah Provinsi);
  g. Regency/Municipality Regulation (Peraturan Daerah Kabupaten/Kota).
\textsuperscript{902} See Anonim, Profile of the Constitutional Court of the Republic of Indonesia, Secretariat-General and Registry Office of the Constitutional Court, 2010, at 2.
5.1.4.1 The History and Development of the Court

The idea to establish Constitutional Court in Indonesia which is separated and equal to the Supreme Court is relatively new. However, the idea to review acts as a mechanism of constitutional adjudication has been debated among the founding fathers of the nation in the preparation of the independence of Indonesia in 1945. Muhammad Yamin was the first founding father who proposed that the Supreme Court had authority to review acts. He further explained that the review could be performed by comparing every product of acts with three systems of norms, namely Constitution, Shariah (Islamic Law) and customary law.\(^903\) Yamin’s proposal was not accepted by the member of Independent Committee and Supomo delivered his objection by giving two arguments. Firstly, the 1945 Constitution is formulated not based on triaspolitica proposed by Montesquieu. Secondly, the numbers of legal graduates, at the beginning of the independence, were not enough to perform the functions to review acts as delivered by Yamin. Moreover, Supomo further argued that to give authority to the Supreme Court to review acts, it needs a deeper study on Constitutional Court (Verfassungsgerichtshof) such as in Austria, Czechoslovakia and Germany with Weimar Constitution. It also takes quite long time to study.\(^904\)

After President Soeharto’s resignation in May 1998, Indonesia began to take comprehensive reform measures by putting sovereignty back to the hands of the people. The peak of such efforts was the series of amendments to the 1945 Constitution, made during four consecutive years, namely the First Amendment in 1999, the Second Amendment in 2000, the Third Amendment in 2001, and the Fourth Amendment in 2002. That series of four amendments produced a blueprint for a system of state administration which was totally different from the previous one. Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution were: (1) the principle of constitutional democracy and (2) the principle of democratic rule of law or “democratischerechtsstaat”.\(^905\) The democratic system was reinforced by the adoption of various fundamental principles to ensure that sovereignty had its sources in the people and was administered by the people, together with the people, and for the

\(^904\) Ibid, at 582.
sake of the people. Among those important principles were: (i) all universally-applicable instruments of human rights and guarantees of citizens’ rights were spelled out in the formulation of the Second Amendment made in 2000, (ii) provisions on the implementation of general elections, based on direct, public, free, confidential, honest, and just principles were included in the Third Amendment in 2001, (iii) the direct presidential election system was set forth in the Third and Fourth Amendments made in 2001-2002, and (iv) ideas were adopted in the Third and Fourth Amendments made in 2001-2002 for the establishment of a constitutional court.  

There are some considerations of the establishment of the Constitutional Court. They are as follow:

a. The state of Indonesia shall be a rule of law state which is based on Pancasila and the 1945 Constitution. The state shall aims at achieving a peaceful, order, clean, prosperous and just country;

b. The Constitutional Court as one of the pillars of the judiciary has an important role in upholding the Constitution, principle of rule of law based on its authority as has been stated in the 1945 Constitution;

c. Based on article 24C (6) of the 1945 Constitution, it is needed to arrange the appointment and retirement of justices, court procedure and other regulations regarding the Constitutional Court;

d. Based on the consideration stated in point a, b, c and to conduct article III of Transitional Provision of the 1945 Constitution, it is needed to enact law regarding Constitutional Court.

In exercising of its constitutional duties, the Constitutional Court aims at implementing its vision, “enforcement of the constitution in the context of realizing the goal of rule of law state and democracy for a dignified life as a nation and state”. This vision is then manifested into two missions of the Constitutional Court, (1) realizing a modern and accountable Constitutional

906 Ibid.
907 See further Constitutional Court Act 2003 and the Amendment of the Constitutional Court Act 2011.
Court as one of the actors exercising judicial power, (2) building Indonesian constitutionality and the culture of constitutional awareness.908

Based on article 1 (2) of 1945 Constitution, it is stated that (2) the sovereignty is vested in the people and it will be fully exerted according to the Constitution. In other words, Indonesian political system is a political system that is based on democracy and the Constitution. In short, having this article in the 1945 Constitution, it can be said that after the third amendment of the 1945 Constitution, Indonesia declared as a constitutional democracy state. Following the third amendment of the 1945 Constitution which declared Indonesia as a constitutional democracy state, did the idea of the constitutionality review of a law become adopted in the constitutional norms, and its institutionalization was even established separately named as the Constitutional Court, separately from and equal to the Supreme Court.909 So, in term of judicial review, the Supreme Court has authority to review regulation under Act based on the hierarchy of ordinance in Indonesia.910 On the other side, the Constitutional Court has authority to review acts enacted by Parliament and approved by the President.

The amendments inter alia reformed judiciary by establishing two new institutions: Constitutional Court and Judicial Commission. The Court has an equal position to the Supreme Court, but with different jurisdiction911. The Constitutional Court has a main function as the organ which has authority to review laws (constitutional review) whether the laws against the Constitution or not.

910Based on Act No 12 of 2011 on the Legislation Making in Indonesia it is stipulated that there is hierarchy of legislation as follows:
a. 1945 Constitution (UU 1945);
b. Decree of the People’s Consultative Assembly (TAP MPR);
c. Laws/Government Regulation in Lieu of Law (UU/PeraturanPemerintah Pengganti UU);
d. Government Regulation (Peraturan Pemerintah);
e. Presidential Regulation (PeraturanPresiden);
f. Provincial Regulation (Peraturan Daerah Provinsi);
g. Regency/Municipality Regulation (PeraturanKabupaten/Kota).
911Ibid, at 376.
In the context of constitutional system, the constitutional powers given to the Constitutional Court significantly contribute to the system of checks and balances as argued by Lindsey that the new Constitutional Court has the potential to radically transform the Indonesia judicial and legislative relationship and create a new check on the conduct of lawmakers and the presidency. The role of the Constitutional Court in Indonesia highlights the importance of separation of powers which has been described as "[replacing] the executive-heavy sharing of powers" put in place by the Pre-amendment Constitution. The Constitutional Court’s judicial review power provides a check on the Legislature, its impeachment power provides a check on the Executive and its decisions on electoral results help to ensure the integrity of the democratic process.

The Constitutional Court as provided for by the constitutional amendment of 2001 was a compromise position under which there would be an independent court but with circumscribed powers. The court would be able to review primary but not delegated legislation, the power of review over which would remain with the Supreme Court. The significance of this distinction is very great in the Indonesian context. It is because most parliamentary legislation is highly skeletal, whereas delegated legislation provides most of the flesh. In addition, there is no power for the ordinary courts to refer issues of constitutional interpretation to the Constitutional Court. One reason for political forces opposed to an independent court to compromise on their position was that, during the debate on this issue in 2001, President Abdurrahman Wahid was impeached. Fearing a similar and highly politicized impeachment attempt being mounted in future, the new President, Megawati Sukarnoputri, and her PDI -P party decided to support the establishment of the Constitutional Court because of its proposed powers over presidential impeachment. The outcome was a court which has most of the powers one associates with constitutional courts, and actually more than the Korean court, although less than the Thai court under the 2007 Constitution. Although the ordinary courts cannot refer a constitutional issue to the Constitutional Court, it can entertain individual petitions based on constitutional violation.

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912 Ibid, at 378.
conduct impeachment proceedings; dissolve political parties, and resolve electoral disputes and disputes between state agencies. With regard to the selection process, this proved to be less controversial than one would have thought, it was being accepted that the ‘Korean system’ under which three judges are chosen by each branch of the state was fair, workable, and a good compromise. Other features of the Constitutional Court which correspond to the Korean example are the diversion of judicial review of delegated legislation to the Supreme Court, and the process for presidential impeachment. The Constitutional Court is empowered by Article 24C in very general terms, to make the final decision in ‘reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general election. It also has power under Article 7B to investigate charges against the President or Vice-President that he or she has violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or is otherwise guilty of moral turpitude, or no longer meets the qualifications to serve as President or Vice-President.

The really striking aspect of the Constitutional Court’s performance is that, although its establishment and jurisdiction did not receive multi-lateral or general support, its actual impact has been remarkable. Crucially the Constitutional Court has used the Constitution rather than political or administrative expediency as its touchstone. It struck down a provision in its own organic law that purported to restrict its jurisdiction over legislation to statutes passed after the reform process began in 1999, arguing that this restriction was not apparent in the Constitution itself-thereby at a stroke opening NewOrder (pre-1999) statutes, including colonial era statutes, to scrutiny.914

STRUCTURE OF CONSTITUTIONAL ADJUDICATION

Figure 1

Constitutional Adjudication Structure

5.2 The Role, Powers and Procedure of the Constitutional Court

The Constitutional Court was established as the guardian of the Constitution. As the guardian of the Constitution, the Constitutional Court is the court which has authority to settle any disputes on constitutional cases. The constitutional cases are the cases related to consistency of implementation of constitutional norms. Therefore, the main foundation used by the Constitutional Court deciding on the constitutional cases is the Constitution.915

Article 24 paragraph (2) of the 1945 Constitution set forth as follows: Judicial power shall be implemented by a Supreme Court and its subordinate judicatures, in the general judicature, the religious judicature, the military judicature, the state administration judicature, and by a Constitutional Court. Whereas Article 24C which consists of 6 paragraphs stipulates as follows:

a. The Constitutional Court shall have the authority to hear cases at the first and final levels, the decision of which shall be final, in conducting judicial review on laws against the Constitution, in deciding disputes concerning the authorities of state institutions whose authorities provided by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the result of general elections.

b. The Constitutional Court shall be required to pass decisions on the opinion of the House of Representatives concerning alleged violations committed by the President and/or the Vice President in accordance with the Constitution.

c. The Constitutional Court shall consist of nine constitutional court justices as stipulated by the President, comprising three justices proposed by the Supreme Court, three justices proposed by the House of Representatives and three justices proposed by the President.

d. The Chief Justice and the Vice Justice of the Constitutional Court shall be elected from among and by constitutional court justices.

e. Constitutional court justices must possess integrity and flawlessness personality, must be fair, statesmen mastering the constitution and state organization and shall not concurrently serve as state officials.

f. The appointment and dismissal of the constitutional court justices, the procedural law and other provisions concerning the Constitutional Court shall be regulated by law.

The Constitutional Court is a part of judiciary, independent and equal to the Supreme Court. The establishment of the Constitutional Court has prompted few comments from constitutional law experts. Some put hope on the Constitutional Court as an independent as well as smart in deciding cases. Therefore, there will be good impact on the working of state organs. The existence of the Constitutional Court may also give a big hope for the implementation of state based on the rule of law. So far, there are many abuses of power among state apparatus which at the same time deny the conception of Indonesia as a state based on the rule of law. This new state organ is expected to guarantee the implementation of democracy based on the constitution as becoming the demand of the citizen.916

In few years of the establishment of the Constitutional Court, the Constitutional Court was mandated one more authority to decide disputes over the results of local election. This authority was previously handled by the Supreme Court. Based on article 236 C Local Government Acts 2008, it is stated that the authority to decide disputes over the results of local election is moved from the Supreme Court to the Constitutional Court within 18 days after the Act has been enacted.\footnote{Bambang Sutiyoso, Tata Cara Penyelesaian Sengketa di Lingkungan Mahkamah Konstitusi, UII Press, 2009, at 6.}

Benny K Harman (2004)\footnote{Benny K. Harman, Peranan Mahkamah Konstitusi dalam Reformasi Hukum, dari buku Menjaga Denyut Nadi Konstitusi: Refleksi Satu Tahun Mahkamah Konstitusi, Konstitusi Press, 2004, at 39} also asserted that the Constitutional Court has given a new fresh air to the political life, democracy and national life of Indonesia. The Constitutional Court functions as a fresh wind for the citizen, particularly in protecting fundamental rights of the citizen from any actions of state which are considered not accordance with the 1945 Constitution. He further explains that the existence of the Constitutional Court has to be warmly welcomed since it is expected that the Constitutional Court may support systematic democracy and political culture. The role of the Constitutional Court is exercised through checks and balances mechanism in constitutional system. This mechanism may also overcome gap between lack of sense of justice in society and the practice of authoritarian regime and the abuse of power in the level of state for long time, more over in Soeharto regime.

Lindsey (2002) argues that if it is effective, the Constitutional Court has potential roles radically to transform relation between the judiciary and legislative organ in Indonesia. This also may give a new mechanism of monitoring on behavior of the members of parliament as well as the president.\footnote{See also Butt, Simon and Tim Lindsey edited by John Gillespie & Randall Peerenboom, The People’s Prosperity? Indonesian Constitutional Interpretation, Economic Reform, and Globalization, 2009, Regulation in Asia-Pushing Back on Globalization, London and New York: Routledge, see also Hazama, Constitutional Review and Democratic Consolidation: A Literature Review, Paper presented at IDE Discussion Paper, Japan, 2009.} Accordingly, it is very essential if there is a more comprehensive evaluation on how far the progress of the Constitutional Court after a decade of the establishment of the Constitutional Court is. The evaluation covers a critical analysis on the achievements as well as the obstacles faced by the Constitutional Court. The research recommended relevant proposal to the Constitutional Court for a better role of the Constitutional Court in the future.
Judicial process is a mechanism to perceive substantive justice. To pursue the justice needs particular procedures. There is no justice without fair procedures. Therefore, a judicial process needs also series procedure where the people may access the justice.

The procedures of the Constitutional Court also have salient characteristic which are different from other courts. The main characteristic of the court procedures lies in the main legal bases of the court procedure used in the legal procedure is the Constitution: the 1945 Constitution. Even though there are some acts and regulation of the Constitutional Court as the legal bases of the procedure, the acts and regulation can be used as long as it does not contradict to the 1945 Constitution. This is because the characteristic of the Constitutional Court essentially is to decide constitutional cases.\(^{920}\) The Constitutional Court performs the hearing process to hear cases filed by the petitioners. There are three kinds of hearings in the Constitutional Court, namely panel hearing, consultative meeting of justices (RPH), and plenary hearing.\(^{921}\) Panel hearing is a meeting attended by 3 (three) constitutional court justices assigned to hold a hearing for preliminary examination. This hearing is held to examine the legal standing of the petitioner and the substance of the petition. Constitutional court justices may give advice for revision of the petition.\(^{922}\)

Consultative Meeting of Justices (RPH) is a closed and confidential meeting. This meeting can only be attended by the Constitutional Court Justices and the Registrar. In this meeting the case is discussed in deeply and in detail and the decision of the Constitutional Court is made. This meeting must be attended by at least seven constitutional court justices. During the RPH, the Registrar takes notes and records every subject matter of discussion and the conclusion.\(^{923}\)

A plenary hearing is held by the panel of the constitutional court justices with minimum standard of attendance of 7 (seven) constitutional court justices. This hearing is open for the public with agenda of hearing examination and pronouncement of the decision. Hearing

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\(^{920}\) Ibid, at 28.


\(^{922}\) Ibid.

\(^{923}\) Ibid.
examination includes hearing the petitioner’s statement, expert’s statement, witness’ statement, and statements of the related parties, as well as examining the evidence.\textsuperscript{924}

5.3 The Issues facing Constitutional Adjudication in Indonesia

After a decade, some constitutional law experts conclude that there are some problems facing the constitutional adjudication in Indonesia. Firstly, as a new state organs, the Constitutional Court tends to be a super body institution without strong supervision either internally or externally. For instance, in case of judicial review of Judicial Commission Act in 2006, the Constitutional Court had nullified the authority of the Judicial Commission to supervise the Constitutional Court Judges. This is a kind of breach of principle of impartiality where the judges may not judge their own interest. Without having strong supervision, the code of ethics of the judges may not be enforced well. Internal supervision becomes weak when the problems lies in the hands of judges of the Constitutional Court. One of the result of this situation was in 2014, Akil Mochtar, the chairman of the Constitutional Court was arrested by the Anti-Corruption Commission on bribery case relating to local election in Borneo.

Secondly, the function of constitutional adjudication in the Constitutional Court has disturbed by incorporating local election disputes become a part of the authority of the Constitutional Court. The Constitutional Court has the authority to settle local election disputes since Election Act No. 22 of 2007 and Amendment of Local Government Act No. 12 of 2008, state that local election is a part of the general election. However, article 22E of 1945 Constitution states that: “the general election shall be conducted to elect the members of the House of Representative, the Regional Representative Council, the President-Vice President, and the Regional House of Representatives”.

There is a contradiction between Election Acts and article 22E of 1945 Constitution whether the local election is a part of the general election regime or it is a part of the local government regime. Aidil Fitriciada argues that the Constitutional Court basically has no

\textsuperscript{924} Ibid, at 16-17.
authority to settle the local election disputes because the local election disputes are part of general election regime as stated in article 22 E of 1945 Constitution. Thirdly, after a decade of the existence of the Constitutional Court, there is an evaluation on the scope of the authority of the Constitutional Court whether the Constitutional Court has to have authority in settling disputes over the result of the local election or the scope of authority added by incorporating the authority to decide on constitutional complaints. Fourthly, in term of disputes on jurisdiction among the state organs, the Constitutional Court hadn’t given a significant role in functioning as mechanism of constitutional adjudication due to two reasons, first, unclear concept of subjectum litis of the petitioners to have legal standing in the Court. Second, lack of understanding of the subject matter jurisdiction (objectum litis) of the Court.

6. Constitutional Adjudication: A Comparison between Malaysia and Indonesia

Based on the previous description of both countries on constitutional adjudication, it may discuss some similarities and differences as follows:

6.1. Similarities

First, the constitutional adjudication in both countries is a part of realizing the goal of the rule of law state and democracy. In a country based on the rule of law and democracy, there is no authority or organs higher than the Constitution. The authority and organs are subject to the supremacy of the Constitution as the supreme law of the nation. This is a formula of modern state for striving a dignified life of the nations. The existence of the constitutional adjudication is also a part of fundamental rights of citizen.

925 Interviewed with Dr. Aidil Fitriciada, on 12 November 2012
926 Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution of Indonesia were: (1) the principle of constitutional democracy, and (2) the principle of democratic rule of law or “democratischerechtsstaat”. See Further Jimly Asshiddiqie, Creating A Constitutional Court for A New Democracy, Paper presented at Seminar held by Melbourne Law School, March 11th, 2009, at 2.
Second, exercising of judicial review in both countries is a part of mechanism of constitutional adjudication. Having this mechanism, the constitutional adjudication in both countries plays the role as check and balance mechanism of the main organs in their constitutional and political systems. This mechanism also prevents the trend of abuse of powers among the state organs.

From a logical and rational point of view, this general power of all judges and courts to act as constitutional judges is the obvious consequence of the principle of judicial supremacy of the Constitution. If the Constitution is the supreme law of the land, in case of conflict between a law and the Constitution, the latter must prevail and it is the duty of the judiciary to determine the issues in each case. This is the impact of the emergence of idea of constitutional democracy where the parliament is not considered as the final and absolute element of democracy. In this sense, even the parliament as the representative of the will of people needs to be controlled by the courts in the light of the spirit of the constitution as the highest law.

6.2. Differences

However, both countries have differences in some ways. First, both countries follow different model of constitutional adjudication. Malaysia follows the common law model with functions the superior courts as organs of the constitutional adjudication, while Indonesia follows kelsenian models by establishing a new court, namely the Constitutional Court. American model is usually called also as John Marshall’s doctrine. According to this doctrine, judicial review is conducted on every case relating to constitutional issues by all ordinary courts through

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928 This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review. Although in case of Malaysia, it limits the authority of judicial review to the superior courts. In the US, as first model of the common law, judicial review may be exercised by all level of courts. See further Allan R. Brewer-Carias, Judicial Review in Comparative Law, Cambridge University Press, 1989, at 89.
929 Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is contrast to the “American” model, whereby all courts have authority to adjudicate constitutional issues in the course of deciding legal cases and controversies. See further Victor FerreresComella, “The European Model of Constitutional Review of Legislation: Toward Decentralisation?”, 2004, Volume 2, issues 3, the International Journal of Constitutional Law, at 461.
a decentralized or diffuse or dispersed review.\textsuperscript{930} This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review.\textsuperscript{931} In other words, in this model of constitutional adjudication, the review is not separate but includes in other cases that are ongoing process in every level of court. Therefore, all levels of courts have the power of judicial review.

On the other hand, kelsenian model is also called as European model. Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is contrast to the “American” model, whereby all courts have authority to adjudicate constitutional issues in the course of deciding legal cases and controversies.\textsuperscript{932} This model is also different from American that has a diffuse system. The Continental model is the concentrated system of judicial review.

The concentrated system of judicial review is characterized by the fact that the constitutional system empowers one single state organ of a given country to act as a constitutional judge. It is the only state organ to decide upon constitutional matters regarding legislative acts and other state acts with similar rank or value, in a jurisdictional way. This state organ can be either the Supreme Court of Justice of the country, in its character as the highest court in the judiciary hierarchy, or it can be a particular constitutional court, council or tribunal, specially created by the Constitution and organized outside the ordinary judicial hierarchy.\textsuperscript{933}

The centralized model of constitutional review was born in Europe after World War I. Austria and Czechoslovakia in 1920, Liechtenstein in 1921, and Spain in 1931, were the first countries to adopt it. Hans Kelsen was the scholar who did the most to develop and popularize this model and defend it against the American alternative. After World War II, the centralized model expanded

\textsuperscript{930}Ibid, at 47. See also Richard H. Fallon, Jr, The Dynamic Constitution: An Introduction to American Constitutional Law, Cambridge University Press, 2004, at 13. In this book, Fallon states that Marshall gave the ruling for which Marbury is famous: It would defeat the purpose of a written constitution if the courts had to enforce unconstitutional statues. The courts must exercise judicial review because the Constitution is law, and it is the essence of the judicial function “to say what the law is.”

\textsuperscript{931} See Allan R. Brewer-Carias, n. 78, at 91.


\textsuperscript{933} Allan R. Brewer-Carias, n. 136, at 185.
to other countries. Today it is the prevailing model in Europe, particularly among the member states of the European Union.\textsuperscript{934}

Continental model has adopted by numerous countries all over the world. Off course, each country also modifies this model into various formulas. Some general features of continental model can be summarized as follows:

a. Constitutional review is implemented variously depending on the system in each country.

b. Constitutional review is exercised by an independent organ.

c. In case of constitutional complaint cases, they settle the case by separating the mechanism from ordinary courts.

d. The constitutional position of the constitutional court is guaranteed through independent administration and budgeting.

e. The constitutional court has monopolistic authority in exercising the constitutional review.

f. There judiciary has power to nullify the legislative acts.

g. The constitutional court judges are usually elected by bodies of political power.

h. The nature of decision made by the constitutional court is legal as well as political, although the constitutional court may have a purely consultative function.

i. The continental model of constitutional adjudication is generally repressive in nature, although in a small numbers, preventive review is also implemented in practice.\textsuperscript{935}

Second, as the consequence of the models, Malaysia has an appel mechanism of the constitutional adjudication because it may start from the High Court, while Indonesia which has a centralized model, has no appeal mechanism because the Constitutional Court’s decision is first and final.


7. Conclusion

The establishment of the Indonesian Constitutional Court in 2003, and the functions of the superior courts in Malaysia are part of realizing the goal of the rule of law state and democracy. The courts have the objectives of striving for a dignified life of the nations, and perform as actors of exercising judicial review as mechanism of constitutional adjudication. The constitutional adjudication in both countries plays the role as check and balance mechanism of the main organs in their constitutional and political systems. However, both countries follow different model of constitutional adjudication. Malaysia follows the common law model which functions the superior courts as an organ of the constitutional adjudication, while Indonesia follows kelsenian models by establishing a new court, namely the Constitutional Court. This paper intends to observe the establishment, role and power of constitutional adjudications institutions of both countries. The development and experiences of the institutions in both countries not only shed more lights of constitutional democracy, but also influenced the process of democratic consolidation in the region.
THE EFFECTIVENESS OF DISPUTE SETTLEMENT ON THE RESULT OF PRESIDENTIAL ELECTION 2014 IN THE CONSTITUTIONAL COURT: CASE STUDY IN INDONESIAN CONSTITUTIONAL COURT

Soni, M.*

Abstract:
This study aims to evaluate the effectiveness of dispute settlement on the result of Presidential Election in the Constitutional Court. The research is a normative and empirical legal research. Normative legal research is conducted through library research. Empirical research uses interview with Respondent such as the staff of the Constitutional Court and also the lawyer who involved in the dispute of Presidential Election in 2014. The result shows that the Constitutional Court can settle the Presidential Election dispute effectively based on the law and regulation. However, in the term of substantive justice, the quality of dispute settlement on the result of Presidential Election is probably still being questioned. This is because the time that was given to settle the dispute on the Presidential Election is very short and it did not give enough opportunity to the parties to provide evidence. The research recommends that first, the time provided by the Law No. 42 of 2008 on Presidential Election and Constitutional Court Regulation No. 4 of 2014 on the guidelines of hearing on the dispute of the results of presidential election needs to be amended. Second, General Election Commission should be better in running his functions, obligations, and in showing the professionalism. Hence, the decision from the Commission will be acceptable by the citizen including the presidential candidate. Besides, the professionalism will make presidential election run fairly and honestly.

Keywords: Presidential Election, Constitutional Court, effectiveness of dispute settlement, Indonesia.

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1. Introduction

The Constitutional Court has rejected the petition of Prabowo Subianto-Hatta Rajasa in the disputes on the result of Presidential Election 2014.936 The reason of rejection was because the Court considered that the petitioners failed in providing a story evidence in supporting their claim in the petition. The failure of petitioners in providing evidence was also influenced by limitation of period of disputes settlement in the Constitutional Court, that is only 14 days. In addition, the Court also limited the number of witnesses proposed by the petitioners. Therefore, it seems that is has put the petitioners in difficult position in defending their right in the process of Presidential Election.

Indonesia held Presidential Election on July 9, 2014. The Election was the third direct Presidential Election in Indonesia. The Election would elect new President and Vice-President because Susilo Bambang Yudhoyono could not be nominated again after his two periods of presidency. In fact, the way of a petition to the Constitutional Court challenged the limitation of period of the presidency. As a result, the Constitutional Court rejected the petition.

The Election was finally won by Joko Widodo-Jusuf Kalla by 53, 15 %, while Prabowo Subianto-Hatta Rajasa only 46, 85 %.937 The elected President and Vice President Joko Widodo-Jusuf Kalla were inaugurated on the October 20th, 2014.

The presidential candidates Prabowo Subianto-Hatta Rajasa submitted a petition dispute on the results of the Presidential Election 2014 to the Constitutional Court on Friday, July 25 in the afternoon. According to them the process of Presidential Election 2014 was undemocratic and contradicted with the 1945 Constitution. As the executor, General Election Commission was unfair, some rules were violated by the Commission. Furthermore, Prabowo said that the recommendation from Election Supervisory Body regarding to the alleged fraud was ignored by the Commission. He also found a number of crimes in the Election involving General Election Commission and another party with a certain goal. And then Prabowo concluded that there are structured, systematic, and massive violations in the Presidential Election 2014.

936 See the Constitutional Court Decision No. 1/PHPU.PRES-XII/2014
Chairman of the Constitutional Court Hamdan Zoelva said that constitutional judges will decide a dispute in the matter of the results of elections (PHPU) fairly. He believed, a verdict of Constitutional Court did not create violence in society. According to Hamdan, Indonesian citizen is considered having high awareness in democracy.\textsuperscript{938}

Hamdan Zoelva further believed that the elite of countries would be able to maintain the attitude in the aftermath of the Constitutional Court verdict regarding the results of the Presidential Election dispute. “Moreover, I believe they have more awareness in facing the nation problems.” Hamdan added, that in the process of hearing until a verdict, the Constitutional Court ensures none of the party will interfere the Constitutional Court.

2. Effectiveness

Effectiveness is a success in achieving targets or beneficiaries that have been set in every activity or program. The level of effectiveness can be measured by comparing between the predetermined plans with the real results that have been realized. However, if the result of the work and efforts made improper thus causing the target not achieved as expected, then it is said to be ineffective. This is in accordance with the opinion of H. Emerson quoted by Soewarno Handayaningrat S. which stating that effectiveness is a measure in the sense of achieving predetermined objectives.\textsuperscript{939}

The effectiveness shows a success on achieving or not achieve the target set. If the results of the activities are closer to the target, meaning the higher effectiveness and if the results of the activities can be achieved until the time limit has been determined, then the program or activity can be said to be effective.


Furthermore, according to Kurniawan, in his book entitled Transforming of Public Services, defines effectiveness as follows:

"The effectiveness is an ability to implement duties, functions (operations or missions program activities) rather than an organization or the like and there are not any pressures or tensions between its implementation".\textsuperscript{940}

Based on some opinions on the effectiveness above, it can be concluded that a program or activity can be said to be effective if a predetermined plan has reached the target or have obtained results as planned.

3. **Indonesian Constitutional Court and the Authorities**

The Constitutional Court is even called as the protector of the Constitution. This statement seems more reasonable when the Amendment of the 1945 Constitution incorporated some article on human rights into the 1945 Constitution. In different sense, the explanation of the Constitutional Court Act states that:

“... One of the important changes of the substance of the 1945 Constitution of Indonesia is the existance of the Constitutional Court as an institution of the state that handle particular cases in the field of constitutional law, in order to guard the Constitution to be implemented with responsibility in accordance with the will of the people and goals of democracy. The existence of the Constitutional Court at the same time to guarantee the implementation of a stable government also as the correction of previous practice of government as the result of multi-interpretation of the Constitution.”

In more clear statement Jimly Ashhiddiqie elaborates as follows:

“In the context of Constitution, the Constitutional Court is construed as the guardian of the Constitution that serves to uphold Constitutional Justice in the community life. The Constitutional Court has duty to encourage and ensure that the Constitution is respected

and implemented by all components of the state consistently and responsibly. In the discourse of the weakness of the existing constitutional system, the Constitutional Court has a role as an interpreter of spirit of the Constitution in order to be a live and flower the practice, the state, and society.  

Article 24C paragraph (1) and (2) explains the authority of the Constitutional Court as follows:

1. The Constitutional Court has the authority to adjudicate at the first and final instance, the judgment of which is final, to review laws against the Constitution, to judge on authority disputes of state institutions whose authorities are granted by the Constitution, to judge on the dissolution of a political parties, and to judge on disputes regarding the results of general election.

2. The Constitutional Court shall render a judgement on the petititon of the People’s Representative Council regarding an alleged violations by the President and/or Vice President according to the Constitution.

The authority of the Constitutional Court specifically addressed in Article 10 of the Constitutional Court Act as follows:

a. To review the laws against the Constitution of the State of Republic of Indonesia of the Years 1945;

b. To judge on authority disputes of state institutions whose authorities are granted by the Constitution of the State of Republic of Indonesia of the Years 1945;

c. To judge on the dissolution of a political party;

d. To judge on a dispute regarding the result of general election; and

e. The Constitutional Court shall render a judgement on the opinion of DPR alleging that the President and/or Vice-President have/has committed a violation of law in the form of treason against the state, corruption, bribery, other felonies, or disgraceful act, and/or no

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longer meets the qualification as President and/or Vice-President as referred to in the Constitution of the State of the Republic of Indonesia of the Year 1945.

4. The Effectiveness of Disputes Settlement on the Result of Presidential Election 2014 in Constitutional Court

Article 201 paragraph (3) Law No. 42 of 2008 on Presidential Election explains that the Constitutional Court decides the disputes based on the objections referred to in paragraph (1) and (2) at least 14 days from the petition accepted in the Constitutional Court.

The reading of the Constitutional Court verdict on the dispute of Presidential Election 2014 filed by the candidate No. 1 Prabowo Subianto-Hatta Rajassa is in the schedule determined by the Constitutional Court on Thursday September 21, 2014. It means that the Constitutional Court conducted his duties based on the law regulated in the Constitutional Court Act No. 4 of 2014, that they only have 14 days of working to settle the dispute of Presidential Election.

Although only 14 days to complete, Hamdan Zoelva, Chairman of the Constitutional Court can confidently settle a lawsuit related to the presidential election. “Hamdan argues that this is not like the legislative elections. So, indeed we have only got 14 days time which is not so long. But, based on the experience, the Constitutional Court may finish the disputes, said the former politician of the Crescent Star Party.942

The Proceedings of Presidential Election dispute began on August 6, 2014 to hear the oral testimony of the applicant, Prabowo Subianto-Hatta Rajasa. The lawyer of Prabowo-Hatta alleged that there were structured, systematic, and massive violation of regulation on the process of Presidential Election 2014.

In addition, the Clerk of the Constitutionl Court, Hani Adhani also added that 14 days which is owned by the Constitutional Court to settle the disputes on Presidential Election 2014 is considered sufficient because the trial applied to settle the Presidential Election disputes is fast, simple, and low cost or called speedy trial.

Based on the previous discussion, the dispute settlement on the Result of Presidential Election 2014 is considered as an effective settlement due to some reasons:

1. Effectiveness is a success in achieving targets or beneficiaries that have been set in every activity or program. The level of effectiveness can be measured by comparing the predetermined plans with the real results that have been realized and in this case The Constitutional Court can resolve all proceedings until decision-making appropriating as planned, therefore, it can be called as effective process of disputes settlement.

2. Applicant, Respondent, and Related Parties can accept the decision that has been made by the Constitutional Court with the official statement from the Applicant, Prabowo Subianto:

   “Good evening, friend. Tonight I want to express my gratitude and highest appreciation to all friends who have joined on this Facebook page, trust, support, and prayers' that have been given to me and my partner's brother Muhammad Hatta Rajasa.

   Although it can’t show substantive justice, the decision of the Constitutional Court must be respected. Tonight I would like to convey to all friends, the trust that has been given to our friends we will never waste it.

   In parliament and at every opportunity, I with Brother Hatta Rajasa and around the Red and White Coalition partners are commitment to continue the strive to realize Indonesia which we aspire”.

3. Coalition of Prabowo-Hatta accepted the verdict. “We accept the decision of the Constitutional Court as the final verdict on the election,” Tantowi Yahya said, a spokesman for a coalition of the Red-White, at the Grand Hyatt Hotel, Jakarta.

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943 Berita Republika: Ini Pernyataan Resmi Prabowo Sikapi Putusan MK, available on http://www.republika.co.id/berita/nasional/politik/14/08/22/naiopg-ini-pernyataan-resmi-prabowo-sikapi-putusan-mk access on September 12, at 09. 20 a.m.
5. **Problem of Disputes Settlement on the Result of Presidential Election 2014 in the Constitutional Court**

The result of Presidential Election 2014 brought about controversies that caused the decision of General Election Commission unacceptable entirely by the community, especially the candidate president and vice-president Prabowo Subianto-Hatta Rajasa. According to Prabowo-Hatta, there are many serious violations during the Presidential Election 2014. Hence, Prabowo-Hatta argue that they registered petition to the Constitutional Court regarding the violation happening in the process of Presidential Election 2014.

Candidate President Prabowo Subianto-Hatta Rajasa and the team pointed out same legal action that will be taken\(^{944}\), they are as follows:

1. File a lawsuit over the election result with the Constitutional Court
2. Report alleged ethical violations by the General Elections Commissin to the Election Organizers Ethics Council (DKPP).
3. File a report with the Election Supervisory Committee (Panwaslu).
4. Report electoral violations to the police.
5. Making a report to the Ombudsman.
6. File a report with the State Administrative Court (PTUN) asking for the KPU on the election result to be annulled.
7. Political maneuver within the People's Representative Council by establishing a Presidential Election Special Committee to evaluate the performance of the KPU. The maneuvering was done by parties within Prabowo-Hatta's coalition.
8. A class action.

Prabowo Subianto took an appeal against the election result to the Constitutional Court of Indonesia, alleging structured, systematic and massive violations and that up to 24,1 million votes were questioned. The first hearing was on 6 August. On 21 August the court delivered a unanimous 9-0 verdict in favour of rejecting all aspects of the appeal. A spokesperson for Subianto stated that his team did not consider the ruling fair, but they would accept the court's

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\(^{944}\) See the Petition of Prabowo Subianto-Hatta Rajasa No. 1/PHPU-PRES/XII/2014
judgement. On the same day, the Election Organizers Ethics Council (DKPP) ruled that there had been some ethical violations. Of the nine local election commissioners dismissed for taking bribes, four of them took money from Prabowo's Gerindra Party. 945

Dispute settlement on the result of Presidential Election 2014 in the Constitutional Court has brought about doubt regarding the effectiveness of the process of Presidential Election dispute in the Constitutional Court. This is because the Constitutional Court Act No. 4 of 2014 that regulate the procedure of dispute settlement on the Presidential Election dispute determine 14 days to resolve the problem.

The Presidential Election 2014 in Indonesia was the practice of democracy in the whole area of the archipelago from Sabang to Merauke that consist of 34 provinces. Considering the huge territory of the country, 14 days are impossible to reveal and prove the violations that occur in almost province in Indonesia although the Constitutional Court apply speedy trial in resolving the disputes of Presidential Election 2014.

According to Heru Widodo as a lawyer from presidential candidate Prabowo-Hatta, to examine a witness need 5-10 minutes, even there are some witnesses who can reach 15-20 minutes. In facing this fact, the Constitutional Court limits the number of witnesses that can be proposed in the trial and than the Constitutional Court may decide the case appropriating with the time that has been set in the regulation.

This limitation makes the applicant difficult to explore and reconstruct the violations that occured. The violation is structured, systematic, and massive, while the elements of massive occured in almost of Indonesian territory. So that with this available witnesses, it is not enough for the applicant to prove all argument on massive violations occuring in the whole provinces in Indonesia.

Actually, in other cases that has no limited time, the Constitutional Court always incur witnesses or experts untill the problem becomes clear. Constitutional Court has to accomodate about that, because every urge that is not delivered has to be listened. 946

Based on the formal law, the Constitutional Court has been referring to the Law of Presidential Election in settling the dispute of Presidential Election 2014. But, if we consider to the substantive justice, the time that is given by the law to settle the dispute of Presidential Election is not in favor to the applicant because the time does not accommodate the applicant to tell the arguments.

In the system of the election justice, the right of citizen and right of the candidate are guaranteed from injustice in the election. Injustice can be from the executor of election or the other candidate. If the injustice cannot be proven because a formal reason, so the regulation has to be amended.

6. Conclusion

Based on the discussion in the previous chapter, it can be concluded that the Constitutional Court can settle the Presidential Election 2014 disputes effectively based on the law and regulation. The parties which were involved in the disputes also accepted the decision of the Constitutional Court.

However, the effectiveness of disputes settlement in the Presidential Election 2014 might be still in term of procedural democracy. On the other hand, in terms of substantive justice, the quality of disputes settlement on the result of Presidential Election 2014 probably is still being questioned. This is because the time that was given by the law to settle the disputes of Presidential Election 2014 is too short, and it is did not accommodate the parties to provide the arguments. In the system of election justice, the right of citizen and right of the candidate are guaranteed from injustice in the election. Therefore, if injustice brought about a formal reason, then the regulation has to be amended, and in this case is Article 39 of the Constitutional Court Act No. 4 of 2014.
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Undang-Undang tentang Ketentuan-ketentuan Pokok Kekuasaan Kehakiman, Undang-Undang No. 14, LN No. 74, Tahun 1970, TLN No. 2961, Penjelasan Pasal 1, sebagaimana diperbaharui dengan Undang-Undang No. 4 Tahun 2004 (Indonesia (c), Undanag-Undang Kekuasaan Kehakiman, Undang-Undang No. 4 LN No. 8 Tahun 2004, TLN No. 4358). Undang-Undang No. 4 Tahun 2004 diganti dengan Undang-Undang No. 48 Tahun 2009.

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Constitutional Court Decision No. 1/PHPU.PRES-XII/2014

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Berita Republika: Ini Pernyataan Resmi Prabowo Sikapi Putusan MK, available on http://www.republika.co.id/berita/nasional/politik/14/08/22/naoipg-ini-pernyataan-resmi-prabowo-sikapi-putusan-mk access on September 12, at 09. 20 a.m.
Nowadays, the issue of children’s rights is becoming a serious problem to the international community, including Indonesia. The most tragic case happened in Indonesia is the murder of Angeline, an eight-year-old girl whose was found buried behind her foster mother’s home in Bali. Angeline case is a reminder for the government to ensure the implementation of Law No. 35 of 2014 on Child Protection, which is not running properly. The type of this research is a normative legal research with statute approach and case approach. By using a qualitative descriptive method, this study would analyze how is the current protection of rights of child in Indonesia based on the perspective of Convention on the Right of the Child (CRC) and Law No. 35 of 2014. Finally, the result shows the protection of children’s right in Indonesia is not strong enough, although Indonesia is already ratified the Convention on the Right of the Child, aside of the enactment of Children’s Rights Act. However, in the case of Angeline, both Convention and Indonesian Law are not running properly, especially the ratification of CRC is only based on Presidential Decree. In addition, the government have to disseminate all the regulation related to how the society also may be a part of the parties who able to protect the children surrounding them. Furthermore, Indonesia also has to increase the level of Presidential Decree become an Act, since there is no sanction can be imposed in the only Presidential Decree.

**Keywords:** CRC, Children Rights, Children Protection, Angeline, Indonesia.
1. Introduction

Angeline case is one case of the many cases that occur in Indonesia. The number of cases of violence against children is a major evaluation for the government in the protection of children in Indonesia. This is a big question for the government concerning child protection system in Indonesia. The government effort is to address the violation of children’s rights marked by the ratification of the Convention on the Rights of the Child in 1990. Angeline case is a reminder for the government to ensure the implementation of Law No. 35 of 2014 on Child Protection in Indonesia, which not running properly.

When we describe one by one case of violence against Angeline obviously it is so contrary with the principles contained in the Convention on the Rights of the Child. In the rights of child who have been mentioned above protected since the ratification of the Convention on the Rights of the Child. But if we look back to the current application or implementation of the Convention on the Rights of the Child in Indonesia is not in line with the principles or values contained in the Convention on the Right of the Child. This is caused by Indonesia, which ratified the Convention on the Right of the Child only in the form of Presidential Decree which means that Indonesia considers the Convention on the Right of the Child does not really matter that affect the implementation of child protection which ultimately was not optimal.

Indonesia signed the Convention on the Rights of the Child (CRC) on September 2nd, 1990 through Presidential Decree No. 36 in 1990. Then on July 23rd, 2012 Indonesia ratified two additional protocols, one of them on sale, prostitution and child pornography through the Law No. 10 of 2012 and since its ratification, Indonesia has been bound by international law to implement its provisions. This means that Indonesia is obligated to protect, fulfil, respect and promote the rights of child, as recognized by the Convention on the Rights of the Child. To achieve this goal, Indonesia needs to adopt legislative, administrative and programmatic measures so as to ensure that the rights of child are realized. As a signatory to the Convention

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on the Rights of the Child, Indonesia also required to ratify other international human rights instruments that are related to the Convention on the Rights of the Child.³

In order to achieve the child protection with the goal of all parties understand the responsibilities that must be adopted, therefore we can analyze the case of Angeline in the perspective of Convention on the Right of the Child (CRC) and Law No. 35 of 2014 on Child Protection. This article aimed to discusses the issues related to the rights of the child protection policy, particularly related to the implementation of the Convention on the Right of the Child in the context of Indonesia.

2. Research Method
   A. The Type of Research
      The type of this research is a normative legal research with the international law and Indonesian law approach through the regulations and conventions that regulated, especially that related with issue of children rights. This research would use statute approach, because it would tell some regulations such as Convention on the Rights of the Child and Law No. 35 of 2014 on Protection of Children. This research would also use case approach, because this research aims to study the regulation in practice pertaining to the violence of children.

   B. Technique of Collecting Data
      The methods of collecting data in this research will be done through library research by literature learning. This methods will collect data from reading analyze, law books, legal journals, and others which related to the main problem as the object of this research.

   C. Technique of Data Analysis
      The data will be analysis systematically through juridical thinking. Systematically means the research will be analysis based on the international law and Indonesian law, especially relating to the issue of children rights/violence of children. Juridical thinking means it would be connected with the principle of law, conventions and others related regulations.

3. Result and Discussion

A. The Historical Context for the United Nations Convention on the Rights of the Child

The United Nations (UN) Convention on the Rights of the Child (CRC) was a by-product of international commitments to human rights, but its history lies in the complex and contradictory developments of the twentieth century, when elevated expectations regarding the welfare of child confronted the realities of war. In the late nineteenth century, material conditions and reform efforts redefined the lives of child in the Western world and created new sentiments about childhood and investments in child’s progress. The First World War and second World War, exposed child’s acute vulnerability and the myth of inevitable progress. After each of these wars, defining what was owed to child and how best to meet their needs was part of larger international negotiations regarding power and prestige. Throughout this period, the involvement of women, a new Swedish presence in international diplomacy, and the growing role of nongovernmental organizations (NGOs) affected what would become a rearticulation of child welfare and protection and a more active commitment to children’s rights.4

B. Case of Angeline

The life story of Angeline is heartbreaking. Born with a poor family in Banyuwangi, East Java, she was only three days taking care by the biological father and mother, Hamidi and Rosida. Because they do not have any money to pay for the necessities of life for the future of the baby, Hamidi and Rosida give Angeline who still a tiny baby to the couple who lived in Denpasar, Bali. Furthermore, Margaret and her husband is foreign nationality were educating and raising Angeline with their two children, Cristina and Ivon.5

Then Angeline grew into a beautiful girl in the house of Margaret in Jalan Sedap Malam, Denpasar. Since his adoptive father died, Angeline life are change turned 180 degrees. Since that time, Angeline become cruelty of stepmother and adoptive brothers.


5 Nusantara, June 11th, 2015, Inilah Asal Usul Angeline, Jawa Pos, taken from http://www2.jawapos.com/baca/artikel/18707/inilah-asal-usul-angelina-, accessed on December 5th, 2015 at 8.46 p.m.
According to Augustine who work at home Margaret, Angeline is always become impingement anger of Margaret. Every morning Angeline also got a special task from his adoptive mother, which feed the chickens before going to school.\(^6\)

Siti Supura, the activist of protection of women and children in Bali, states “Agus was seen Angeline always getting smash from Margaret”. Augustine also claimed to hear Margaret call Angeline on May 16, 2015, after 10 minutes later, Margaret mentioning the name of Angeline loundly. It sounded like a very regret. “Presumably, Angeline died after being tortured and killed at that time” said Siti. At night Margaret call Agus and asked him to bury the body of Angeline behind chicken coop.\(^7\)

C. The Enforcement of Human Rights under Indonesian Law

In practice, sources of international Law are the most important and useful of international human rights Law is international agreement that clearly and directly creating international obligations. International treaties are binding only if this agreement is valid and is only related to state explicitly that a participant. Declaration of a State to be bound by a treaty may be through ratification, acceptance, approval, accession and signature.\(^8\)

Until now there are nine (9) major international human rights instruments (The Core International Human Rights Treaties) governing rights to certain categories in order to further elaborate the Universal Declaration of 1948. These instruments as the international standard for the protection and promotion of human rights for everyone countries that are bound to it. The ninth instrument consists of:\(^9\)

1. International Covenant on Civil and Political Rights, 1966, and two optional protocol:
   a) Optional Protocol on individual complaints, 1966;
   b) Second Optional Protocol on aiming at the abolition of the death penalty, 1989.

\(^6\) Ibid.
\(^7\) Ibid
5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, and optional protocol on establishes national and international monitoring mechanism, 2002;
   a) Optional Protocol on the Rights of the Child on the involvement of children in armed conflict, 2000;

From the nine major international human rights legal instruments in the above, the Government of the Republic of Indonesia has ratified six (6) human rights legal instruments with different legal grounding as shown in the table below:

<table>
<thead>
<tr>
<th>The Instrument of International Human Rights Law</th>
<th>The Legal Basis of Ratification</th>
</tr>
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<tbody>
<tr>
<td>International Covenant on Civil and Political Rights, 1966</td>
<td>Law No. 12 of 2005</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights, 1966</td>
<td>Law No. 11 of 2005</td>
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<td>International Convention on the</td>
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Table 1. The Legal Basis of Ratification of Human Rights Legal Instruments


Based on the table of the six major of international human rights instruments that have been ratified by Indonesia, only Convention on the Rights of the Child, which was ratified in 1989 by using a Presidential Decree, then other instruments using the Law.\(^1^0\)

Human rights issues are a political problem, because it involves the state as the main actors who have agreed an international commitments and obligations through legal reform. Indonesian government should do its obligation to protect has to protect its citizen from the possibility of violations such rights. The protection has to be done in order to implement the obligation to fulfill the Economic and social rights of Indonesians. As the member of United Nations (UN); Indonesia is asked by UN Charter to implement such code of conduct in implementing human rights.\(^1^1\)

\(^{10}\) Yayasan Pemantau Hak Anak, Op.Cit., p. 6

In addition, human rights will also affect the course of foreign policy because of the issue of human rights, democratization, and the environment into strategic issues of international relations. In this regard up to now there are two (2) optional protocol of CRC has been ratified by the Government of the Republic of Indonesia namely:\textsuperscript{12}

1. Optional Protocol on the Rights of the Child on the involvement of children in armed conflict, 2000 was ratified into Law No. 9 of 2012.
2. Optional Protocol on the sale of children, child prostitution, and child pornography, 2000 was ratified into Law No. 10 of 2012.

See both the substance of that international agreement, which regulated the human rights issues, it should be ratified by the Law. This is in accordance with Law No. 24 of 2000 on International Treaties and Law No. 12 of 2011 on the Establishment of Laws and Regulations, the issue of granting legal basis for ratification depends on the substance of the treaty. Based on two Laws, the substance of the charge that should be regulated by legislation among other human rights issues. However, it has juridical implication for effort to reform the Law through legislative effort because of the optional protocol as derivative instrument or instrument derives from CRC which ratified by the Law whereas CRC as main instrument that was ratified by Presidential Decree. In the other words, the effort in making the legislation related to child protection as subject of rights or on the other interest related to the problems of child in the future, than the Presidential Decree No. 36 of 1990 cannot be used as a juridical basis of legislation.\textsuperscript{13}

D. The Substantive Analysis of Presidential Decree No. 36 of 1990 on The Ratification of Convention on the Rights of the Child

The momentum ratification of the CRC in 1990, actually can be used as a first step to harmonize the substance of all of the legislation that created before ratification. At the same time laying the foundation for the construction of the Indonesian legal system to implement the principles and norms of CRC. However, granting legal basis ratification of the CRC, through Presidential Decree No. 36 of 1990 be a stumbling block for constructing a legal system that respects and protect the children’s rights.

\textsuperscript{12} Yayasan Pemantau Hak Anak, \textit{Op. Cit.}, p. 7
\textsuperscript{13} \textit{Ibid}
Both the People’s Consultative Assembly and the House of Representatives as the Parliaments are basing on their authorities for legitimacy to make decisions for children based on the government’s perspective. Children as interest groups and as a subject regulated by the CRC, are not involved to participate. In the discourse of a democratic country, should the interests of the children are represented by the Parliament. The Presidential decision is a political aspect in terms of human rights to refuse the role of Parliament. That is indirectly also override the interests of the children. In fact, children are an integral part in the life of the state that has the legitimate rights and interests of political order to fulfil their rights. In the substance of the CRC should be regulated by law, which means that with the involvement of the Parliament. This is shown by the constitutional convention ratified other international human rights legal instruments by Law.\textsuperscript{14}

Then, it can be understood why the President at that time, provide the legal basis of the CRC ratification by Presidential Decree Number 36 in 1990. There are 3 (three) aspects influenced, they are:

1. The problem of child is not considered politically;
2. The decision of the President is used to indicate that the President has more power than the House of Representatives; and
3. The President did not want to divide up their powers with the House of Representatives when doing the act ratifying an international treaty.

Human rights issues are a political issue because it puts the State as the main actor who will receive international commitments to implement obligations through legal reform. In addition, human rights will also affect the course of foreign policy because the issue of human rights, democratization, and the environment into strategic issues of international relations. Implementation of human rights is always related to the political rights because these implementations involve certain variables such as priorities, budgets and social resources, as well as political will. For example, the State must open access to information as possible to the child, but this freedom can be rejected with the excuse does not comply with

\textsuperscript{14} Yayasan Pemantau Hak Anak, \textit{Op.Cit.}, p. 42
\textsuperscript{15} Ibid.
the provisions of the 1945 Constitution.\textsuperscript{16}

According to the hierarchy of Indonesian legal system, the legal force of Presidential Decree as the legal basis for ratification of the CRC is weaker than the Law. Decree of the President based on the theory Stufenbau, in the period before the applicable Law No. 12 of 2011 on the Establishment of Laws and Regulations, is a function of government regulation and at the same time that the implementation of legislation. Presidential Decree function here is a function that is based on the theory Stufenbau where a regulation under it is always valid, sourced, and is based on higher regulations on it.\textsuperscript{17}

In addition, the government has to change the CRC (Presidential decree) become Act. Since CRC only as presidential decree, the CRC has no power to protect the child well because there is no sanction which regulated in CRC. Based on the hierarchy, the position of CRC is lower than Law and it makes the CRC is not powerful. Based on Law No. 12 of 2011 the presidential decree is not recognized in hierarchy.

E. The Analysis of Angeline’s Case

Angeline an eight years old was reported missing since Saturday, May 16, 2015 finally discovered on Wednesday, June 10, 2015 was killed in a decaying condition buried in his backyard. Margaret Megawe is a foster mother who had been caring for Angeline. She is married with a foreign who had died three years ago. Angeline as a third child has two sisters, Cristina and Ivon who lives in Sanur, Denpasar, Bali.\textsuperscript{18}

An infamous case of violence against a child has led to calls for reform in child protection and adoption legislation in Indonesia. Angeline’s adoptive mother, Margaret Megawe, was arrested on June 14, 2015, on suspicion of child neglect. In addition, a household helper confessed to having killed the girl after sexually assaulting her twice. Speculation on the motive for the homicide includes either to cover up the assaults or perhaps because the adoptive mother promised him with a large payment. Angeline reportedly

\textsuperscript{18} Data Biografi, June 6\textsuperscript{th}, 2015, \textit{Angeline - Bocah Mungil yang Menghilang di Bali}, Taken from http://www.databiografi.com/2015/06/angeline-kisah-tragis-bocah-mungil.html, accessed on December 1\textsuperscript{st}, 2015 at 8.21 a.m.
inherited money on the death of her adoptive father.\textsuperscript{19}

The tragedy of Angeline, give attention and concern of many parties. Various opinions were emerging from the process of adoption by the desire to revise the Law on Child Protection. Angeline’s adopted by Margaret and her husband were foreign nationals since the Angeline was born. Angeline adopted by Margret because of Hamidi and her husband did not have enough money for recovery of Angeline health, Himadi is biological mother of Angeline, she said “When the husband is not able to finance the cost of childbirth, and Margaret gave me money IDR 800,000.00 for the childbirth and IDR 1 million for the cost of my health.” However, in the agreement, Angeline will be returned to their parents after the age of 18 years.\textsuperscript{20}

For the record, the foster mother Angeline, Megawe Margriet and her husband has two children women before lifting Angeline as a child. So based on the procedures for adoption are listed in Regulation of Minister of Social Affairs No. 110 of 2009 on Adoption Requirements, the process of appointing Angeline as a child by Margriet and her husband against the rule.

First, the adoption process is not through the Institute of the Child Caregiver. Whereas in Article 11, Regulation of Minister of Social Affairs No. 110 of 2009 on Adoption Requirements, adoption by the prospective adoptive parents, one of which foreigners must go through the Child Care Institutions. Second, before adopting Angeline, Margriet and her husband have had two biological children. Whereas the so-called conditional pair of candidates adopters are not or have not had children or only one child.


4. Remarks

A. Conclusion

Based on the explanation in the previous chapter, the author would like to conclude that Protection of children’s rights in Indonesia under Law No.35 of 2014 and Convention on the Rights of the Child on case of Angeline, both Convention and Indonesian Law are not running properly. Furthermore, the ratification of Convention on the Rights of the Child least describe clearly how the state of human rights policy discriminates against the full enjoyment of children’s rights. Children’s rights discriminatory politics is visible on Providing a legal basis the ratification of the Convention on the Rights of the Child, 1989 through Presidential Decree.

Granting legal basis synthetically in the Presidential Decree ratifying the CRC shows that experiences to children's rights are considered to be problems of the periphery. In addition, the government has to change the ratification of CRC (Presidential decree) become an Act. Since CRC only as presidential decree, the CRC has no power to protect the child well because there is no sanction which regulated in CRC. Based on the hierarchy, the position of CRC is lower than Law and it makes the CRC is not powerful.

B. Suggestion

The government have to disseminate all the regulation related to how the society also may be a part of the parties who able to protect the children surrounding them. Furthermore, Indonesia also has to increase the level of Presidential Decree become an Act, since there is no sanction can be imposed in the only Presidential Decree.

The expectation is that Angeline case will not happen again in this country and also the other children. Hopefully from this case of Angeline, all of us will realize to keep our children from all violence, also may encouraging the government to be more active in socializing Law No. 35/2014 can be an active role to protect Indonesian children from the dirty hands of the sex offender.
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THE RESPONSIBILITY OF THE STATE ON TRANSBOUNDARY HAZE POLLUTION AFTER THE RATIFICATION OF AATHP:
CASE OF INDONESIA

Gunawan, Y.* & Wahyu, M.A.**

Abstract:

Land and forest fires in Indonesia has resulted the economic and ecological losses caused by opening the land (land clearing) with burning land. Land and forest fires in Sumatra and Kalimantan are now not only a national issue, but also became an international issue because it arise the transboundary haze pollution. Beside the loss in Indonesia itself, the smoke also disrupts neighboring countries, such as Malaysia, Brunei and Singapore. Every year Malaysia and Singapore as countries affected by transboundary haze pollution filed a strong protest to the Indonesian government. Based on the principle of international law of state responsibility, Indonesia should be responsible for the transboundary haze pollution. Because of it has disrupted the environment of other countries. In 2014, Indonesia became the last country to ratify ASEAN Agreement on Transboundary Haze Pollution (AATHP). The type of this research is a normative legal research. By using a qualitative descriptive method, the research aims to describe the responsibility of Indonesian government on transboundary haze pollution after the ratification of AATHP. The result shows that Indonesia cannot be required to pay compensation fully because it was a shared responsibility to prevent the transboundary haze pollution and Indonesia also can avoid lawsuits of international law because of transboundary haze pollution. The Indonesian government have to undertake preventive action, which prevents forest fires that often occur as a result of land clearing. The government also has to educate the farmers on how to open land effectively.

Keywords: International Law of State Responsibility, Ratification, AATHP, ASEAN, Indonesia.

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1. Background

Smog problems re-emerged in recent times, land and forest fires in Sumatra and Kalimantan are now not only a national issue, but also an international issue, because this case cause transboundary haze pollution.\(^1\) Transboundary haze pollution is considered one of the major problems in the ASEAN region. It is caused by land/forest fires which mostly derive from Indonesia land and forest fires. The worst forest fire was in 1997-1998 and since then they occur every year with various intensity.\(^2\)

In 2002 the whole ASEAN members agreed to sign the ASEAN Agreement on Transboundary Haze Pollution (AATHP) in Kuala Lumpur, Malaysia. Although at that time Indonesia has not yet ratified. They draft the ASEAN Agreement on Transboundary Haze Pollution (AATHP) and entered into force officially on November 25, 2003 which aims to prevent and resolve the transboundary haze pollution from land and/or forest fires which should be implemented through national efforts, regional, and international intensive.\(^3\)

Indonesia has ratified the ASEAN Agreement on Transboundary Haze Pollution (AATHP) on September 16, 2014. The ratification of the AATHP is the right step taken by Indonesia to demonstrate its seriousness in overcoming transboundary haze caused by land and forest fires. The ratification was done following a discussion by a plenary session of the House of Representatives attended by parliamentary members and leadership, as well as ministers of environment, foreign affairs, justice, and human rights.\(^4\)

Transboundary haze pollution from forest fires is against the principles of international environmental law. One principle is "\textit{Sic utere tuo ut alienum non laedes}" which determines that a State is prohibited from or permitted activities that may harm other

\(^2\) Laely Nurhidayah, 2012, \textit{The Influence of International Law upon ASEAN Approaches in Addressing Transboundary Haze Pollution in the ASEAN Region}, NUS-Asian SIL Young Scholars Workshop, NUS Law School, p.2
countries, and the other principle is "Good Neighborliness" which basically says that the principle of the sovereignty of the territory of a State shall not be disturbed by other States.\textsuperscript{5}

Another principle of international law for the protection of the environment is "in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".\textsuperscript{6} In principle 21 of the Stockholm Declaration in 1972 also stated, "responsibility to ensure that activities within reviews their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction".\textsuperscript{7}

These principles can be the basis for asking the liability of the state against other state that has committed acts that harm other countries. According to international law, state responsibility arises when the related state harms other countries. In this case, the forest fires in Indonesia have a negative impact on Malaysia and this happens almost every year without any serious follow-up from the Indonesian government.

2. The History of Transboundary Haze Pollution in Southeast Asia

Forest fire became a global attention as environmental and economic issues, especially after the disaster of El-Nino\textsuperscript{8} in 1997-1998 scorching 25 million hectares of forest land area all over the world. Fires are considered a potential threat to sustainable development because of direct effects to the ecosystem, contributing to carbon emissions, and its impact on biodiversity.\textsuperscript{9}

\textsuperscript{6} United Nations (UN), Rio Declaration on Environment and Development 1992, Principle 2
\textsuperscript{7} Stockholm Declaration 1972, Declaration of the United Nations Conference on the Human Environment, Principle 21
\textsuperscript{8}\textit{El Nino} is a phenomenon of deviations sea conditions characterized by increased sea surface temperature (SST) in the Pacific Ocean around the equator (equatorial pacific) especially in the central and eastern part (around the coast of Peru). Because the ocean and the atmosphere are two interconnected systems, the deviation ocean conditions caused a deviation on the atmospheric conditions that ultimately result in climate change.
\textsuperscript{9} Luca Tacconi, 2003, \textit{Kebakaran Hutan di Indonesia: Penyebab, Biaya dan Implikasi Kebijakan}, Bogor, Center for International Forestry Research, p.1
Since 1982, there have been five major fire outbreaks in Southeast Asia with small fires occurring almost annually. The major fire was in 1997-1998, destroying an estimated land and forest area of more than 9 million hectares (ha) in Indonesia alone.\(^\text{10}\) From October through November 1997, fires in Indonesia and the resulting haze made front-page news around the world as the haze spread as far the Philippines to the north, Sri Lanka to the west, and northern Australia to the south.\(^\text{11}\)

In the middle of 1997, forest fires in Indonesia began to affect neighboring countries, spreading thick clouds of smoke and haze to Malaysia and Singapore.\(^\text{12}\) Seasonal rains in early December brought a brief respite but soon after, the dry conditions and fires returned. By 1998, Brunei and to a lesser extent, Thailand, Vietnam and the Philippines has also felt the haze. By the year of 1997-1998 fire episode was finally over, some 8 million hectares of land was burned while countless millions of people suffered from the effects of air pollution.\(^\text{13}\)

3. The Impact of Transboundary Air Pollution in Southeast Asia

Haze pollution means smoke resulting from land and/or forest fire which causes deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment.\(^\text{14}\) In windless conditions haze tends to remain in one location, creating adverse health effects including reduced lung capacity in young people, cardiovascular problems, and reduced life expectancy. People living in areas affected by haze may deal with it for weeks or months at a time, breathing in smoke particulates until a storm system powerful enough to move or dissipate the dense, “hazy” air passes through the affected area.

Tropical peat land fires in Indonesia are generally caused by Illegal human activities, including:\(^\text{15}\)

\(^{10}\)Ibid.
\(^{11}\)The Asian Forest Fires of 1997-1998, [http://rainforests.mongabay.com/08indo_fires.htm](http://rainforests.mongabay.com/08indo_fires.htm), accessed on June 20, 2015 at 10am
\(^{13}\)Ibid.,
\(^{14}\)Article 1, Point 6, ASEAN Agreement on Transboundary Haze Pollution
\(^{15}\)Mark E Harrison, Susan E Page, Suwido H Limin, *The Global Impact of Indonesian Forest Fires*, *Biologist*, London, The Institute of Biology, Volume 56 Number 3, August 2009
1. **Land Clearing:** the area of peat-swatch forest (PSF) being allocated for plantations and consequently being burned for land clearance is increasing annually and these fires are frequently out of control. Indonesia is the world’s largest palm-oil producer.

2. **Use of fires as a weapon in land tenure/use disputes:** Uncertain land tenure and access rights with consequent conflicts can contribute to increase burning. Smallholders can become frustrated at being unable to have their claims heard in a fair and transparent judicial system and resort to the use of fire as a weapon to reclaim land for agriculture.

3. **Fire for resource extraction and other purposes:** this takes many guises (e.g. hunting, burning waste) but is generally of low importance.

4. **Accidental fire:** these are often caused by discarded cigarettes or unprotected cooking fires, following increasing human access into peat land areas along newly-constructed logging tracks and canals.

Besides, the land and forest fires in Indonesia also generally caused by peat land fires, peat land fire is the most contribute factor caused the haze pollution, since it contains the high level of carbon.

4. **Indonesia Ratification of the ASEAN Agreement on Transboundary Haze Pollution**

The ASEAN Agreement on Transboundary Haze Pollution (AATHP) is a regional treaty signed by 10 ASEAN countries (Brunei, Cambodia, Laos, Malaysia, Myanmar, Singapore, Thailand, Vietnam and Indonesia) that came into force in 2003. Indonesia only ratified the treaty on 16 September 2014. The agreement requires parties to develop and implement prevention, monitoring and mitigation measures, respond to information requests made by affected states, and take legal or other measures to implement obligations under the agreement.

The objective of this agreement is to prevent and monitor the transboundary haze pollution as a result of land and/or forest fires which should be mitigated, through concerted national efforts and intensified regional and international co-operation. This should be

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pursued in the overall context of sustainable development and in accordance with the provisions of this agreement.\textsuperscript{17}

The Agreement is the first regional arrangement in the world that binds a group of affected states to tackle transboundary haze pollution resulting from land and forest fires. It has also been considered as a global role model for the handling of transboundary issues. The ASEAN Agreement on Transboundary Haze Pollution (AATHP) is a legally binding environmental agreement signed in 2002 by all ASEAN nations to reduce haze pollution in Southeast Asia.\textsuperscript{18}

On September 16, 2014, Indonesia ratified the Association of Southeast Asian Nations (ASEAN) Agreement on Transboundary Haze Pollution (Haze Agreement), initially signed in 2002. It was the last of the ten signatory nations to ratify the pact; the other participants are Brunei Darussalam, Burma, Cambodia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam.\textsuperscript{19} After ratifying the agreement, Indonesia will receive several benefits:\textsuperscript{20}

1. Playing an important role in making decisions and taking active part in directing ASEAN policies on combating land and/or forest fires;
2. Protecting the Indonesian community from the impact of land and/or forest fires detrimental to human health;
3. Protecting land and forests from land and/or forest fires; and
4. Contributing to the control of land and/or forest fires which lead to transboundary haze pollution.

5. Indonesian Government’s Policy toward Transboundary Haze Pollution in Southeast Asia

The Indonesian government did ban using fire to clear land in 1995, but this ban has not been effectively enforced due to Indonesia’s relative poverty and the fact that slash-and-burn agriculture is a traditional land-clearing technique believed to create more fertile land.\textsuperscript{21}

\textsuperscript{17} Article 2, ASEAN Agreement on Transboundary Haze Pollution
\textsuperscript{18} ASEAN Agreement on Transboundary Haze Pollution, http://haze.asean.org/?wpfb_dl=32, accessed on June 25, 2015 at 2pm
\textsuperscript{19} ASEAN: Indonesia: Regional Haze Agreement Ratified, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404126_text, accessed on July 3, 2015, at 4.29pm
\textsuperscript{21} Ibid., p.36
The efforts that have been undertaken by the Ministry of Forestry in land and forest fire control, among others: spread the maps of forest fire in prone provincial level; urges the Governor in Kalimantan, Sumatra and Sulawesi in order to be ready to face land and forest fires in 2014 and attempts to anticipate the *El Nino*; and conducted simulations, technical guidance and patrol extinguishing forest fires in fire-prone provinces.\(^{22}\)

The government through cooperation between the ministries and authorized body has conducted several measures, among others: first, the extinguishing against the land and forest fires; second, the extinguishing in the air through water bombing and weather modification techniques; and Third, socialization and law enforcement.\(^{23}\)

Some steps have already been taken by Indonesia Government, in 2009, Law Number 32 of 2009 on Environmental Protection and Management was enacted in Indonesia imposing a maximum fine of Rp.10 billion (approximately US$800,000)\(^{24}\) and up to ten years in prison for individuals or corporations engaging in land burning activities. This has led to a number of successful prosecutions in the past two years. More recently, the Indonesian government has introduced the Indonesian Sustainable Palm Oil\(^{25}\) scheme, which bans the use of fire in plantation development, and will be mandatory for all palm oil companies in Indonesia by end-2014.\(^{26}\)

In the case of law enforcement there has been increasing legal efforts taken to reduce the number of the offense of forest fires. In the report of KLH\(^{27}\) in 2012 there were two cases that have been handled, namely PT Kalista Alam and PT Surya Panen Subur. While in 2013, there were 7 criminal case files that had been submitted to the General Attorney of Republic

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\(^{22}\) Teddy Prasetiawan, *op. cit.* p.10

\(^{23}\) Ibid.,

\(^{24}\) Article 98, Law Number 32 of 2009 on Environmental Protection and Management

\(^{25}\) The Indonesian Sustainable Palm Oil (ISPO) Foundation is a national non-profit organization aiming to improve the sustainability and competitiveness of the Indonesian palm oil industry and contribute to the Indonesian government’s objectives to reduce greenhouse gases emissions and draw attention to environmental, [http://www.sustainablepalmoil.org/](http://www.sustainablepalmoil.org/).


\(^{27}\) Kementrian Lingkungan Hidup (KLH) or The Ministry of Environment is the Indonesian government ministry in charge of environmental affairs. The Ministry of Environment headed by a Minister of the Environment.
of Indonesia and one civil case file that is still in the process of drafting a lawsuit. Since 2013 until now, the police have conducted 41 prosecutions against the offenders, especially to the palm oil plantation companies. From the 41 prosecutions, the 25 offenders have been named as the suspects and even already punished started from 8 months to 8 years.

In terms of technical implementation mandated by the ASEAN Agreement on Transboundary Haze Pollution (AATHP), Indonesian government has conducted several measures to prevent and control land and/or forest fires, among others:

1. To conduct the socialization of AATHP and capacity building massively and sustainable to the ministries/agencies, business community, society, NGOs, and local governments in areas prone to land and forest fires.
2. To commit good coordination inter-ministerial/agency, local government or with the society based on Indonesia Comprehensive Plan of Action on Transboundary Haze Pollution such as:
   a. Mapping prone areas of land and forest fires;
   b. Strengthening the data and information relating to hot-spot, the distribution of smoke, burnt area mapping, Fire Danger Rating System (FDRS), SOP development in the prevention and control of land and forest fires, and peat land management. Even LAPAN has provided training to Malaysia in the development FDRS through remote sensing system;
   c. Strengthening and building the capacity of caring fires society which conducted through the socialization, early prevention activities and training
   d. Disaster management of coordinated smoke in terms of emergency response, among others: through the fire fighting forces and weather modification operations.

31 Lembaga Penerbangan dan Antariksa Nasional (LAPAN) or National Institute of Aeronautics and Space is a Non-Government Institutions of the Republic of Indonesia who carry out government duties in the field research and development of aerospace and its utilization, http://www.lapan.go.id/
3. To commit the law enforcement (criminal and civil law) to the offenders (individual or corporations) of burning land and forest and transboundary haze pollution which is resulting environmental damages. Criminal law enforcement is conducted, integrated and coordinated by PPNS KLH and Police investigators together and through the mechanism of multi-doors. Civil law enforcement conducted through a lawsuit of compensation against the offenders of the burning of land and forest to restore the quality of the environment.

4. To strengthen the institutional and legislation which supports the policy of land clearing without burning (zero burning policy) and the prevention of the land or forest fires and transboundary haze pollution.

6. The Responsibility Before Ratification of AATHP

For a long time, transboundary haze pollution has been a concern of international law. The first and famous case of transboundary haze pollution is the Trail Smelter Arbitration. Until recently, transboundary haze pollution was high on the environmental agenda in many regions of the world including Europe, the United States and South East Asia. In addition, the threat of transboundary haze pollution is now on a global scale with such ozone depletion and climate change which requiring cooperation to tackle this problem.

According to Draft Articles on Responsibility of States for Internationally Wrongful Acts, “every internationally wrongful act of a State entails the international responsibility of that State”. An internationally wrongful act exists when conduct consisting of an action or omission is attributable to the State under international law; and that conduct constitutes a breach of an international obligation of the State.

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32PPNS KLH is the Civil Investigators of Environmental Ministry of the Republic of Indonesia.
33Multi-doors mechanism is a case management guidelines launched by the Police, the Ministry of Environment and the General Attorney to deal with cases related to natural resources and forestry, especially the problem of forests and peat lands.
34Laely Nurhidayah, op.cit,p.5
35Article 1 of Draft articles on Responsibility of States for Internationally Wrongful Acts
When a state causes an injury to another state, the responsible state is liable to make full reparation to the injured state. Under Article 31 Draft Article on Responsibility of State for Internationally Wrongful Act, reparation may take the form of restitution, compensation, and satisfaction.37

1. Restitution: restitution involves the restoration of a situation that existed before the wrongful act was committed, provided that this is possible does not impose a greater burden on the responsible state than compensation.38 A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:39
   a. is not materially impossible;
   b. does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation

2. Compensation: the state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.40

3. Satisfaction: the state responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.41 Satisfaction may consist of in an acknowledgment of the breach, an expression of regret, a formal apology.42 Satisfaction will be necessary where restitution or compensation is in adequate.43

38 Ibid, p.295
39 Article 35, Draft Article on Responsibility of State for Internationally Wrongful Act
40 Article 36, Draft Article on Responsibility of State for Internationally Wrongful Act
41 Article 37, Draft Article on Responsibility of State for Internationally Wrongful Act
42 Muhammad Naqib Ihsan Jan, *op.cit*, p.234
43 Ademola Abass, *op.cit*, p.296
Based on the state responsibility theory of International Law Commission’s Draft Article on Responsibility of State for Internationally Wrongful Act, the Indonesian government should be responsible for the transboundary haze pollution.

The first responsibility that must be carried by the Indonesian government based on the concept of the state responsibility in international law is restitution. Indonesia should perform the restoration of situation to the affected countries of transboundary haze pollution until the original condition of a state before affected by haze pollution either material loss or immaterial losses as a form of state responsibility at the highest level. Indonesia also have to pay compensation to the affected countries by replacing the losses caused by haze pollution and convince the neighboring countries that the pollution caused by the haze will not be repeated again. Then, in conditions where the replacement of economically, either restitution or compensation do not allow, acknowledgment of the breach, an expression of regrets, and a formal apology become a form of responsibility that must be done by the state that led to the haze pollution.

Many environmentalists hold that the principle for transboundary pollution, as declared in Principle 21 of the Stockholm Declaration, is now a norm of customary international law. To cause damage to other countries is considered as a breach of international law. States are supposed to avoid negative externalities and to compensate for the damage the cause to other states. States are supposed to terminate the activity that led to the occurrence of externalities.

Principle 21 from the 1972 Stockholm Conference has become one of the most important principles used in international environmental law. It states that:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities

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46 Ademola Abass, op.cit, p.622
within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

Besides, in international law, states are not allowed to conduct or permit activities within their territories, or in common spaces, without regard for the rights of other states or for the protection of the environment. This point is referred to as the principle of “good neighborliness” or “sic utere tuo ut alienum non laedes” in Article 74 of the UN Charter.

The Principle refers to social, economic and commercial matters, but has been extended to environmental matters by rules promoting international cooperation. It applies particularly to activities carried out in one state that might have adverse effects on the environment of another state or in areas beyond national jurisdiction.

The commitment to environmental cooperation is reflected in many international agreements and supported by state practice. According to international lawyer Allen Tan, state responsibility and liability for Indonesia under international law for the 1997-98 fires can clearly be made out because Indonesia failed to “exercise its due diligence obligation to prevent and punish the activities of its private citizens who were deliberately setting fire.

7. The Responsibility After Ratification of AATHP

To reduce the impacts of transboundary haze pollution, the ASEAN countries realize that they need to strengthen national policies and strategies to prevent and mitigate the land and forest fires that cause the transboundary haze pollution. The ASEAN Agreement on Transboundary Haze Pollution is an international agreement that made between the countries in the written form.

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51 Henriette Litta, op.cit, p.97
According to Article 2 of the Vienna Convention the Law of Treaties (1969):

“Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

The definition of international agreement also stated in the Article 1 of Law on Diplomatic Relationship (1999):

“Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

Therefore, it can be concluded that the international agreement is all agreements made by the state as a subject of international law, which is governed by international law, binds the state (parties) and have legal consequences.

In international law, international agreement that have been made, will create binding obligations for the state (the parties), and the forces binding of international agreements stated in the Article 26 Vienna Convention on the Law of Treaties 1960: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith” or it called as the principle of pacta sunt servanda.

As the sovereign country, Indonesia has been actively involved in diplomatic relationships and established the international agreements with other countries both bilaterally and multilaterally. In implementing the International agreements, Indonesia follows the principle of primacy of national law which means that the national law has a higher status than international law.

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52 Article 2, 1969 Vienna Convention on the Law of Treaties
53 Article 1, Law on Diplomatic Relationship 1999
56 Pacta Sunt Servanda is a Latin term which means agreements must be kept. It is the principle in international law which says that international treaties should be upheld by all the signatories. The rule of pacta sunt servanda is based upon the principle of good faith. The basis of good faith indicates that a party to the treaty cannot invoke provisions of its domestic law as a justification for a failure to perform. The only limit to pacta sunt servanda is the peremptory norms of general international law known as “jus cogens” which means compelling law.
Based on the agreement of the countries that have ratified AATHP, there is a main objective contained in Article 4 (point 1) of AATHP, namely:

“Co-operate in developing and implementing measures to prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated, and to control sources of fires, including by the identification of fires, development of monitoring, assessment and early warning systems, exchange of information and technology, and the provision of mutual assistance.”

Article 27 of ASEAN Agreement of Transboundary Haze Pollution also states:

“Any dispute between Parties as to the interpretation or application of, or compliance with, this agreement or any protocol thereto, shall be settled amicably by consultation or negotiation.”

It means that, even if there is a willful breach of the clauses in the agreement it will not lead to any national or international liability and that it can be resolved only through friendly cooperation. After ratification the ASEAN Agreement on Transboundary Haze Pollution, Indonesia as the pollutant country cannot be required to pay compensation fully because it was a shared responsibility of the ASEAN countries. Shared responsibility means Indonesia should be responsible along with another ASEAN Countries in addressing transboundary haze pollution.

By ratifying the AATHP Indonesia can avoid the lawsuits of international law of transboundary haze pollution problem. Although based on the international law of state responsibility Indonesia can be required by other countries to compensate the affected countries by haze pollution from burnt land in Indonesia. Because of that, after ratification of the ASEAN Agreement on Transboundary Haze Pollution, Indonesia cannot be blamed because it was the responsibility of the ASEAN countries, despite the emergence of the haze pollution originating from Indonesia. Beside, in AATHP, the addressing haze pollution will not make the Indonesia legal system change as a result of the ratification of the agreement.

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57 Article 4, ASEAN Agreement on Transboundary Haze Pollution
8. **Conclusion**

Based on the description in the previous chapter, the research can be concluded as follows: Before ratification the ASEAN Agreement on Transboundary Haze Pollution, the first responsibility of Indonesian government to the haze pollution based on the International law of state responsibility is restitution that Indonesia should perform the restoration of the situation to the affected countries to the original condition before they were affected. Then, Indonesia has to pay compensation to the affected countries by replacing the loss caused by haze. The last is Indonesia should undertake the satisfaction such as expression of regret and offer an apology and it will be necessary where the restitution and compensation is inadequate.

After ratification the ASEAN Agreement on Transboundary Haze Pollution, Indonesia as the pollutant country of haze pollution in Southeast Asia cannot be required to pay compensation fully because it was a shared responsibility of the ASEAN countries. Indonesia also can avoid lawsuits of international law because of transboundary haze pollution.

9. **Suggestion**

The Indonesian Government have to undertake preventive action, which prevents forest fires that often occur as a result of land clearing, so that the haze pollution which caused by land and forest fire will not happen again. The government also has to educate the farmers on how to open land effectively without burning it and if forest fires cannot be overcome and avoided, Indonesia has to ask for help to another countries such as Singapore and Malaysia as stated in AATHP.
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THE PROTECTION OF SMALL AND MEDIUM ENTERPRISES IN YOGYAKARTA TOWARDS ASEAN ECONOMIC COMMUNITY BASED ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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Abstract:
The ASEAN Economic Community (AEC) is one of the pillars of the ASEAN Community were set out in the Bali Concord II. AEC shall be the goal of regional economic integration by 2015. AEC envisages the following key characteristics: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. Yogyakarta is a city in Indonesia where many citizens are involved in the business, actually in small and medium-sized enterprises (SMEs). Based on the data obtained from the Department of Trade, Industry and Cooperatives Yogyakarta, in 2015 there were 230,047 SMEs industries. With the increasingly fierce competition as a result of the single market of the AEC will very likely have an impact on the survival of these SMEs, since many imported-products will flood the domestic market. Indonesia has ratified International Covenant on Economic, Social and Cultural Rights (ICESCR). On October 28, 2005, the Indonesian government ratified the ICESCR into ICESCR Ratification Act 2005. This study aims to analyze the protection of small and medium enterprises in Yogyakarta towards ASEAN Economic Community based on economic, social and cultural rights. The study is normative legal research which is conducted through library research. The results shows the government has a binding obligation to take various measures and policies to implement the obligation such as “to respect”, “to protect” and “to fulfill” human rights toward SMEs in Yogyakarta, especially in Economic, Social and Cultural Rights.

Keywords: AEC 2015, SMEs, Yogyakarta, Economic, Social and Cultural Rights

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1. Background

The implementation of ASEAN Economic Community (AEC) was implemented in the end of 2015. The AEC is one of the pillars of the ASEAN Community were set out in the Bali Concord II. ASEAN hopes to establish a single market and production in the end of 2015. The ASEAN Economic Community shall be the goal of regional economic integration by 2015. AEC envisages the following key characteristics: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy.

The first AEC characteristic seeks to create a single market and production base through free flow of goods, services, investment, skilled labor and freer flow of capital. The second characteristic helps to create a business-friendly and innovation-supporting regional environment through the adoption of common frameworks, standards and mutual cooperation across many areas, such as in agriculture and financial services, and in competition policy, intellectual property rights, and consumer protection. It also supports improvements in transport connectivity and other infrastructure networks. The third characteristic seeks to achieve equitable economic development through creative initiatives that encourage small and medium enterprises to participate in regional and global value chains and focused efforts to build the capacity of newer ASEAN Member States to ensure their effective integration into the economic community. The fourth characteristic envisages ASEAN’s full integration into the global economy pursued through a coherent approach towards external economic relations, and with enhanced participation in global supply networks.

Indonesia's readiness to facing the ASEAN Economic Community 2015 can be seen from the comparison aspect of economic growth, the national export growth and Gross Domestic Product (GDP). The readiness of Indonesia can be viewed from the aspect of economic growth. Based on the economic growth report that was launched by the International Monetary Fund (IMF) in 2012, it appears that in the last 10 years of economic growth.

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growth in Indonesia is very stable in the range of 5.5 percent, ± 1 per cent with an average growth of 6.11 percent, from 2007 to 2012.  

Yogyakarta is a city in Indonesia where many citizens are involved in the business, actually in small and medium enterprises (SMEs). From the data obtained from the Industry and Commerce Bureau of Yogyakarta, in 2015 there were 230,047 SMEs industries. With the increasingly fierce competition as a result of the single market of the ASEAN Economic Community will very likely have an impact on the survival of these SMEs, cause will many imported products that will flood the domestic market.

Small and medium enterprises (SMEs) play a vital role in the development and economic growth. Actually, since small and medium enterprises is the main provider of goods and services it’s has a low-income. So the protection of Economic, Social, and Cultural (ESC) rights of small medium-sized enterprises is very needed towards free market in ASEAN Economic Community in Yogyakarta.

The Economic, Social, and Cultural rights are vague, inherently of a positive nature which required positive measures for their implementation, and resource dependent becomes the departure point in discussing the justifiability of these rights in this article. Although international law recognizes ESC rights as genuine rights, a lively and contentious debate over the ideological and technical nature of these rights is still ongoing. The debate about the justifiability of ESC rights has become an issue since the development of human rights.

This study will assess the protection of small and medium enterprises in Yogyakarta towards ASEAN Economic Community 2015 in light with economic, social and cultural Rights. This study will focus on the role of Yogyakarta government to protect ESC rights of small and medium enterprises in Yogyakarta.

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2. Research Method

A. The Type of Research

The type of this research is a normative legal research with the international law and Indonesian law approach through the regulations and conventions that regulate it, especially that related with the issue of economic, social and cultural rights. This research would use statute approach,\(^9\) because it would tell some regulations such as Universal Declaration of Human Rights and other conventions relating to the issue of refugees which applicable to the protection of small and medium enterprises based on economic, social and cultural rights, for instance International Covenant on Economic, Social and Cultural Rights and its Protocol. This research would also use case approach,\(^{10}\), because this research aims to study the norms or regulations in practice pertaining to the Yogyakarta’s protection towards small and medium enterprises.

B. Technique of Collecting Data

The methods of collecting data in this research will be done through library research by literature learning. This method will collect data from reading, analyze, and try to make conclusion from related documents namely convention, laws books, legal journals, and others which related to the main problem as the object of this research.

C. Technique of Data Analysis

The data will be analyzed systematically through juridical thinking. Systematically means the research will be analyzed based on international law and Indonesian law, especially relating to the issue of economic, social and cultural rights. Juridical thinking means it would be connected with the principle of law, conventions, and others related regulations.


\(^{10}\) Ibid p. 321.
3. Discussion and Result

A. Small and Medium Enterprises in Yogyakarta Towards AEC 2015

SMEs are defined by a variety of different ways depending on the state and other aspects. Therefore, it is necessary to review specific to these definitions in order to obtain an appropriate understanding of SMEs, which adheres to a quantitative measure in accordance with economic progress. In Indonesia,\(^{11}\) there are many different definitions of SMEs based on the interests of the institution to give a definition.

1) The Central Statistics Agency (BPS): SMEs is a company or industry with the total workers between 5-19 people.

2) Bank of Indonesia (BI): SMEs is a company or industry with characterized by: (a) the capital less than IDR 20 million; (b) for one round from his business only needs IDR 5 million; (c) has some maximum assets of IDR 600 million, excluding land and buildings; and (d) annual turnover of \(\leq\) IDR 1 billion.

3) Ministry of Cooperatives and Small and Medium Enterprises (Law No. 9 of 1995): SMEs are the economic activities of small-scale of the people and traditional, with a net income IDR 50 million - IDR. 200 million (excluding land and buildings) and annual turnover of \(\leq\) IDR 1 billion. SMEs Act 2008, with a net income between IDR 50 million - IDR 500 million and annual net sales of IDR 300 million - IDR 2.5 billion.

4) Ministry of Industry and Commerce: a) the Company had assets up to IDR 600 million, excluding land and buildings (Department of Industry before combined), b) the Company has a working capital less than IDR 25 million (Department of Commerce before it merged).

In general, small businesses have characteristics, such as: a self-management, provided the capital itself, a local marketing area, small company assets, and a limited number of employees employed. SMEs is the implementation of the principle of solidarity, democratic economy, independence, balance, progress, sustainability and efficiency of justice, as well as national economic unity. The people's economy is also often called informal sector, because of backwardness and the production volume is very small and not

equipped with a formal business license\textsuperscript{12}. The importance of growth and development of SMEs sector regional scale must be considered, especially in the framework of ASEAN economic integration.\textsuperscript{13}

SMEs are also an integral part of economic development and growth of the ASEAN Member countries because of the number of SMEs exceeds the number of large companies in both the company and the quantity of the labor force employed. SMEs directly impact the advancement AFEED Program. This is evident from the number of SMEs that stand covers more than 96\% of all companies and 50\%-85\% of domestic work is absorbed by SMEs.\textsuperscript{14}

SMEs is one of the economic development aspects in Yogyakarta, because so many people involve in SMEs. It can be established by all people which only need a small capital. Moreover, the freedom was the main reason they set up SMEs, many of the founders of SMEs claimed that they were forced to set up SMEs because they already do not like working as a laborer in a factory which has so many rules that should be obeyed at the factory. This is evidenced by the growing number of SMEs from year to year.\textsuperscript{15}

The author obtains the data of SMEs in Yogyakarta from the related institutions such as the Cooperation and Small Medium Enterprises Bureau of Yogyakarta and Industry and Commerce Bureau of Yogyakarta which are shows the number of SMEs in Yogyakarta with some Indicators, as described below.

Table
Number of SMEs

<table>
<thead>
<tr>
<th>No.</th>
<th>Sector</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>SMEs</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>By Type of Enterprises</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Various Enterprises</td>
<td>44,45</td>
<td>47,8</td>
<td>49,9</td>
</tr>
</tbody>
</table>


\textsuperscript{15} Ana Syukriah, Op, Cit, p. 117.
<table>
<thead>
<tr>
<th>Category</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trading</td>
<td>58.60</td>
<td>63.0</td>
<td>65.8</td>
</tr>
<tr>
<td>Agriculture Industry</td>
<td>55.76</td>
<td>59.9</td>
<td>62.5</td>
</tr>
<tr>
<td>Non-Agriculture Industry</td>
<td>46.39</td>
<td>49.8</td>
<td>51.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>205.2</strong></td>
<td><strong>220.7</strong></td>
<td><strong>230.0</strong></td>
</tr>
</tbody>
</table>

### II By Scale Enterprises

<table>
<thead>
<tr>
<th>Scale</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Micro Enterprises</td>
<td>111.9</td>
<td>101.6</td>
<td>104.8</td>
</tr>
<tr>
<td>Small Enterprises</td>
<td>51.45</td>
<td>67.5</td>
<td>71.2</td>
</tr>
<tr>
<td>Medium Enterprises</td>
<td>31.12</td>
<td>51.5</td>
<td>54.5</td>
</tr>
<tr>
<td>Large Enterprises</td>
<td>10.71</td>
<td>94</td>
<td>87</td>
</tr>
<tr>
<td><strong>Data Correction</strong></td>
<td><strong>205.2</strong></td>
<td><strong>220.7</strong></td>
<td><strong>230.0</strong></td>
</tr>
</tbody>
</table>

### III New Enterprises

<table>
<thead>
<tr>
<th>Target</th>
</tr>
</thead>
</table>
### IV Detail per Region/City

<table>
<thead>
<tr>
<th>Region/City</th>
<th>Count (000)</th>
<th>Realization</th>
<th>Growth (00)</th>
<th>Capital (00)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yogyakarta City</td>
<td>4,643</td>
<td>18,4</td>
<td>20</td>
<td>65,3</td>
</tr>
<tr>
<td>Sleman</td>
<td>2,608</td>
<td>10,3</td>
<td>65</td>
<td>65,5</td>
</tr>
<tr>
<td>Bantul</td>
<td>4,479</td>
<td>17,8</td>
<td>68</td>
<td>65,3</td>
</tr>
<tr>
<td>Kulon Progo</td>
<td>1,578</td>
<td>6,26</td>
<td>8</td>
<td>65,3</td>
</tr>
<tr>
<td>Gunung Kidul</td>
<td>3,113</td>
<td>12,4</td>
<td>12</td>
<td>65,1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>16,42</strong></td>
<td><strong>65,3</strong></td>
<td><strong>33</strong></td>
<td><strong>65,5</strong></td>
</tr>
</tbody>
</table>

**Sources: Industry and Commerce Bureau of Yogyakarta**

Based on data above, SMEs have a huge opportunity to develop their business. However, the development of SMEs in Yogyakarta is still hampered a number of issues. They are still having a barrier to the development of SMEs in terms of two factors: internal factors and external factors of SMEs, where the handling of each of these factors must work together to obtain the maximum results, namely: (1) the internal factor, SMEs is weak in terms of capital, management capabilities, production, marketing and human resources; (2) External
factors: the issues arising from competition. For example, the lack of government supports to protect SMEs in term of legislation to facing the AEC 2015.

In other hand, the number of SMEs in Yogyakarta is growth smoothly, we may see from the development each year. The development of SMEs is uncontested; there is also the government action to develop and protect SMEs in Yogyakarta and SMEs gives the highest contribution in Yogyakarta economic development rather than others.

Based on elaboration above shows that the SMEs in Yogyakarta is growth gradually year to year and it would be needed protection from the government. However, they cannot survive to facing the single market and production base, and a region fully integrated into the global economy in AEC 2015 without any protection and action from the government.

B. Economic, Social and Cultural Rights and ICESCR

Everyone is entitled to ESC rights. The ICESCR states that these rights are guaranteed to all without discrimination of any kind such as ‘race’, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This list is not exhaustive and discrimination is also forbidden on other grounds, including disability, sexual orientation or gender identity, marital or family status, or socio-economic status.

The concept of ESC rights, the state set as the parties have an obligation to the protection of small and medium-sized enterprises. This happens because it is a consequence of ICESCR ratification in the form of our positive law, i.e. ICESCR Ratification Act 2005. Those consequences, according to Eko Prasetyo, briefly mention that the absence of reasons for the whole country to inevitably have to carry out all things which are mentioned in the ICESCR. All these things will be linked to the issue of implementation of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles) will be applied in the fulfillment of ESC rights.

Obligations undertaken by states and consequently by the international community, under international human rights instruments shall be implemented in good faith. This standard applies to all parts of the contemporary human rights system. However, many

16 Result from the Interview with Eko Prasetyo as a head of Centre for Human Rights Studies of UII.
17 See, in so far as treaty obligations are concerned, this is expressly provided for by Article 26 of the Vienna Convention on the Law of Treaties of 1969: “Every treaty in force is binding upon the parties to the treaty and must be performed by them in good faith”.
obstacles must be overcome in fulfilling this standard, including that of the relative neglect of economic, social and cultural rights, another problem has been the slow process in clarifying the content of these rights and their corresponding obligations. Greater and more detailed precision has been obtained during later years. However, by way of the “general comments” interpreting the relevant international instruments by the UN Committee on Economic, Social and Cultural Rights.\(^\text{18}\)

State responsibility in this context is a statement of “commitment” and “goodwill”, which does not recognize “half-committed” or “commitment patchy” but “full commitment” to guarantee the non-discrimination principle, including ensuring the equality of men and women to enjoy all ESC rights which is guaranteed in Article 3 of the Covenant. The Covenant gives a significant impact, particularly to the developing country such as Indonesia. The State must guarantee the fulfillment of economic, social and cultural rights of its citizens.

The ratification has consequences to the implementation of human rights, because Indonesia has bound themselves legally among other. The government has an obligation to adopt a treaty that has been ratified into the legislation, well-designed and that has been enacted as Act, the other is that the government has an obligation to bind to take various measures and policies to implement the obligation to respect, to protect and to fulfill human rights. This obligation also followed by other government obligations, namely to create a report relating to the adjustment of law, measures, policies and actions.\(^\text{19}\)

The formulations in ICESCR, “...undertakes to take step... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant...,” The formula gives an indication that the economic, social and cultural rights is positive rights. As a positive right, then right to economic, social and cultural cannot be prosecuted in court (non-justiciable).\(^\text{20}\)

ICESCR which command the state parties to protect their citizen from the violation of ESC rights, where the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights more specific regulate about the obligation to fulfill requires States to take appropriate


\(^{20}\) A. Masyur Effendi. 2005, Perkembangan Dimensi Hak Asasi Manusia (HAM) Proses Dinamika Penyusunan Hakum Hak Asasi Manusia (Hokham), Bogor, Ghalia Indonesia, p. 130
legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.\textsuperscript{21}

In line with Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Prof. Dr. Nik Ahmad Kamal Nik Mahmod argues that “every country who ratify the Covenant should be consistent to implement the Covenant and have to reforming their law which is related to the Covenant. Thus, Indonesia might implement the values of ICESCR into society”.\textsuperscript{22}

Based on elaboration above, the government should implement the ICESCR with their consequences such as to respect, to protect and to fulfill the economic, social and cultural rights. However, Indonesia already bind himself with the covenant as international law which mean Indonesia should run the obligation on it, such as: make or reforming a related legislations and make a progress reports to United Nations.

The protection has to be done in order to implement the obligation to fulfill the Economic and social rights of Indonesians. As the member of United Nations (UN); Indonesia is asked by UN Charter to implement such code of conduct in implementing human rights (Article 55 UN Charter), since the center of the purpose of UN is human rights. Therefore, the decisions of Indonesia policy, shall always take in to account the human rights aspect. Moreover, Article 103 of UN charter states: “In the event of a conflict between the obligations of the Members of the United Nation under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

\textsuperscript{21} See, Article 6 of Masstricht Guidelines on Violations of Economic, Social and Cultural Rights stated “Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.”

\textsuperscript{22} Result from the Interview with Prof. Dr. Nik Ahmad Kamal Nik Mahmod as Professor of Law, International Islamic University Malaysia.
Therefore, Indonesia government in general and Yogyakarta government in particular have no reason to do not implement ICESCR as their obligations. Hence, these elaborations above give an obvious clue to the states about which obligations that states have to prioritize if they are facing double obligations that contradict each other.23

From above explanation, shows that the distinguish role of ICESCR with their instruments are very important and needed to fulfill the ESC rights in each country, especially in Indonesia because Indonesia already ratify the Covenant and legally binding with international law. Moreover, Yogyakarta should fulfill their obligations on ESC rights consistently to protect small and medium-sized enterprises towards AEC 2015.

C. The Protection of Yogyakarta Provincial Government to the SMEs towards ESC Rights

Yogyakarta government protection to SMEs towards AEC 2015 is very necessary to shield the economic, social and cultural rights of SMEs. However, Indonesia already ratified ICESCR into Indonesian legal system that has consequences to implement it well. Yogyakarta is the one of cities in Indonesia where they should protect SMEs based on ICESCR.

The government's role is expected as complementary to encouraging the efforts that have been made to improve the competitiveness of SMEs. With a conducive-business climate which is created by the government, it will be easier for SMEs to improve competitiveness, both the competitiveness of companies and the competitiveness of the products produced. Other stakeholders should improve the system of alliances that have been created by SMEs, due to the support of stakeholders in the form of education / training/counseling, promotion and facilitation proven to encourage efforts to improve the competitiveness of SMEs significantly.

According to Firsan Edy as the Head of Productivity and Marketing Division at Department of Cooperation and Small Medium Enterprises of Yogyakarta believe that "The government has conducted several activities to minimize the factors that hinder the development of SMEs by providing soft loans, providing training services to the owners of

SMEs to be able to expand its business by working with relevant parties, infrastructure development such as road construction, simplify licensing. The government's role would be particularly important for the readiness of SMEs to compete other businesses in utilizing the AEC in 2015". Several attempts have been made to empower local governments to SMEs are:

1) Improve access to finance;
2) Improving the quality of human resources; and
3) Facilitating SMEs access related to the information and promotions.

Like previous argumentation, the Head of Integrated Business Service Center (Pusat Layanan Usaha Terpadu) at Cooperation and Small Medium Enterprises Bureau of Yogyakarta, Darso argues that “To preparing the readiness of SMEs towards AEC 2015, Yogyakarta has set up the SMEs Center which is located in the Cooperatives and SMEs Bureau of Yogyakarta. Government hopes with the SMEs center would be a place to promote the product or services from SMEs as well as the products marketing of SMEs from various community groups. Thus, SMEs products would be produced and sold in the market will improve the welfare of society”.

According to Eko Riyadi as the Head of Centre for Human Rights Studies of Universitas Islam Indonesia argues that “Yogyakarta Government should have two kinds of way to protect SMEs towards AEC 2015, those are legal protection and administrative protection”. The legal protection means the government should protect the ESC rights of SMEs through legislation. Aside, administrative protection is the government should fulfill the ESC rights through give the social insurance such as incentive, program, etc.

In other hand, According Dewo Isnu, Head of Law Bureau of Regional Secretary of Yogyakarta argues that “Nowadays, Yogyakarta government do not have Regional Regulation or equal regulations to protect the ESC rights of SMEs in Yogyakarta because the government think that the Government Regulation is already clear to be implemented in Yogyakarta”. However, the role of government to protect ESC rights is very needed.

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24 Result from the Interview with Firsan Edy as the Head of Productivity and Marketing Division at Department of Cooperation and Small Medium Enterprises of Yogyakarta
25 Result from the Interview with Darso as the Head of Integrated Business Service Center at Cooperation and Small Medium Enterprises Bureau of Yogyakarta
Moreover, the covenants and the guidelines have given a rigid explanation about how to guard and implement the economic, social and cultural rights, Yogyakarta still does not promulgate the legislations to protect small and medium enterprises towards AEC 2015, especially on economic, social and cultural rights.

Based on the discussion above, Yogyakarta has strong efforts to protect the economic, social and cultural rights of SMEs in term of administrative matters such as: incentives, program for SMEs as well as coaching and partnership, etc. Nevertheless, the protection on economic, social and cultural rights of SMEs in term of legislation is still vulnerable. However, ICESCR has an outstanding role to protect SMEs in Yogyakarta and Yogyakarta government should fulfill the ESC rights of SMEs through all aspect equal and consistently.

4. Remarks
   A. Conclusion

   From the above-cited explanation, the author may conclude that the International Covenant on Economic, Social and Cultural Rights has an outstanding role to shield the small and medium-sized enterprises in Yogyakarta toward ASEAN Economic Community 2015 since ICESCR as a tools to bind government with their obligations to protect SMEs principally in Economic, Social and Cultural rights. Moreover, International Covenant on Economic, Social and Cultural Rights more specific than other covenants which are compose about Economic, Social and Cultural rights. However, ICESCR was ratified into ICESCR Ratification Act 2005. It would be more vigorous to put into effect in Yogyakarta and it as government’s guidance to protect small and medium-sized enterprises, especially on ESC rights.

   In contrast, the Yogyakarta government’s protection on ESC rights within small and medium-sized enterprises toward AEC 2015 is vulnerable in term of legislation because they do not have Regional Regulation neither about small and medium-sized enterprises nor the protection of SMEs. The legislation is momentous to protect small and medium-sized enterprises which raising some consequences on the budgeting, programing and schema to protect SMEs. Nonetheless, the SMEs has been protected by government through administrative fields in term of government policies, such as partnership strengthening, made decision to helping SMEs in term of credit and capital, and make a connection between SMEs and exporter, etc.
In addition, notwithstanding ICESCR is very meritorious to shade the Economic, Social and Cultural rights of SMEs in Yogyakarta towards AEC 2015. Furthermore, Indonesia notably Yogyakarta should be implementing ICESCR properly to protect the SMEs towards AEC 2015. However, international law is only soft law but the Covenant should be respected by every country which had ratified it and they shall implement covenants appropriately indeed. Otherwise, if Indonesia through Yogyakarta government does not respect and implement the Covenant felicitous even unto ignore ICESCR, it would be “shameful” and “unsavory labeled” by other countries in the international meeting as well as in United Nations meeting.

B. Suggestion

Based on the discussion and conclusion above the author would give recommendations to overcome the problem, the author has two recommendations which are consists of one for Yogyakarta government and another one for ASEAN, those are:

Firstly, Yogyakarta should make Regional Regulation which regulate about small and medium enterprises in term of economic, social and cultural rights protection. However, Regional Regulation is stronger than other regulation in province level.

Secondly, the author suggest that ASEAN should establish institution to settle the violations of economic, social and cultural rights towards ASEAN Economic Community 2015 in particular and violation of Economic, Social and Cultural rights at ASEAN in general. Whatever the form is, it may court as well as European Human Rights Court or arbitration.
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Paper


Legislations

United Nations Charter

International Declaration of Human Rights 1948

International Covenant on Economic, Social and Cultural Rights 1966

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

International Covenant on Economic, Social Cultural Rights Ratification Act 2005

Micro, Small and Medium Enterprises Act 2008

Internet


ASEAN, ASEAN Economic Community (AEC), http://www.asean.org/storage/2012/05/56-.December-2015-Fact-Sheet-on-ASEAN-Economic-Community-AEC.pdf Jakarta, downloaded on Monday, February 8, 2016, at 1.30 p.m.
THE INTERNATIONAL LAW PERSPECTIVE ON THE ESPIONAGE OF AUSTRALIA TO INDONESIA

Negara, Y.S.* & Pratiwi, D.A.**

Abstract:

The issue of Espionage among nations is an exceptionally old and extensive human endeavor which is done in various fields. Espionage is current not only between countercurrent in terms of political opponents, but also between countries that are friendly and cooperative in global arena. International law has long addressed the issue of espionage during times of war while peacetime espionage has remained unaddressed. The development of international legal principles regarding peacetime espionage has lagged behind changes in international intelligence gathering norms and practice. Australian intelligence tried to listen into Indonesian president Susilo Bambang Yudhoyono’s mobile phone, Australia’s spy agencies have attempted to listen in on the personal phone calls of the Indonesian president and have targeted the mobile phones of his wife, senior ministers and confidants, a top-secret document from whistle-blower Edward Snowden. The type of this research is a normative legal research with statue approach and case approach. By using a qualitative descriptive method, this research will describe the International law perspective on espionage in peacetime condition. Finally, the result shows the reason why International law perspective on espionage in peacetime condition is needed.

Keywords: International law, International perspective on espionage, Indonesia

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1. Introduction

Australian intelligence tried to listen into Indonesian president Susilo Bambang Yudhoyono's mobile phone, material leaked by NSA whistle-blower Edward Snowden reveals. Documents obtained by the ABC and Guardian Australia, from materials leaked by the former contractors at the US National Security Agency, show that Australian intelligence attempted to listen into Mr. Yudhoyono’s telephone conversations on at least one occasion and tracked activity on his mobile phone for 15 days, in August 2009. The top-secret documents are from Australia's electronic intelligence agency, the Defence Signals Directorate (now called the Australian Signals Directorate), and show for the first time how far Australian spying on Indonesia has reached.¹

Australia's spy agencies have attempted to listen in on the personal phone calls of the Indonesian president, Susilo Bambang Yudhoyono, and have targeted the mobile phones of his wife, senior ministers and confidants, a top-secret document from whistle-blower Edward Snowden reveals. The document, dated on August 2009, names the president and nine of his inner circle as targets of the surveillance, including the vice-president, Boediono, who last week visited Australia. Other named targets include ministers from the time who possibly become candidates in the following year's Indonesian presidential election, and the first lady, Kristiani Herawati, also known as Ani Yudhoyono.²

On Monday, November 18th, 2013, daily Britain, The Guardian, and daily Australia, The Sydney Morning Herald, reported that ten senior ministers of Indonesia were intercepted by the US Government through Australia. The report refer to documents from the former US intelligence agency contractor, Edward Snowden. In one of the document entitled “3G Impact and Updates” listed ten name the type of cell phone complete with Indonesian officials that they use. The action was conducted in 2009.

The officials who were intercepted through their phone were the then Indonesian President, Susilo Bambang Yudhoyono (Nokia E90-1), Kristiani Herawati better known as Ani Yudhoyono (Nokia E90-1), Vice President, Boediono (BlackBerry Bold 9000), Dino Pati Djalal, president’s foreign affairs spokesman (BlackBerry Bold 9000), Andi Mallarangeng, who was at the time the president’s spokesman, and who was later minister for youth and sports before resigning amid corruption allegation (Nokia E71-1), Hatta Rajasa, State Secretary (Nokia E90-1), Sri Mulyani Indrawati, the finance minister (Nokia E66-1) and Sofyan Djalil, the state minister of state enterprises (Nokia E90-1), Widodo Adi Sucipto Menko Polkam (Nokia E66-1).³

One class conversation determine what policy will be taken by the opposing state. Since the era of primitive tribes, the Greek war, the World war I and II, the cold war, and until now, the economic war, tapping the conversations of political decision makers is a common thing done by the national security agents from both developed countries and some developing countries. The underdeveloped countries were not able to do it, because they do not have the capitals, both technology and human capitals.⁴

2. Research Method

A. Type of Research

The type of this research is a normative legal research with the international law, domestic law and conventions that related to the issue of the espionage case of Australia to Indonesia.

The research used statute approach,⁵ because the research tells several regulations such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and conventions in regard to the issue. The research also used

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⁵ A normative research should use statute approach in order to examine the various rules of law that are the focus of research as well as a central theme of the research. See Mukti Fajar, Yulianto Achmad’s book, 2013, Dualisme Penelitian Hukum Normatif dan Empiris, Yogyakarta, Pustaka Pelajar, p. 185
case approach, because this research aims at studying the norms or regulations in practice pertaining to espionage case between Australia and Indonesia.

**B. Technique of Collecting Data**

The methods of collecting data in this research was done through library research by literature learning. This method will collect data from reading, analyze, and try to make conclusion from related documents namely convention, laws books, legal journals, and others which related to the main problem as the object of this research.

**C. Data Analysis**

The data will be analyzed systematically through juridische qualitative. Systematically means the research will be analyzed based on international law, especially the international treaty and sovereignty. Juridical thinking means it would be connected with the principle of law, conventions, and others related regulation.

**3. Result and Discussion**

**A. Espionage in International Law**

International law has long addressed the issue of espionage during times of war while peacetime espionage has remained unaddressed. Rather, peacetime espionage has always been seen as an issue of domestic law, even though an international event is obviously involved. Consequently, the existing laws of war are a valid starting point for international juridical treatment of peacetime intelligence. Principles regarding spying in the laws of war are unique, clear and consistent. As such, the laws of war provide a compass for navigating

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6 The normative study aimed to learn the application of norms or rules of law in the practice of law. Especially on cases that have been decided as can be seen on jurisprudence that is the focus of research. It is clear that the case that has occurred is empirical. Nevertheless, in a normative study, the case is studied in order to gain an overview of the impact of the regulation dimensions of the rule of law in the practice of law, as well as using the results of the analysis for an input in the legal explanation. See Johnny Ibrahim’s book, 2006, *Teori dan Metodologi Penelitian Hukum Normatif*, Malang, Boymedia Publishing, p. 321
the ethical dilemmas involving human rights, sovereignty, and global security that human intelligence collection entails.\(^7\)

Espionage among nations is an exceptionally old and extensive human endeavor. In times of war and peace, a generous slice of states' resources are allocated to intelligence organizations. Foreign espionage also involves considerable moral harm. One would then expect to find that espionage is anchored in solid moral and legal underpinnings. Surprisingly, this costly and harmful activity lacks a clear justification. Legal and philosophical scholarship seeks to understand the legitimacy of war among nations, and the proper legal framework for regulating war.

Scholars also rigorously debate the legitimacy of the domestic use of governmental force. Yet when it comes to espionage, moral theorists are as soundless as spies. If espionage is discussed, it is generally perceived as an extra-moral activity, one that goes beyond the boundaries of ethics. Espionage is frequently associated with a murky sphere in which the gravitational pull of states' supreme interests bends the standard contours of moral space.\(^8\)

Espionage between states is therefore an undercover state-sponsored intrusion into the restricted space of another state or organization for the sake of collecting information. Access to a given space can be restricted in many ways, including - but not limited to - physically, visually, acoustically, digitally, and legally. An intrusion into a restricted space can be achieved through any known method of espionage, whether human or technological.\(^9\)

1. **Wartime Spying**

The legitimacy of espionage in time of war arises from the absence of any general obligation of belligerents to respects the territory or government of the enemy state, and from the lack of any specific convention against it. The deception involved resembles that in stratagems or *ruse de guerre* and differs from violations of specific conventions like those of

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\(^7\) Geoffrey B. Damarest, Espionage in International Law, 24 *Denver Journal of International Law and Policy* 321, 1996, p.4


the flag of truce, red cross emblems, and armistices, all of which constitute “perfidy” and are forbidden by the law of war.¹⁰

Even so, for the most part, the law of espionage in time of war has been codified in the Hague Regulations of 1899 and 1907. The persisting problem is the inexistence of a specific convention prohibiting such activity, probably for the simple reasons that governments are not ready to give up such a useful and resourceful information gathering activity.¹¹

The Regulations Respecting the Laws and Customs of War on Land, in the Section two (Hostilities) of the Chapter one (Means of Injuring the Enemy, Sieges, and Bombardments), the regulations set, in article 24, that ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible. The rules of espionage, under the law of war in general, include the concept of legitimate ruse of war, and the Hague Regulations in particular, are useless either to secure state secrets or to preserve minimal human rights where sensitive information is involved.¹²

2. Peacetime Spying

In the law of peace, the territorial division of the regulation is based on the distinction between national spaces and international spaces. A contemporary issue is to determine if the law of peace recognizes espionage and if it does, how does it deal with it. Very little has been said about it in the books. Espionage is still considered mainly as a term of art in law of war.¹³

¹¹ Jerome Mellon, Espionage in International Law: A Necessary Evil, Paper prepared for Professor Craig BROWN, Public International Law LAW-427A, Faculty of Law, University of Western Ontario, December 3rd, 1999, p. 23.
¹² Ibid.
¹³ Ibid.
In time of peace, however, espionage and, in fact, any penetration of the territory of a state by agents of another state in violation of the local law, is also a violation of the rule of international law imposing a duty upon states to respect the territorial integrity and political independence of other states.\textsuperscript{14}

There is no rule of international law prohibiting a state to punish individuals engaging in espionage activities. In fact, it's a matter of domestic law and thus it belongs to each state to define peacetime espionage. The practice has developed to treat espionage in time of peace as a problem of municipal law. When a spy is caught conducting espionage activity, in time of peace, what usually happens is that the sending state denies any connection with the captured agent and let the domestic law of the victim state take care of the spy.\textsuperscript{15}

Occasionally, espionage by diplomats or officials is subject to an exchange of notes between governments. While that kind of communication stays relatively hidden from the public and is, \textit{prima facie}, relatively benign, we can easily understand that it can rapidly leads to serious tensions between two states in their not only politic but also economic relations. Also, espionage in peacetime is today recognized in some circumstances, as a conduct giving rise to international responsibilities.\textsuperscript{16}

B. How International Law Work with Espionage

Legal conventions and treaties of international law combined with customary international law have been important. This body of law encompasses codified sources and customary principles. Of these, the most relevant were those that concern with sovereignty, prohibition of use of force and the principle of non-intervention.\textsuperscript{17}


\textsuperscript{16} \textit{Ibid.}

\textsuperscript{17} Ella Shoshan, Applicability of International Law on Cyber Espionage Instructions, Faculty of Law, Stockholm University, 2014. p.9
1. Non-intervention

The principle of non-intervention in contrast to the prohibition of the use of force in Art 2(4) of the UN Charter refers not only to armed forces, but also to lower intensities of force.\(^\text{18}\) If one state interferes with the domestic or international affairs of another state but to a level that does not reach the threshold of an armed attack or an aggression, international law refers to this act as intervention.\(^\text{19}\) The principle is integrated, in the words of the ICJ ‘part and parcel’, in international law.\(^\text{20}\) Because the non-intervention principle traditionally is viewed to be a corollary to a state’s sovereign territory, the extent of the prohibition against intervening include the areas conventionally regarded as the physical territory of a state.\(^\text{21}\) Although it is an autonomous principle of customary international law it is closely linked to the principles of sovereign equality of all states in customary international law and put down in Art 2(1) and 2(7) of the UN Charter.

The principle prohibits all acts that are intended ‘to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.’\(^\text{22}\)

In Arts 4–5 of the Budapest Convention on Cybercrime (BCC), it is clear that interference as described by the convention is also not applicable to cyber espionage.\(^\text{23}\) This definition may thus apply to cyber attacks. In contrast, cyber espionage merely utilizes access and sometimes interception without compromising data, in contrast to interference, which, according to the BCC, alters and consequently affects data. However, the non-intervention principle may also be viewed against the backdrop of the rights that a state enjoys through its sovereignty and territorial jurisdiction.\(^\text{24}\)

\(^\text{18}\) Ibid. p. 40
\(^\text{20}\) Ibid.
\(^\text{22}\) UN General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc A/RES/25/265 (24 October 1970).
\(^\text{23}\) The Budapest Convention on Cybercrime, available at http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm accessed on October 5\(^\text{th}\), 2015 at 2:34 p.m
\(^\text{24}\) Ella Shoshan, Op.Cit., p. 44
2. Sovereignty

The principle of sovereignty is used in international law to express a relationship between a state and its own territory.\(^\text{25}\) Based on this principle, each state can claim from all other states full respect for its territorial integrity and also political independence.\(^\text{26}\) Importantly, the concept of sovereignty in international law is a legal construct as opposed to so called political sovereignty that reflects possession of power and authority in practice.\(^\text{27}\)

The territorial principle is a corollary of a state having sovereignty over its territories. The sovereignty of the state entails that it has the right to prescribe laws ‘that set the boundaries of the public order of the state’.\(^\text{28}\) This right extends also to actions within its territory that has their effects abroad, and to actions abroad that have effects inside the territory.\(^\text{29}\)

It is important to determine whether cyberspace can be subject to state sovereignty because this would give the state right to exercise its functions within cyberspace. A description of what sovereignty is can be found in the Island of Palmas Arbitral Award of 1928. The Court held that sovereignty is signified by states being independent from one another in the sense that within a state’s sovereign territory the state has the right to exercise, among other things, the functions of a state.\(^\text{30}\)

Because cyber espionage is conducted without authorization, it is therefore a violation of the principle of sovereignty. Because data is stored on servers, and servers are included in the definition of cyber infrastructure, this means that if data intruded upon is located on the target state’s territory the target state has a right to exercise ‘sovereign prerogatives’ over that data.\(^\text{31}\)

This view argues that although cyberspace is an abstract dimension it still has physical locations, for example, the locations of servers. The location of the server is subject to state jurisdiction, placing the ‘slice’ of cyberspace that is located on that server, under that state’s jurisdiction. Furthermore, the actors that exist in cyberspace, are also subjects of state jurisdiction. Together, this makes it clear that cyberspace does not exist in a vacuum. Instead, both the machines and the actors that constitute and effectuate cyberspace, are subject to state sovereignty.\(^{32}\)

In the context of cyber espionage this principle entails that states may regulate all cyber activities and control the use of any cyber infrastructure that take place within its territory, and exercise legal jurisdiction over such activities.\(^ {33}\)

Cyber espionage, i.e., extraterritorial intrusions through cyberspace into protected data of a foreign state, should be seen as a violation of a state’s sovereignty. Cyber espionage is comparable to an agent who breaks into a governmental office to find and collect secret and protected information of the target state. Similarly, cyber espionage involves an unauthorized presence in the target state by a foreign organ or entity acting in official capacity.

The jurisdiction of a state encompasses the state’s authority to prescribe, enforce and adjudicate. Jurisdiction extends to matters of civil, criminal, or administrative nature. In international law, jurisdiction concerns to which extent a state is permitted to exercise its jurisdiction over persons or things in its territory and/or abroad. Jurisdiction in international law is closely linked to sovereignty of states this is reflected in the principles of equality of states and non-interference in other states’ domestic affairs.\(^ {34}\)

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3. Human Rights

States are not the only entities with rights under international law. Individuals also have rights, relevant to cyber intrusions. One such right is the freedom of information, which is included under the freedom of expression, covered by Article 19 in both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

While a state has the right to close its borders including borders in cyber space it must still respect the right to “receive and impart information and ideas of all kinds, regardless of frontiers”. This means that any efforts that a state may take in order to counter, for instance, terrorism, will have to respect this right.35

The Human Rights Committee has confirmed this dichotomy and confirmed that the convention has extraterritorial application, though not in exactly the same terms. Therefore, even measures which do not violate the sovereignty of a foreign state may be prohibited because they violate the human rights of an individual.36

This means that measures in foreign cyberspace that can be justified by consent, necessity or as countermeasures can still be in violation of international law if they violate human rights. The same applies to messages intercepted in the territory of the intercepting state or on the high seas or in outer space (or in Antarctica). It is important in this context to remember that human rights cannot be disposed of by the state of nationality of the person in question.

4. The Legality and Illegality of Espionage

a. Illegality of Espionage

The first leads in determining the possible legality of cyber espionage are found within the larger category of espionage. There are different opinions within the legal and

36 Ibid. p. 16
sometimes the political debate on the legality of espionage. Some view it as illegal, others claim it to be lawful and some say it is neither legal nor illegal.  

Those who suggest that cyber espionage is illegal argue that espionage is penalized within domestic law systems. This line of reasoning is based upon the view that ‘Under international law, if something were truly legal (or at least not illegal), no state should prosecute those who do it’.  

However, the sources of international law, for example the ‘principles of law recognized by civilized nations’ of Art 38(1) of the Statute of the International Court of Justice (ICJ Statute), hold otherwise. The article elevates those principles of national law that are applicable to inter-state relations, to the level of international law. Activities of espionage are penalized within all principal systems of domestic law, but the mere existence of such penalization is not enough to deem espionage prohibited under international law.

Importantly, the subjects of domestic law are not states, but individuals, and domestic law governs only the individual criminal liability for espionage activities, not the liability of states. Hence, domestic laws of states criminalizing espionage cannot be elevated to a principle of international consisting of a prohibition of espionage.

b. Legality of Espionage

The predominant argument among those who view espionage as expressly permitted under international law is that espionage is a component of a right of self-defence or anticipatory or pre-emptive self-defence. Self-defence is allowed according to Art 51 of the UN Charter, if it is lawful and in conformity with the Charter.

39 Ella Shoshan, Op.Cit., p. 25
41 Ella Shoshan, Op.Cit., p. 26
42 Article 51 of United Nations Charter
However, the scope of this essay is limited to peacetime cyber espionage, whereas cyber espionage justified as self-defence intrinsically belongs only to situations of conflict. If one goes further and believes in the controversial putative right of pre-emptive or anticipatory self-defence, cyber espionage could consequently be conducted in periods where a conflict might be imminent but has not yet developed. If one holds the view that such a right exists, espionage is a legitimate means whereby states defend themselves.43

An evident counterargument of this incentive-based view is that it gives the espionage perpetrators an ‘easy way out’ as they could, perhaps too easily, rely on claiming that their (subjective) incentive was based on a right of anticipatory self-defence and that they did not intend to conduct an act of aggression. Consequently, unless an actual act of aggression takes place it would be hard to show that the state conducting espionage intended to commit such an act.44

One more argument of the lawfulness of espionage refers to its widespread state practice. Of particular weight to this argument is the existence of government intelligence agencies that provide espionage services as legitimate functions of the state, and these agencies do so without incurring the other state’s official statements of illegality of espionage, therefore insinuating legality under customary international law.45

The International Court of Justice (ICJ) has confirmed that a rule of ‘international custom, as evidence of a general practice accepted as law’ as stated in Article 38(1)(b) of the ICJ Statute requires two conditions to be fulfilled: first, that the acts concerned must amount to a generally uniform and consistent state practice, and second, that there must be a belief that the behaviour is required or permitted under international law – described in the notion of opinio juris sive necessitatis.46

44 Ella Shoshan, Op.Cit., p.27
45 Ibid.
46 The International Court of Justice Article 38, available at http://www.icj-cij.org/documents/?p1=4&p2=2 accessed on June 3rd, 2015 at 12.23 p.m
The above arguments of the illegality and legality of espionage, respectively, were here both found to be insufficient. One has therefore to find an intermediate path, and look beyond these arguments. The ICJ has arguably had opportunities to take a position of peacetime espionage they have not done so.\textsuperscript{47}

In the Permanent Court of International Justice (PCIJ) Lotus case of 1927 a principle applicable to situations that are not, or only partly regulated by international law, is presented.

The Court stated that:

“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.”\textsuperscript{48}

From this statement, the principle that follows is that, defined here in a simplified and short version, a state may exercise jurisdiction on any matter, as long as international law does not expressly prohibit it to do so. Peacetime espionage as such is not expressly prohibited under international law but there are specific acts of espionage that are prohibited.

For example, Art 41(1) of the Vienna Convention on Diplomatic Relations states that diplomatic staff stationed abroad must comply with the domestic law of the state that they are stationed in, and indeed, states do generally criminalize different acts of espionage in their domestic systems of law.\textsuperscript{49}

\textsuperscript{47} Ella Shoshan, \textit{Op.Cit.}, p.30
\textsuperscript{48} The Case of the S.S. ‘Lotus’ (France v Turkey) (Judgment) 1927, Permanent Court of International Justice Rep Series A No 10, 18. Available at http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf accessed on October 3\textsuperscript{rd}, 2015 at 4:12 p.m
\textsuperscript{49} Ella Shoshan, \textit{Op.Cit.}, p. 30
The author Forceses emphasises that the question of international law and espionage should not be reduced to one of legality or illegality. Instead, the answer depends on an assessment of the method, location and other relevant factors of the assessed espionage activities.50

C. Law Enforcement

All states seek to establish or maintain national security, and cyber espionage for purposes said to pertain to national security is sometimes argued to be a means of attaining such security. It should be noted that states avoid the term espionage when referring to its own state-sponsored activities since espionage is often punishable according to domestic law.51

Regulation about Spying

Internet surveillance clearly affects the privacy of electronic “correspondence” such as e-mails, instant messages, voice and video calls (through systems such as Skype), online forums, and other digital equivalents of the telephone and telegraph. However, surveillance in this modern communications environment goes much further than crocodile clips attached to a targeted telephone line, or a bug installed in a telephone. In the online world almost every activity leaves behind detailed records, or “metadata”, linked to individuals through the IP address of their computer or smartphone, and through digital “cookies” left on their browser by Web sites, as well as numerous other identifiers.52

Covert surveillance on behalf of Australia is conducted by what is officially known as the Australian Intelligence Community, which includes organisations that gather intelligence and those that interpret it and provide reports to the Government. Those organisations more likely to be involved in phone tapping are the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS) and the Australian Signals Directorate (ASD, formerly known as the Defence Signals Directorate). The leaked Power

51 Ella Shoshan, Op.Cit., p. 8
Point slides refer to the Defence Signals Directorate, but it may not have been the only agency involved.53

a. **Australian Law**

Australian law allows all three intelligence organisations quite broad powers to undertake surveillance and gather intelligence. Most of the restrictions that are in place are designed to protect the privacy of Australians. The limits are strongest in relation to intelligence-gathering in Australia. This affects ASIO more than the other agencies due to its domestic focus. It needs to obtain a warrant from the responsible minister before it can search premises or undertake surveillance in Australia (such as the use of listening devices, interception of postal articles or “the interception... of communications made to or from [a] telecommunications service”).

Fewer restrictions apply to the overseas operations of ASIS and ASD. Section 11(1) of the Intelligence Services Act says that they can operate "only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside of Australia”. Similarly, they are only allowed to undertake activities "necessary for the proper performance of its functions”.

Authorisation from the minister is required before an agency can undertake activities that would obtain information on an Australian or would have a direct effect on an Australian. The ASD must also comply with privacy rules set by the minister when dealing with information about Australians. However, on the whole, Australian law does permit ASIS and ASD to tap the phones of officials of other countries if it is in the interests of Australia to do so.

b. **Indonesian Law**

Indonesia, like Australia, only allows the surveillance of its citizens in certain circumstances. Consequently, wiretapping on Indonesian territory by agents of foreign governments such as Australia is almost certainly illegal under local laws. Tapping can be carried out legally in Indonesia in certain circumstances.

However, Indonesian law places limits on who and why people can lawfully undertake wiretapping. “Indonesia has laws protecting the privacy of individuals,” Dr Melissa Crouch, a research fellow at the Centre for Asian Legal Studies at the National University of Singapore, told Fact Check. “Covert surveillance of people can only be undertaken by authorised law enforcement agencies and even then only under limited circumstances.”

Dr Crouch pointed to the Indonesian Law No 11/2008 concerning the electronic information and transactions, and the Indonesian Intelligence Law No 17/2011, which allows the Indonesian Intelligence Service (known as BIN) the power to wiretap individuals only in relation to matters such as ‘national security’ or ‘terrorism’. According to both Dr Crouch and Mr Wiratramen, it would be a criminal offence to wiretap in other circumstances. Dr Crouch says “given the very limited conditions under which actions such as wiretapping are permitted in Indonesia, it is highly questionable that such actions by foreign governments would be permitted under Indonesian law”.

c. **International Law**

International law is made up of several different sources including conventions and treaties, practices followed by states (known as customary law) and decisions of international courts such as the International Court of Justice in The Hague.

However, that is not the end of the story. A key principle of international law is respected for "state sovereignty". Associate Professor Craig Forcese, has written extensively on national security law and takes the view that espionage may violate the sovereignty of the country being spied on if the actions are illegal under that country's laws. Right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognised by international law.
It is unclear whether it is alleged that spying against Indonesia took place in Indonesia or from Australia. However, Associate Professor Forcense says "there would still be a breach to Indonesia's sovereignty if Australia, acting on Australian territory, somehow collected the intercept via some tools or techniques on Indonesian territory". Countries also have an obligation under international law to not intervene, directly or indirectly, for any reason, in the internal or external affairs of any other state.

Given there are no treaties addressing the issue and that spying remains a common practice, the international law position cannot be described as settled. However, the Indonesian president's view is that it is illegal under international law is certainly a valid one, supported by expert opinion.

IV. Remarks

A. Conclusion

1. International law does not have any specific regulation related to the issue of espionage at this time. Yet, many principles of International law may be engaged to the spying activity. When Australian intelligence tried to listen into Indonesian President Susilo Bambang Yudhoyono’s mobile phone, intentionally, Australia breached some principles of International law such as Sovereignty, Non-intervention, and Human rights.

2. Espionage has been done by Australia in peacetime conditions places Australia at breaching some principles of International law. From the principles of sovereignty, it is clear that Australia doesn’t have full respect over Indonesia for its territorial integrity and also political independence. In terms of the principles of Non-intervention, Australia tried to interferes political independence of Indonesia by tapping Indonesian’s president and also ministers of Indonesia. Based on Universal Declaration of Human Rights, everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers, in this case Australia violate the rights of Indonesian’s president.
B. Suggestion

International law has a role to solve the dilemma of espionage in time of peace when foreign surveillance become common among states. International law have to provide some regulations according to this issue to avoid big problems in the future relations among states.

Indonesia has a big challenge to protect national security. Espionage by foreign states might violate the security of Indonesia and public order. Because of that, Indonesia should take serious action immediately to protect Indonesia national security such as upgrading national cyber security considering that Indonesia has a potential to become a target of foreign surveillance.

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spied-on-indonesian-president-leakeddocuments-reveal/5098860 accessed on February 10th, 2015 at 2:26 p.m.


Abstract:

The history of waqf in Morocco dated to as early as 9th century with the creation of waqf education and the establishment of the first on-going university in the world. The creation of Qarawiyyin University as the oldest waqf higher education marks the high quality education system in Islam but sometimes, lacks highlight and appreciation. In Morocco, waqf tradition remains, as social and political obligation and sustainable awareness exist among the notable and common people. Employing a qualitative research method, this paper uses historical institutionalist approach, which include reviewing literatures on history and waqf in Morocco. In addition, the authors engaged in interviews with the officers in charge in order to understand the contemporary administration and the challenges in waqf administration in Morocco. Although waqf has been in practice since the early establishment of the country, the development is relatively firm and steady. Waqf in Morocco works beyond the traditional practices as happens in some Muslim countries. Similar to others, Morocco needs to advance waqf practices in order to fully utilise waqf benefits. Moving along the spirit of waqf in making changes for the Muslim, Malaysia can learn several things progressively even from the past history.

Keywords: Waqf, Morocco, waqf education, history, social justice and philanthropy.
1. Introduction

A decision to study waqf administration in Morocco began with the information that University Qarawiyyin in Fes is reported as the oldest on-going endowment university in the world. This has led to a journey to the North Western African country, al-Maghrebi or Mamlakah al Maghribiyyah or Morocco. In the journey, wider means of seeking knowledge were acquired. It was later realized that knowledge searches on waqf in Morocco should not be confined only to the keywords such as waqf, religious endowment or Qarawiyyin University or Fatimah al Fihri, instead, habs, ahbas, habous, Andalusia Mosque, Maryam al Fihri, the Marinids, the Bou Inaniyya, the stork or Laqlaq, the Madrasa ben Yousif, the Maristanat, and a few more that have been acquired along the journey in search for the knowledge. The bulk of the knowledge may be acquired not only for those who know Arabic but Spanish, French as well as English.

The knowledge search started from a mere curiosity about the oldest waqf University offering integrated knowledge of science and Islam stimulates the motivation to understand the history of Islam in Morocco. No doubt, understanding on Islam and its development in Morocco has contributed to a better appreciation of waqf and its contribution to Islam in general and Morocco in particular. The long history of civilization in the country started with the Berber, the Roman and later, the Arabs. This explains the reason for the establishment of the first integrated knowledge in waqf university of Fes. The importance corpus of knowledge that Islam offers attracted many Muslim and non-Muslim to come to Fes. As result, Al Maghreb has attracted and received many scientists and Muslim jurists such as Ibn Tumart, (1078-1139); Ibn Bajjah (Avempace); Ibn Rushd or better known in Latin as Averroes (1126-1198), Ibn Tufayl (Abubacer); Ibn Sina (Avicenna), Ibn Khaldoun, Ibn Batutah, etc.

2. Moroccan geography and political background

Geographically, Morocco is partially isolated from other North African countries by the Atlas Mountains and the Sahara desert. Nevertheless, the Moroccan has had a long trading history with Mediterranean countries of Southern Europe and Western Asia. It was said that it is traceable as far back at least to the Phoenicians in the 1st millennium BC.
Morocco appeared as an independent political entity during the rule of the Berber kingdom of Numidia, which was followed by Roman Empire's rule, there was brief invasion of the Germanic Vandals, the re-establishment of a weak Byzantine ruled by the Byzantine Empire, the rule of the Islamic Caliphates under the Umayyads, the Abbasids, and the Fatimids (The History Files). The most enduring rule was that of the local Berber empires of the Almoravids, Almohads, Hammadids, Zirids, Marinids, and Wattasids (to name some of those among the most prominent) from the 8th to 13th centuries. The Ottoman Turks ruled the region as well. (The History Files; https://en.m.wikipedia.org/wiki/Maghreb).

Nowadays, Morocco is parliamentary constitutional monarchy. The current King, Mohamed VI came to power in 1999. While his father, King Hassan II was an autocratic ruler, King Mohamed VI appears to have a different vision for Morocco’s future. Under his leadership, there seems to be a tendency towards more democratic and liberal values in Morocco (http://www.europeanforum.net/country/morocco). Mohamed VI has stressed the need for social and economic reform and the need to tackle problems like poverty, illiteracy, and unemployment. In relation to this, NGOs and independent human rights organisations achieved more successes due to the increased possibilities the new regime offered. The King retains much of the executive power, but Parliament is democratically elected. King Mohamed VI has, next to economic and social reforms, also reinforced his powerbase by strengthening the army (European forum.net).

3. History of Morocco and its Relationship with Waqf

The history of Morocco began as early as the end of the 2nd millennium BC Rome with the Berber (http://encyclopedia2.thefreedictionary.com/Morocco). They represent the aboriginal people who are brave and rough. They extended their rule after defeated the Carthage in 146 BC. The fine Roman ruins at Volubilis and Chellah, Rabat witnesses the presence of Roman. When Rome declined, Morocco was invaded first by the Vandals and then, in the 7th century, by the Arabs. Although external Arab rule lasted little more than a century, the arrival of Islam proved to be a permanent addition to Moroccan culture. Morocco received a series of ruling dynasties, which came into power, including the Al Daarisa (Idrisids), the Al Murabituns (Moravid) and the Al Mowahiduun (alMohid).
Spain and Portugal started to show interest on Morocco at the beginning of the 15th century. Their strife to throw out the Moors led to further effort to conquer Morocco. Although the Moroccan managed to defend against these invasions, but the tide of European imperialism seemed to be irresistible and too strong. By the middle of the 19th century Morocco's strategic importance had become evident to all of the European powers, and they engaged in a protracted struggle for possession of the country. In 1911, France officially as protector of the greater part of the country, with Spain receiving a number of isolated locales. French rule came to an end in 1953, although its cultural influence on Morocco remains strongly in evidence. The history of Morocco in general helps us to understand the rise and fall of the benevolent act of waqf in Morocco. During the early settlement of the Arabs descendant, waqf contributions were vast and full of use to the people. The impact were felt and known to the present days not only in Maghreb but other parts of the Muslim world (David S Powers, 2011).

1. Philanthropy and Social Justice in Islam

Tracing the history of endowment in Morocco, one will acknowledge two things. Endowment has been given full-fledged encouragement by those in the highest position of the state as well as the commoners, i.e. the imam, the caliphate or the King since it manages to take lead in providing social welfare to the people (Raissouni, 2001). It arose out of their faith in Allah swt and seeking blessing for life after death. Islam promotes helping others. The helps does not confine to Muslims or human being only. Waqf or Islamic endowment is an act of sustainable giving unlike sadaqah (donation) which is rewardable once only. Waqf emphasizes on permanency of the act and the on-going benefits.

Secondly, many have related the support of the rulers for waqf benevolent act not only for religious objective but also political and social solidarity, security and to bolster the deficiencies of the public authorities (Penz, Charles, undated). When Idrisid ruled Fes, waqf for the Zawaya managed to mobilize armies during the 10th and 11th centuries to regain the usurped parts in Al Araish, Al Ma'moura and others (Rostom, Mohamed Zein al Abden, 2014). Whatever the conclusion on what has motivated the Moroccan to generously donating their properties especially the immovable properties, the fact shows that many religious institutions, hospitals, educational centres, public bath and spas, the source of water and even
the chandelier in Qarawiyyin mosque came from the generosity of its people (Penz, Charles, undated). It is difficult to disagree that Islam and its teaching on the importance of helping one another and seeking continuous blessing from Allah swt are the utmost goals of any Muslim's act. Thus, it is right to say the spirit of waqf decreasing, the Islamic spirit is also drying in the heart and mind of the Muslim. The legacy of waqf or religious endowment in Morocco is proven with the existence of various types of waqf products in various periods of administration.

4.1 **During Ad Darisah Period**

i. Waqf for mosques especially for friday prayers especially during the period of Idris II (M 213 H) (Al Juznaei, 1967) (Jami' Asyah and Mosque Syurafa');

ii. Waqf Mosque Qarawiyyin by Fatimah al Fihri (245H) and Jami Al Andalus by Maryam al Fihri (247H); the waqf were not only confined to the endowment of the mosque alone but supporting the function of the mosque as centre of leaning such as the Qoranic schools, libraries, ablution facilities, wages for caretakers, muezzin and sermon maker (Raissouni, 2001; Apelian, Colette, 2014).

4.2 **During Al Murabituun (Al Moravid) Period**

i. The widening of the Mosque of Qarawiyyin to facilitate the increase of the prayers; The expenses was taken from the other properties endowed for the Mosque itself including the rentals from the waqf houses, incomes from (public bath and spa *(hammam)*), hotels *(funduk)*. It was reported that the incomes from the properties endowed for Mosque of Qarawiyyin reached about 80 000 dinar (Awqaf Meknes, 1/48). The income suffice to make Mosque Qarawiyyin self-sufficient and free from depending on *Baitul Mal*.

4.3 **During Almohad (Muwahidun) Period (1147-1269)**

There were significant development in terms of the quantity and the quality management of waqf properties and it is said that *habous* institution attained its peak during this period and the Marinid (Penz, Charles, undated).
i. All waqf properties in Fes were dedicated to Qarawiyyin Mosque such as the hotels (funduk), bakeries (farran), soap factories, leather factory (ma'mil jild), house for rents, stalls (qaisariyah @ hawanit), schools (madrasa), khazanah (libraries or resource rooms), hospitals and water supplier (sikhayah). (Fez Qabla Himayah, 1/378);

ii. The benefits of waqf were distributed to imam, muazzin, ulama', qadhi, the orphans and the homeless. Some of the practices remain until now but channeled through the respective ministries or departments;

The improvements done during this period can be divided into several categories:

a. Humanitarian:

The benefits of waqf have been used for humanitarian works;

b. Storage and Record System

Waqf properties have been properly stored and recorded referred to as "Mustawda' Awqaf" built on a piece of waqf land near to Qarawiyyin Mosque; This system gained trust from the contributors; Mustawda' Awqaf was initiated by Faqih Muhammad Yashkur Jauraei (died 598H); There are three different officers in-charge of the opening of the doors, without one of them, the doors cannot be opened; Nevertheless, it was reported that during the period of Qadhi Fes Abu Imran, there were cases of theft in Mustawda' Awqaf.

4.4 During Marinid Period

During this period waqf has developed beyond religious needs and duties. The leaders of Marinid dynasty used waqf as a means to strengthen their political influences. They realized the importance of waqf and seriously promoted waqf among the people. Waqf spread beyond Fes and waqf has been used to maintain hospitals and animal shelters. Waqf for education did not only center in Fes but other states such as Taza, Marakech, Sale and Septah. Profit gains from awqaf properties increased by 10,000
silver dinar for the first half of the year. The benefits allowed for the money to be used to maintain mosques outside Fes.

i. Waqf for education:

a. Increase of waqf for books and libraries. New madrasah called Madrasah Andalusiyyah was set up at the West of Fes. Special waqf chairs were endowed for the use of the teachers (Mu'allim) especially for Qarawiyyin mosque;

b. Sultan Yusuf Yaacob has filled up the library for Madrasah Halfawiyah in Fez with manuscripts returned by the King of Sancho 1 from Castille, Portugal;

c. Ibn Khaldun has dedicated "Kitab Ibar" to the students of Qarawiyyin;

d. Sultan Abi Inan has dedicated al Quran which he has personally written it;

e. Sultan Abu Hassan Al Marini has endowed the book written by Ibn Rusd Al Jadd (died 520H) entitled "Al Bayan Wa At-Tahsil Lima Fi Mustakhrajah Min Taujih Wat Ta'lil ";

ii. Waqf for Health and Hospitals

a. Hospital and Maristan (mental hospital) were built by Sultan ABu Yusuf Yaakob; offering not only the medical services but medicines and meals for day and night; In one of the Maristan known as Sidi Farj, musical instruments were also endowed to help release the tension of the patients;

b. clothes for the deceased who were unknown (ghuraba') or without relatives;

iii. Waqf for Shelter/Accommodation (Aqqarat)

a. Houses built for the elderly sponsored by Sultan Abu Hasan;

b. A special house for elderly who regularly attending prayers at Al Andalus Mosque in Fes;

c. Houses for the poor people;

d. Houses for people with disability or special needs;
e. Venues for special ceremony such as marriage for those who can't afford;

Interestingly, it was reported that waqf house were among the big houses or mansions in Fes. It shows that everybody gave special attention to waqf.

iv. Waqf utilities

a. Siqayat or waqf of water is well known and are still available and is evident at present especially in Fes;

v. Waqf for financial contraints

a. use of waqf incomes to provide interest-free credits to settle debts; The capital was provided by the Sultan with a special staff to records the details of the debts. The first clerk appointed was Ibn Hajj An Namari (died 774H);

vi. Waqf for community

a. properties for poor people, the orphans and the elderly;

b. Waqf specially for animals such as the horses, the cows, sheep, etc.;

4.6 Waqf during Wattasids and Sa’diyyin Period

The records showed the endowments contribution during these two periods diminished. The factors associated to the decrease are:

i. Lack of trust on the management of waqf. Among others, the trustee failed to observe the conditions of waf; mismanagement, some waqf properties were not utilized according to the intention of the waqif, where some madrasa have been used as place of abode, or the storages were used as cattle post or barns;

ii. Lack of qualification for the Nazir to manage waqf;

iii. Wars;

iv. Misuse and mismanagement in waqf dhurri
During these dynasties, mosques became the centre of waqf administration. A record book for waqf properties known as *Hawalat* was introduced which recorded the types of waqf properties, the beneficiaries, and its maintenance.

### 4.7 Waqf During Alawiyyin Period

Waqf spirit decreased during the period of Saadiyyin but gained its momentum during the Alawiyyin. The leaders of this dynasty realized the importance of waqf properties and its contribution to the safety and security of the country has taken the vital step to personally oversee the management and administration of waqf. Thus, waqf ruled through royal orders and majestic instructions, waqf prospers with close monitoring system by the King. Sultan Maulay Ismail has set up the Ministry of *Habous*. The monarch also responsible to appoint suitable and trusted staff and assigned the *Qadhi* known as *Qudat Syari’yyin* and *Nuzzar Waqf* to accomplish the duties. A special record known as *hawalat Islama’iliyyah* was introduced to record and identify the object of *awqaf* properties (Mustafa BenA’lah, 1992) The productive progress on waqf was continued the later monarch including Sultan Sidi Muhammad bin Abdullah, Sultan Maula Abdurrahman and Sultan Sidi Muhammad bin Abdulrahman. Among their contributions are to rule that waqf properties are not to be exchanged, sold, charged or wasted even a part of it (Mustafa BenA’lah, 1992). Nevertheless, the decadence of the system seemed to appear during the reign of El Hassan (1873-1894) (Penz, Charles, undated). Many reasons were associated to this development; a lack of religious construction, of education, and of charitable bequest and the *habous*. Interference of the European often rendered the administration of *habous* difficult (Penz, Charles). The worst abuses took place during the Maulay Hafid (1908-1912). From 1912, in conformity with the Treaty of Fez, it was asserted a principle of inviolability of the *habous* but with a reorganisation of the Institution and allowed it to evolve within its traditional plan, guided by the *Chraa* (Shari’ah) and custom.

Other forms of waqf known in the history are:

i- waqf to support Muslim in distress (Peretie, 1912, *Madaris* in Morocco; Luccion, 1982, 79-93 cited in Kagelmann, F. 1999);
ii. *waqf* to purchase the freedom of prisoners of war who had been sold into slavery. (At-Tazi, 1995, 57-64);

iii. A pious endowment provided for a weekly concert for the inmates as a kind of forerunner of modern music therapy (Luccion, 1953, p.463);

iv. *Ahbas* for medical purpose; (Kagelmann, F., 1999);

v. *Ahbas* to provide for burial of poor people, help the needy and feeding the poor; (Kagelmann, F., 1999)

v. to provide clothing during winter for the poor (Kagelmann, F., 1999)

vi. Income from Ahbas al Maristan is to provide means for survival to 500 inhabitants from the Village of Beggars in Arsat al-Qadi (Kagelmann, F, 1999)

vii. To establish Dar-al-Kitun with the object to improvish Sharifas i.e. female descendant of the Prophet and any Sharifas who want to escape their husband authority.

5. **Waqf Administration and Its Development**

There are three types of *waqf* that are well known in Morocco i.e. *waqf am* or *khairy* and *waqf family* or *waqf dhurri* or *muqqab* and *waqf mushtarak* (mixed *waqf*). While other countries took the steps to prohibit *waqf zhurri* or gave less attention to it, Morocco left the *waqf* in their own phase but monitored by the *Nazir* for whatever *waqf zhurri* came to their knowledge. Administration of *awqaf* was not uniformed in Morocco (Murat Cizakca, 2000). General Directorat of Habous (*Vizirate*) and Directorate of Sherifian Affairs were formed under the authority of the Sultan, administering the public *waqf* and exercise stricter control of family *waqf* and monasteries (Penz, Charles, undated). Efforts were made to record *waqf* properties and helped in identifying the value of the wealth. It was reported that in a period of almost twenty years, 1740-1759, nearly 40% of all the registered *waqfs* had been founded (138 *waqfs*), after 1810 only one *waqf* per year was established. About 31% of the individuals who founded these *waqfs* were women (Stöber, 1986).
One of the French legacies is the centralised waqf administration, which occurred during the sixteenth century when a central office ran the Qarawiyin mosque. The family waqfs, on the other hand, enjoyed substantial autonomy. By the eighteenth century, the Sultans were trying to expand their control over the whole system. They established the office of nazir an-nuzzar and a centralised system of waqf registers. The rulers who were behind these developments were motivated to centralise the awqaf as a reaction to the alleged role the waqfs played in the uprisings (Murat Cizakca, 2000; Raissouni, 2001).

Centralization increased especially when the rulers attempted to intervene in the management of the waqfs. This occurred, on the one hand, by subjecting the appointment of a trustee to the approval of the ruler and, on the other, by direct interference in the management of the waqf properties. The European influence continued with the grant of concessions which basically in the form of ibdal/istibdal. This has led to the usurpation of the waqf properties.

In general, the Morocco waqfs entered into a new phase with the establishment of the French and Spanish protectorates. The colonials were trying to make the impression that they respected the waqfs and that any change in their organisation was for their own benefit. The organisation of the waqfs with local offices, with the trustees appointed by the Sultan remained untouched. Nevertheless, the introductions of various rules and regulations have to a certain extent, limited the power of these trustees. These trustees were attached to a higher officer, the muraqib. In the French zone muraqabah offices were established in Fés, Meknés, Marrakech, Rabat and Mazagan.

By 1912 a General Directorate of Habous was established which later known as the Ministry of Habous in 1915 and under the purview of the central organisation. The ministry not only was empowered to control the monthly accounts of the waqfs, but could also take decisions concerning long-term lease, or even ibdal/istibdal of waqf properties. Until now, the King and the related office may decide on the matters concerning Istibdal as shown below:
Value of *ahbas* property | Authority to decide
--- | ---
> than 10 Million Dirham | Endorsement from the King is required.
5 Million Dh - 10 Million Dh | Majlis A’la approval is required.
< 5 Million Dirham | The approval from the related government authority/agencies

Source: Mudawwanah Waqf 2010, Article 64.

Under the French protectorate, the establishment of the Ministry allowed them to have a certain control over waqf properties. For example, all the financial transactions: checks payable had to be signed by the ministry officials and the French authorities took all the important decisions. An office of the ministry, the *Service d’inspection*, audited the trustees annually. In fact, the organisation of the *habous* management can be considered as an example of the typical French colonial influence where in reality, all the locals’ decision-making powers that really mattered were abolished (Murat Cizakca, 2000)

Until 1932 ca. 12,000 ha land was sold by the *habous* administration to the colonial administration for resale to the settlers but merely 5,000 ha was actually bought by the latter. In addition to this, long term leasing, up-to 30 years, also took place: the colons leased 1,500 hectares and thus the waqf characteristic of these lands was maintained. The farming-out of *habous* lands by public auctions remains until the protectorate in Rabat. Moreover, a group of share tenants could pool their resources and lease a waqf property in a partnership where a quarter shares appear to have been quite common. Share tenancy was also practiced in the Western Rif and the auctions were either based on sharecropping or cash.

Under the French rule, a law dated 21 July 1913 regulated the farming-out procedure and sharecropping was replaced by cash rents. The public auctions leasing process were opened to non-Moroccan. Among others, the law detailed out the procedures and limited the lease period to 1 year, which was later expanded to 3 years. Long-term leases, up-to 10 years could be obtained subject to the approval of the *Direction générale*. If a tenant invested in land an amount that exceeded a 5-year long rent, he would be eligible for 2 more extensions of the lease without prior approval from the waqf administration. Each one of these
extensions was for 10 years, thus effectively increasing the lease period to 30 years. For each renewal the rent would increase by 20%. The auctions were held each year in October and the minimum auction price was determined by the previous rent. The system continued throughout the twentieth century and by the 1970s more than 190,000 parcels of land totaling 47,000 ha were farmed out this way. Under the system, short-term leases were allowed but prompted several problems: the tenants were reluctant to invest in land, the quality of which deteriorated from year to year. In response, the Central Waqf Administration resorted to an ancient Islamic contract form: the muqarasa where the tenant committed himself to plant a certain number of trees on the leased waqf land. The produce of these trees would then be shared between the habous and the tenant according to a prearranged formula. At the end of the contract period, the land as well as the trees on it was to be divided between the waqf and the tenant. In short, the tenant ended up becoming a landowner through the muqarasa. (Stöber, 1986: 38-39).

The administration of waqf and its organisational structure based on French model was maintained even after independence of Morocco but led by the Moroccans. Major change continued until in 1970s when the lands leased by the French settlers reverted to Moroccans and a Direction des Affaires islamiques was established. The management of the waqfs is now completely subject to the ministry. Similar to other countries, the Qadi has gradually lost all the controlling and decision making power over waqf matters.

On 25 July 1969 it was declared that the state could acquire habous lands in irrigated areas by ibdal or istibdal. This has resulted in about 13,000 ha were transferred to state ownership within a few years. Out of these, 11,000 ha were redistributed to the peasantry. Notwithstanding these distributions, the overall share of the habous lands in Morocco did not decline substantially since 10,000 ha of habous lands originally usurped by the tribes, were reregistered. In sum, the agricultural habous properties were estimated to be about 84,840 ha, 195,850 parcels in 1977. The number of urban properties, on the other hand, reached 33,356. There were altogether 8,292 beneficiaries receiving revenue from these establishments (Murat Cizakca, 2000)
At present, a special ministry on waqf has been formed since 1955 and earlier known as Wizarah Hubs. Its jurisdiction is clearly stated under Article 1, Mudawwanah Awqaf 2010. Directorat Awqaf is one of the central divisions under the Ministry (Ahmad Aj’un, 2006). The Directorat has 5 different divisions; The Waqf Property Division; the Waqf /Real Estate Investment; the Waqf Asset Division; The Treasury and Waqf Dispute Resolution Division. Every division is further divided into another four departments (Habous, 2006). The Directorate also has to monitor the nazir who are appointed by the Minister of Waqf (Said Bakuri, 2006; personal interview with Mr Muhammad Idrisi, Nazir Fes, 5 February, 2016). Every nazir is given an office and is in-charge of several small departments under his supervision. Nazir job scope includes (Khalid Masluhi, Jan 28, 2016):

a. To record all waqf using a system known as rasm aqari;
b. To manage all public waqf (am);
c. To make profit from waqf properties (Muhammad Idrisi, Feb 5, 2016)

6. Morocco Waqf Contributions

Waqf in Morocco does not represent the religious practices but it has been developed as part of the culture and economically contributed to its people. The spirit spread beyond their land. The Almoravid and the Almohad had brought with them the waqf culture when they ruled the Andalucia even though some claimed that the act was actually part of their political propaganda and survival. The Marinids had introduced an ambitious programme that combined the function of hostelry and mosque, usually on burial site (Jonathan Benthan, Jrome Bellion-Jourdan, ). The earliest Moroccan endowment in Jerusalem was set up in the 12th century (CE) as Mujir al-Din relates in his book on the history of al-Quds (Jerusalem) and al-Khalil (Hebron), that 'Afdal al-Din (the son of Salahadin) "endowed as waqf the entire quarter of the Maghrib is in favor of the Maghribi community, without distinction of origin," and that the "donation took place at the time when the prince ruled over Damascus, to which Jerusalem was joined" at the time (Daily Sabah, 2016). Another endowment was set up in 1303 by Umar ibn Abdullah ibn Abdun-Nabi al-Masmudi al-Mujarrad, who dedicated a religious school for North Africans who then lived in and visited the Moroccan Quarter (Daily Sabah, 2016). The recording system of waqf properties and the establishment of a
proper storage for waqf properties indicate the level of concerns of the leaders and the people in taking the trust to manage waqf properties. These, must have rooted not only in professionalism of the trustees but also their religious awareness.

The grandson of Abu Madyan Shu'ayb Al-Ghawth, a major Sufi master of the 13th century, dedicated a retreat in the area for the benefit of Moroccans and North African Sufis who then visited the area. In addition, Abu Inan Faris al-Marini, the sultan of Morocco, inscribed a Quran in his own hand and established an endowment in Jerusalem that financed a person to recite the Quran daily in the al-Aqsa Mosque. Thus, what is known in Palestine's history as Harat al-Magharibah (the Moroccan Quarter) dates back to the end of the Crusades, and this sector of the city was mostly destroyed following the 1967 war.

Perhaps the tradition of providing education and its infrastructures to the people has motivated the government to maintain the act of providing free education to the people until to date. In fact, the benefit has also been extended to some Muslim from other countries. Every year, the Moroccan Kingdom offers free scholarship or free tuition fees to a few selected students from all over the world to study in some selected universities in Morocco. One of may be hundred instances, as reported by an anthropologist, in the 1960s, waqf still exist in Sefrou, at the foot of Atlas Mountain where bazaar were still shaped by the institution of hubs, ateliers, ovens, public bath, slaughter house, granaries, gardens, wheat fields and orchards, where the original donation were systematized in al Mujallad Al Mubarak (the blessed bound book) (Clifford Geertz, 2003; Slyomovies, Susan, 2009). Another example is Zawiyat Sidi al Ghazi, which survived as privately organized waqf properties (John A Shoup, 2011).

7. Lessons Learnt

Waqf have had pious lasting effect on the lives of the Muslim in Morocco. Religious endowment has taken place in the early history of Moroccan due to the generosity and piousness of the earlier people. Although there are allegation that pious endowment has been used as part of the political agendas among some of the leaders of the ruling dynasties, endowment remain a culture for the earlier generation of the Moroccan. The first lesson goes
back to the religious awareness of the people including the leaders, which prompted for voluntary contribution for religious endowment. Second, the earlier leaders have used religious endowment as a way to take care of the social welfare of their people. The acts went from providing free water to the duties of providing free education and medical needs. Although the zeal of waqf decreasing, the modern waqf system in Morocco moves towards maximizing the benefits of waqf and from time to time works towards a better management of waqf in the country. Furthermore, Morocco has followed other countries to legally strengthen the waqf administration with the introduction of Mudawwanah Awqaf in 2010. It is observed that Morocco needs to fully utilize the waqf properties through various creative means of development taking advantage of the flexible principles of waqf according to Maliki schools. Furthermore, the fatwa (edict) institution in Morocco seems to be also flexible thus, adventuring into a new concept and waqf development may not find obstacle in its red-tape procedures as faced by some Muslim countries.

The centralization of waqf administration has its own strengths and weaknesses. It has, to a certain extent, provided a stricter check on the management of waqf with a few standards of practice and orders. Nevertheless, the management may subject waqf administrators and trustees to many red-taps thus will slow down the development of waqf. For example, the appointments of the trustee were subjected to the approval of the Ruler or the Ministry of Awqaf office (Islamicbanker.com). Perhaps, the flexibility of Maliki school of thought has contributed to vast activities of waqf including the practice of ibdal /istibdal.

The history of waqf in Morocco showed the importance of creating and reviving waqf based on the foundation of Shari’ah and the impact was amazing. In addition, Morocco has shown the importance of waqf in academic and scientific progress through research funds, infra as well as logistics. Waqf contribution has been channeled towards creating job opportunities, improving job opportunities and upgrading the economic level of the ummah. Despite old history of waqf practices and proven effective in academic and social welfare contribution, the majority of Muslim in the Muslim countries perceives waqf as mere traditional ritual practices such as mosques, cemeteries and madrasah. The contribution of waqf should move beyond ritual agendas and encompass economic development, scientific research and technologies as well as infrastructures.
Lastly, the long tradition of recording waqf properties and their details has safeguarded some of the waqf properties till present. At least, the size of waqf land, the details of waqf properties and the trustees are known to the people if not to the government.

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PERKAHWINAN TIDAK MENGIKUT PROSEDUR: SATU TINJAUAN AWAL DI MAHKAMAH SYARIAH TERENGGANU

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Abstrak


Kata kunci: perkahwinan, tanpa kebenaran, perngesahan, mahkamah, Terengganu

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1. Pendahuluan


2. Objektif dan Metodologi Kajian

mahkamah Syariah negeri Terengganu manakala temubual dilakukan dengan Pendaftar Mahkamah Syariah Kuala Terengganu.

3. Sorotan Literatur


hadapan Pendaftar (74 kes), kesalahan berhubung dengan akad nikah (56 kes), acaun palsu untuk berkahwin (6 kes) dan mengakad nikah tanpa kuasa yang sah sebanyak 5 kes.

2. Prosedur Perkahwinan Menurut Enakmen Undang-Undang Pentadbiran Keluarga Islam Terengganu 1985


Bagi perkahwinan selain daripada poligami atau wali raja atau perkahwinan oleh individu bawah umur, prosedur yang pertama yang perlu dilakukan ialah mendapatkan kebenaran daripada Pendaftar Perkahwinan, Perceraian dan Ruju’ orang Islam. Seksyen 14 Enakmen memperuntukkan:

(1) Apabila dikehendaki untuk mengakad nikahkan sesuatu perkahwinan di Terengganu, tiap-tiap satu pihak kepada perkahwinan yang dicadangkan itu hendaklah memohon dalam borang yang ditetapkan untuk kebenaran berkahwin kepada Pendaftar bagi mukim di mana pihak perempuan bermastautin.

(2) Jika pihak lelaki bermastautin di mukim yang berlainan daripada mukim perempuan, atau bermastautin di mana-mana Negeri lain, permohonannya hendaklah mengandungi atau disertai dengan kenyataan dari Pendaftar bagi mukimnya atau dari pihak berkuasa yang hak bagi Negeri lain itu, mengikut mana yang berkenaan, yang bermaksud bahawa sejauh yang dapat dipastikan perkara-perkara yang disebut dalam permohonan itu adalah benar.

(3) Permohonan tiap-tiap satu pihak hendaklah disampaikan kepada Pendaftar sekurang-kurangnya tujuh hari sebelum tarikh yang dicadangkan bagi perkahwinan itu, tetapi Pendaftar boleh membenarkan masa yang lebih singkat dalam mana-mana kes tertentu.
Permohonan untuk kebenaran perkahwinan dilakukan melalui borang permohonan yang boleh didapati dari pejabat Agama Islam di daerah masing-masing. Setiap permohonan mestilah disertakan dengan maklumat yang diperlukan seperti maklumat pasangan dan persetujuan wali. Selain itu, terdapat beberapa maklumat lain yang perlu disertakan mengikut kes pihak yang ingin berkahwin seperti sekiranya pihak lelaki adalah merupakan individu yang tidak bermastautin di negeri Terengganu. Setelah berpuas hati, Pendaftar boleh memberi kebenaran berkahwin kepada pemohon tersebut mengikut seksyen 15 Enakmen iaitu:

“Tertakluk kepada seksyen 16, Pendaftar, apabila berpuas hati tentang kebenaran perkara-perkara yang disebut dalam permohonan itu, tentang sahnya perkahwinan yang dicadangkan itu, dan, jika pihak lelaki itu sudah berkahwin, bahawa kebenaran yang dikehendaki oleh seksyen 21 telah diberi, hendaklah, pada bila-bila masa selepas permohonan itu dan setelah dibayar fee yang ditetapkan, mengeluarkan kepada pemohon kebenarannya untuk berkahwin dalam borang yang ditetapkan”.

Seksyen 16 memperuntukkan keperluan merujuk kes kepada Hakim Syar'i iaitu bagi kes yang melibatkan permohonan oleh individu bawah umur, janda atau jika sekiranya perempuan tidak mempunyai wali dari nasab menurut hukum syara’. Seksyen ini memperuntukkan:

(1) Dalam mana-mana kes berikut, iaitu

(a) jika salah satu pihak kepada perkahwinan yang dicadangkan itu adalah di bawah umur yang dinyatakan dalam seksyen 7; atau

(b) jika pihak perempuan adalah seorang janda yang tersabit oleh seksyen 12(3); atau

(c) jika pihak perempuan tidak mempunyai wali dari nasab menurut Hukum Syara', maka Pendaftar hendaklah, sebagai ganti bertindak di bawah seksyen 15, merujukkan permohonan itu kepada Hakim Syar'i yang mempunyai bidangkuasa di tempat perempuan itu bermastautin.
(2) Hakim Syar'i, apabila berpuas hati tentang kebenaran perkara-perkara yang disebut dalam permohonan itu dan tentang sahnya perkahwinan yang dicadangkan itu dan bahawa kes itu adalah kes yang mewajarkan pemberian kebenaran bagi maksud seksyen 7, atau kebenaran bagi maksud seksyen 12(3), atau persetujuannya terhadap perkahwinan itu bagi maksud-maksud seksyen 11(b), mengikut mana yang berkenaan, hendaklah, pada bila-bila masa selepas permohonan itu dirujukkan kepada dan setelah dibayar fee yang ditetapkan, mengeluarkan kepada pemohon kebenarannya untuk perkahwin dalam borang yang ditetapkan.

Seksyen 17 pula mempruntukkan syarat mendapat kebenaran sebelum akad nikah. Seksyen menyebut: “Tiada sesuatu perkahwinan boleh diakadnikahkan melainkan suatu kebenaran berkahwin telah diberi

(a) oleh Pendaftar di bawah seksyen 15 atau oleh Hakim Syar'i di bawah seksyen 16, jika perkahwinan itu melibatkan seorang perempuan yang bermastautin di Terengganu; atau

(b) oleh pihak berkuasa yang hak bagi sesuatu Negeri lain, jika perkahwinan itu melibatkan seorang perempuan yang bermastautin di Negeri itu.

Prosedur seterusnya ialah majlis akad nikah bagi perkahwinan tersebut. Majlis akad nikah hanya boleh dilakukan setelah kebenaran berkahwin diberi atau diluluskan. Dalam hal berkait dengan majlis akad nikah ini, ia boleh diadakan hanya di dalam mukim di mana pihak perempuan itu bermastautin mengikut kehendak Enakmen Undang-Undang Pentadbiran Keluarga Islam Terengganu 1985, atau ia juga boleh diadakan di luar mukim perempuan bermastautin samada di Terengganu atau di negeri lain dengan kebenaran Pendaftar atau Hakim Syarie (mengikut mana berkenaan) bagi negeri Terengganu atau pihak berkuasa Negeri di mana perempuan itu bermastautin jika perempuan tersebut berasal dari negeri lain. Prosedur ini dinyatakan di dalam seksyen 18 iaitu:

(1) Tiada sesuatu perkahwinan boleh diakadnikahkan kecuali dalam mukim di mana pihak perempuan bermastautin, tetapi Pendaftar atau Hakim Syar'i yang memberi kebenaran berkahwin di bawah seksyen 15 atau 16 boleh memberi kebenaran untuk
perkahwinan itu diadakan di tempat lain, sama ada di Terengganu atau di mana-mana Negeri lain.

(2) Kebenaran di bawah subseksyen (1) boleh dinyatakan dalam kebenaran berkahwin yang diberi di bawah seksyen 15 atau 16.

(3) Walau apa pun peruntukan subseksyen (1), sesuatu perkahwinan itu boleh diadakan di mukim lain daripada mukim di mana pihak perempuan bermastautin jika

(a) dalam hal di mana perempuan itu bermastautin di Terengganu, kebenaran berkahwin mengenai perkahwinan itu telah diberi di bawah seksyen 15 atau 16 dan kebenaran untuk perkahwinan itu diadakan di mukim yang lain itu telah diberi di bawah subseksyen (1); atau

(b) dalam hal di mana perempuan itu bermastautin dalam sesuatu Negeri lain, kebenaran berkahwin mengenai perkahwinan itu dan kebenaran untuk perkahwinan itu diadakan di mukim yang lain itu telah diberi oleh pihak berkuasa yang hak bagi Negeri itu.

Undang-undang menetapkan bahawa hanya orang-orang yang boleh mengadadnikah sahaja boleh menjalankan akad nikah tersebut. Orang yang boleh mengadak nikah bagi sesuatu perkahwinan di negeri Terengganu ialah wali dengan kebenaran Pendaftar atau seorang jurunikah bertauliah bagi kawasan yang berkaitan seperti yang diperuntukkan dalam seksyen 6 Enakmen. Seksyen ini menyebut:

(1) Sesuatu perkahwinan di Terengganu hendaklah mengikut peruntukan-peruntukan Enakmen ini dan hendaklah diadakan mengikut Hukum Syara' hanya oleh

(a) wali, dengan kebenaran Pendaftar; atau

(b) seorang Jurunikah sebagai wakil wali.

Seterusnya apabila urusan akad nikah selesai diadakan, perkahwinan tersebut hendaklah diafarkan. Dalam masa tujuh hari selepas akad nikah yang diadakan di negeri ini, perkahwinan itu hendaklah diafarkan di bawah Enakmen ini. Seksyen 23 menyatakan
“Setiap perkahwinan yang diakadnikahkan di Terengganu selepas tarikh yang ditetapkan hendaklah, dalam masa tujuh hari selepas akadnikah, didaftarkan mengikut Enakmen ini, jika perkahwinan itu sah menurut Hukum Syara', walaupun apa-apa peruntukan Enakmen ini telah dilanggar atau tidak dipatuhi”.


Selepas pendaftaran dilakukan, Pendaftar akan mengeluarkan surat perakuan perkahwinan berkenaan dalam tempoh yang secepat mungkin.

3. Perkahwinan Poligami


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4. Dapatan Kajian dan Perbincangan

Di antara mahkamah rendah pula, kes yang paling banyak difail dan dibicarakan ialah dari Mahkamah Rendah Syariah Besut (801 kes) diikuti dengan Mahkamah Rendah Syariah Kuala Terengganu (785 kes).

Kes-kes yang difailkan di Mahkamah Rendah Syariah

- Tidak mendapat keizinan wali
- Nikah sindiket
- Kes-kes lain

Sumber: Temubual (2016, 28 Mac)

Berdasarkan maklumat temubual dengan Pendaftar Mahkamah Tinggi Syariah Kuala Terengganu, Puan Nurulhuda Abdul Rahman, kebanyakan kes yang dibuat permohonan di Mahkamah Rendah pula adalah melibatkan perkahwinan yang tidak mendapat keizinan daripada wali nasab, nikah sindiket dan sebab-sebab lain. Di Terengganu Enakmen menetapkan prosedur bahawa orang yang boleh memberi keizinan ialah wali nasab. Dalam keadaan di mana wali tidak bersetuju, atau ketiadaan wali nasab, keizinan dari wali raja atau wali hakim boleh diperolehi dengan membuat permohonan ke mahkamah Syariah terlebih dahulu. Walau bagaimanapun terdapat pasangan yang tidak mendapat keizinan wali nasab tetapi mengambil tindakan berkahwin di luar kawasan. Ini merupakan satu perlanggaran kepada prosedur yang ditetapkan oleh Enakmen. Keadaan inilah yang menyebabkan mereka membuat permohonan untuk pengesahan pernikahan mereka (Sumber Temubual).

Nikah sindiket pula berlaku di mana terdapat individu tertentu yang mengatur perkahwinan antara pasangan. Dalam kes nikah sindiket kemungkinan semua syarat nikah telah dipenuhi. Walau bagaimana pun mereka tidak membuat permohonan ke Majlis Agama Islam bagi mendapat kebenaran perkahwinan (Sumber Temubual). Adalah sesuatu yang menghairankan bila mana semua syarat dapat dipenuhi tetapi pihak-pihak yang terlibat secara sengaja tidak memohon kebenaran perkahwinan.


Mahkamah dalam membatalkan perkahwinan dan memerintah akad nikah baru memutuskan bahawa akad nikah yang dilakukan oleh wali raja dalam kes ini adalah adalah suatu akad nikah yang fasid menurut Hukum Syara’, dan merupakan suatu akad nikah yang tidak diakui dan tidak boleh didaftarkan di bawah Enakmen Undang-Undang Pentadbiran Keluarga Islam, Terengganu 1985. Dalam kes ini mahkamah juga menyebut:

“seseorang wali raja disyaratkan supaya menyempurnakan kerja-kerja nikah kahwin dengan betul dan cermat, mengikut sebagaimana yang dikehendaki oleh hukum syara’ dan undang-undang. Mengikut kehendak undang-undang, dalam satu-satu permohonan kebenaran untuk berkahwin yang mana jika perempuan tidak mempunyai wali dari nasab mengikut hukum Syara’, maka Pendaftar Perkahwinan,
Perceraian dan Ruju’ orang Islam hendaklah merujukkan permohonan itu kepada Hakim Syarie yang mempunyai bidang kuasa di tempat perempuan itu bermastautin. Hakim Syarie berkenaan apabila berpuas hati tentang kebenaran perkara-perkara yang disebut dalam permohonan itu dan tentang sahnya perkahwinan yang akan dicadangkan itu dan bahawa kes itu adalah kes yang memerlukan persetujuan-nya terhadap perkahwinan itu, pada bila-bila masa selepas permohonan itu dirujukkan kepadanya dan setelah dibayar fi yang dietetapkan, mengeluarkan kepada pemohon kebenarannya untuk berkahwin dalam borang yang dietetapka”.

Dalam kes ini, tiada rujukan dibuat oleh Pendaftar Perkahwinan, Perceraian dan Rujuk orang Islam ke mahkamah. Oleh itu mahkamah memutuskan bahawa perkahwinan itu tidak sah kerana tidak mendapat kebenaran hakim Syar’i dan diarahkan supaya satu perkahwinan baru yang mematuhi prosedur dilakukan dengan kadar segera.

5. Perbincangan

Daripada penerangan di atas, jelas menunjukkan ketidakpatuhan terhadap prosedur yang dietetapkan oleh Enakmen Pentadbiran Undang-Undang Keluarga Islam boleh memberi kesan yang serius terhadap kesahan sesuatu perkahwinan. Kesahan perkahwinan pula sangat penting dalam Islam kerana ia memberi kesan seterusnya kepada hal-hal yang berkait dengan perkahwinan itu sendiri seperti pendaftaran kelahiran anak dan tuntutan nafkah, hadhanah, harta sepencarian atau harta pusaka, jika sekiranya pasangan tersebut bercerai atau meninggal dunia.

Kesan Perkahwinan yang Tidak didaftarkan dan Tidak Mendapat Pengesahan Mahkamah

i) Masalah Pendaftaran Kelahiran Anak

Pasangan yang tidak mendapat keizinah berkahwin dan tidak mendaftarkan perkahwinan mereka menghadapi risiko apabila mempunyai cahaya mata. Biarpun anak tersebut sah dari segi hukum syarak, ianya sukar didaftarkan sebelum mereka mendaftarkan perkahwinan secara sah terlebih dahulu. Ini memberi erti sukar untuk mendapat sijil kelahiran sekiranya ibu bapanya tidak dapat memberi bukti perkahwinan yang sah.
Mengikut peraturan baru yang dikeluarkan oleh Jabatan Pendaftaran Negara, setiap pasangan yang akan mendaftarkan kelahiran bayi mereka hendaklah membawa bersama sijil nikah yang sah dan telah dikeluarkan oleh Majlis Agama Islam negeri-negeri di Malaysia. Jika pasangan tersebut telah berkahwin di luar mukim dan membawa sijil nikah yang tidak diiktiraf maka pihak Jabatan Pendaftaran (JPN) tidak akan mendaftarkan kelahiran bayi tersebut.

ii) Kesan Selepas Perceraian

Satu perkara lagi yang sering menimbulkan masalah ialah apabila berlaku perceraian di antara pasangan terbabit, mereka yang sering menjadi mangsa dan teraniaya dalam hal ini ialah kaum wanita. Antara kesan yang akan dihadapi ialah:

a) Tidak Boleh Menuntut Sebarang Hak

Sekiranya perkahwinan tidak didaftarkan dan pengesahan perkahwinan tidak dilakukan, apabila berlaku perceraian, isteri tidak akan dapat membawa kes perceraian itu untuk dibicarkan di mahkamah. Ini adalah kerana sebelum mengesahkan perceraian tersebut, mereka hendaklah mengesahkan perkahwinan mereka terlebih dahulu. Oleh kerana perkahwinan itu sendiri tidak dapat disahkan, maka lebih-lebih lagi perceraian tersebut. Oleh yang demikian, segala aduan mereka tidak dapat dilayan dan dilaksanakan oleh pihak berkuasa.

Oleh itu, kegagalan mendaftarkan perkahwinan menyebabkan isteri akan kehilangan hak mutlak mereka sebagai seorang isteri yang sah dari segi undang-undang. Oleh yang demikian, mereka tidak boleh menuntut sebarang hak sebagai seorang isteri yang diceraikan seperti hak mut’ah, harta sepencarian, naftkah mahupun hak penjagaan anak atau hadhanah, sebagaimana yang diperolehi dan dinikmati oleh wanita-wanita yang berkahwin mengikut prosedur undang-undang di negeri ini.
b) Tidak Boleh Berkahwin Lagi (Gantung Tak Bertali)

Apa yang menyedihkan lagi ramai di kalangan wanita yang menjadi mangsa gantung tak bertali akibat dari perkahwinan yang tidak didaftarkan. Mereka mungkin ditinggalkan begitu sahaja tanpa kata putus yang pasti. Dalam hal ini, apabila isteri ingin mengadu bahawa mereka ditinggalkan atau pun untuk menuntut cerai secara sah, mahkamah tidak dapat melakukan apa-apa tindakan kerana mereka tidak mempunyai surat nikah yang sah.

iii) Kesan Selepas Kematian

Masalah lain yang akan timbul ialah, apabila berlaku kematian mana-mana belah pihak dari pasangan tersebut. Oleh sebab tidak ada bukti perkahwinan yang sah dari segi undang-undang, mana-mana pihak sama ada isteri atau suami, masing-masing tidak boleh menuntut sebarang hak pusaka si mati. Bukan hanya isteri atau suami sahaja yang tidak boleh menuntut harta pusaka, malah anak-anak mereka juga akan mengalami nasib yang sama. Masalah pembahagian harta pusaka akan timbul jika perkahwinan tidak disahkan dan didaftarkan, lebih-lebih lagi jika perkahwinan itu adalah poligami. Jika suami yang meninggal dunia, isteri yang dikahwin ti tanpa mendapat kebenaran mahkamah tidak dapat membuat sebarang tuntutan pusaka melalui mahkamah kerana tidak ada bukti bahawa mereka telah berkahwin.

6. Penutup

Memandangkan kepada kesan dan implikasi yang besar akibat tidak mengikuti prosedur perkahwinan yang telah ditetapkan oleh Enakmen Undang-Undang Pentadbiran Keluarga Islam di setiap negeri, adalah diharapkan agar semua pihak yang terlibat perlu mengambil berat akan peranan masing-masing. Setiap pihak perlu mengetahui hak dan tanggungjawab masing-masing sebelum memulakan urusan perkahwinan. Pihak yang lebih arif sepatutnya memainkan peranan memberi kesedaran dengan cara memberi maklumat kepada pasangan yang akan berkahwin. Bagi pasangan yang kahwin lari pula, penalti yang tinggi dan keras perlu dikenakan bagi memberi pengajaran kepada mereka di atas kesalahan yang dilakukan terhadap undang-undang bertulis di negara ini. Sewajarnya mereka telah tahu kewujudan undang-undang di Malaysia mengenai tatacara perkahwinan, maka
tindakan berkahwin tanpa kebenaran dan tidak mengikut undang-undang di Malaysia adalah merupakan satu tindakan yang tidak sewajarnya dilakukan.

**RUJUKAN**


Enakmen Undang-Undang Pentadbiran Keluarga Islam Terengganu 1985


**KES**

Hasmah Shafie Iwn Juhari Abdul Ghani [2004] CLJ (Sya), hlm. 441-450.

Abstract

In Malaysia, as of January 2016, nearly 90% of the legal firms comprise of less than five partners (4,818 firm out of 5,405 firms registered). With small number of partners and lack in knowledge in accounting, it is perceived that a special accounting management system for the law firms would be very useful for the lawyers to operate their accounts and book keeping. At present, there are many software on legal firms account management system, for example, the MyCase's web based legal practice management software and the QuickBooks legal accounting software. However, most of these international formulated software are expensive and might not be suitable to cater the practice of local small law firms.

Computerised Accounting Information System for law firms (Cais@Law), is specially developed to assist the small law firms in Malaysia to manage the financial transactions, monitor the firm’s performance, record the cash inflow and outflow of clients account and facilitate the auditing process. The report produced by Cais@Law is also adequate for submission to the professional body as evidence of a good account keeping by the firms.

Keyword: Account Management system, Law firms, Malaysia
1. Introduction

Dyt and Halabi (2007) pointed out that the most obvious and startling distinctions between successful and discontinued small businesses laid in their approach towards the use of accounting information. Accounting Information System (AIS) is a primary source of information to help firms manage their business (Ismail & Mat Zin, 2009). Good AIS could help evaluate the performance of the firm (Heidari, Moradi, Ghahramanizady & Heidary, 2012) and could be used to help owners grow and develop their firm (Halabi et al., 2010). AIS could also inform owners of the consequences of their firm’s operations and the effects of their past decision making (Wan Ismail & Ali, 2013). Therefore, inaccuracy of accounting information could cause SMEs to inaccurately assess their financial situation, and make poor or wrong financial decisions (Miller & Rojas, 2004). Previous research however had found that not all small firms produce accounting reports which is the source on accounting information. Moreover, for those who keep records, they do so only to meet minimal reporting requirements (Davis et al., 2009).

Development in IT has changed the way of doing business. Accounting is one of the important business areas facing unprecedented challenges due to the rapid development of IT (Davis et al., 2009). Many researchers agree that aspects of accounting practice have been changed fundamentally by advances in IT, including financial reporting, managerial accounting, auditing and taxation (e.g., Kouser et al., 2011; Ismail, 2009; Davis et al., 2009; Moorthy et al., 2010; Kharuddin et al., 2010). In fact, accounting was the first area to be computerized (Davis, 1989). Accounting systems that were previously performed manually could now be performed with the help of computers (Salehi et al., 2010). Nowadays, there are range of off-the-shelves accounting software packages or Computerised Accounting Information System (CAIS), which have been produced as cost effective solutions for SMEs and easy to use by those who are not trained accountants (Halabi et al., 2010).

However, the main challenge for law firms in using the general CAIS is their unique nature of business. In Malaysia, the majority of legal firms can be categorised as SMEs and they have specific processed and rules regarding accounting records should be kept and recorded (Abd. Ghadas et al., 2015). Moreover, the accounting information that they need also differ from other businesses. Differ to the other companies, normally law firms have to
handle the Client Account separately from Office Accounts to ensure better accountability of the client monies. Hence the slow adoption of automation accounting among law firms might be implies the uniqueness of law firms cannot be entertain by general CAIS. This urged to the need for a Turnkey System for law firms. Turnkey System is a system which written by vendors who specialize in a particular industry (Romney & Steinbart, 2012). For that reason, this research proposed an idea to create an accounting turnkey system which is acceptable and meet the special needs of attorney and SMEs law firms.

2. Research Methodology

CAIS@LAW is developed using Rapid Application Development (RAD) methodology. RAD integrates project management techniques, development techniques, users and tools to build quality application systems in a fixed time frame to deliver business value. It can eliminate time constraint problem in order to develop the system faster. RAD has four main processes and requires less time to complete compare to Waterfall Model approach. In general, RAD is a software development methodology, which involves iterative development and the construction of prototypes. Prototype is an approach based on creating a demonstrable result as early as possible and refining that result. The refinement is based on feedback from the business, the eventual users of the system. Prototyping requires an open approach to development and it also requires an emphasis on relationship management and change management.

Figures 1 shows RAD processes, where the result of each phase, often called an end product or deliverables, are flow down into the next phase. This phase is a continuous phase where prototypes are rapidly developed until they fulfil the objectives of system requirements.
The first phase of the RAD is to understand the requirements of the system (analysis and quick design). It requires that high level or knowledgeable end-users determine what the functions of the system should be. It should be a structured discussion of the business problems that need to be solved. The process in this phase includes deciding what programming languages and database need to be used. PHP scripts and MySQL database have been chosen as development tools to develop a prototype. PHP is free software released under the PHP License and widely used. It also includes the interface design (what are the interfaces going to look like) and data design (what data will be required). During these phases, the software's overall structure is defined. It is important to understand the requirements of the system before proceeding to prototype development.

The second phase is a repetition of prototype development (development, demonstrate, design). It includes creating database physical design and mainly focuses on translation of design into programming codes. A code to connect from programming language to MySQL Database Management System (DBMS) is created.

The third phase is testing the prototype to validate CAIS@LAW business processes. Normally programs are written as a series of individual modules and functionality. CAIS@LAW is tested by looking at the functions available in the system. Later, the flow of the system is tested to ensure that interfaces between modules work (integration testing). Next, the analysis report of the system is compiled. The next process involves enhancement and errors corrections of prototype. This process is repeatedly done until the system is validated.

**Figure 1: Rapid Application Development (RAD)**

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prototypes meet the research objectives. The last phase is deployment in actual environment when all system functionalities and databases design have been validated.

3. CAIS@LAW Architecture and Framework

AMS-LFS is an online web based system. It can running using any web browser such as Monzilla Firefox, Chrome or Internet Explore at any operating system platform such as Windows, MacOs or UNIX.

AMS-LFS is designed based on multi-tier client-server architecture. Figure 2 shows the AMS-LFS architecture and framework is structured into three tier. The legal firm staff’s own computer with an Internet browser is the client presented in Tier 1 Presentation. In Tier 2 Application processing and data management, a web server provides data management services and implementing the logic of application to provide the required functionality to end users. The web server generate AMS-LFS web pages, manage the financial transaction in client account and office account and generate the report. The core of the system is the transaction which the main process took place where as the operation of office account and client account applies. The AMS-LFS database provides database services in Tier 3 Database processing. Efficient middleware that supports database queries in SQL (Structured Query Language) is used to handle information retrieval from the database.
4. CAIS@LAW Implementation

System implementation is the action that must follow any preliminary thinking in order for something to actually happen. It is the process of getting the system operating properly, including installation, configuration, running, testing and making any necessary changes. Figure 3 and Figure 4 show login and the homepage of CAIS@LAW which sets up the menu of the system, respectively.

Figure 3: AMS-LFS Login Page

Figure 4: Menu Manager

Figure 5 shows the chart of the account system where the user need to set a code for an account name.
Figure 5 Chart of Account

Figure 6 shows the transaction menu of cashbook for client.

Figure 6 Client Account Transaction

Figure 7 shows the report of client ledger according to respective case of each client.
Figure 7: Client Ledger

Figure 8 shows the profit and lost where all the records of the transactions are displayed based on company’s accounting period.

5. Conclusion

CAIS@LAW provides effective ways for small law firms owners to improve operations and accountability. Business owners can also create a competitive advantage by developing cost allocation processes in their management accounting function. Reports produced by CAIS@LAW also assist the small law firms for reporting purposes. As regards
to system requirements, CAIS@LAW is able to clout on existing hardware and network resources of the firm to safeguard existing IT investment. The main setback of this system is that it need to be upgraded if the firm’s process of works changes from the existing process of work, for example if the firm received concession agreement works which it never do before, the firm need to contact the admin to upgrade the system and some cost might be incurred.

As a conclusion, CAIS@LAW is suitable for small law firms in Malaysia to manage their account and to comply with the regulatory body’s requirement. Such software is easy to use by the lawyers who has limited accounting knowledge as it specially designed to cater all transactions involved in practices of small law firms.

References:


THE CONCEPT OF SHAKHSIYAH I’ITBARIYAH AND ITS APPLICATION IN CORPORATION

Abd Ghadas, Z.A.* & Abd Aziz, H.**

Abstract:

Under the Malaysia company law, a body corporate is recognized as a legal person and the doctrine of corporate personality is used to justify the corporation’s juristic personality. As a creature of the statute, the existence of a company is totally dependent on the provisions of the Companies Act. Such principle is not available under Shari’ah because under the Islamic law, the existence of business entity is based upon agreement between the parties.

The existence and validity of Shari’ah business structure is mainly based upon contractual principles. The existence of various types of Musyarakah and Mudarabah are subjected to agreement between the parties. With the recent vast and rapid development in Shari’ah compliance businesses in the global market such as Islamic banking and finance, halal products, and halal-tech, there is a question on whether such Shari’ah compliance / based businesses could be carried out in a conventional corporate structure. This paper discusses the concept of legal entity under Shari’ah and deliberate its application in Malaysian companies which carries out Shari’ah compliance business such as Islamic Banks and Takaful companies.

Research methodology adopted in this paper is doctrinal analysis which is based on statutory and case law analysis.

Keyword: Legal Entity, Juristic Person, Shari’ah

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1. Introduction

In Malaysia, the Islamic institutions were established under respective legislations which contain express term on their status as a body corporate. Examples of these institutions are Islamic banks, zakat collection institutions, Pilgrimage Board (Lembaga Tabung Haji) and Takaful (Islamic insurance) companies. As an example, the Bank Islam Malaysia Bhd (BIMB) which is the first Islamic bank was established under the Islamic Banking Act 1983 (IBA), which came into effect in April 1983. BIMB commenced its operations in July 1983. BIMB is essentially a syirkah al’iman based on the concept of al-musyarakah. BIMB is a company formed by having a group of shareholders and elected representatives to manage the business on the basis of wakalah. The shareholders retain their management control (i.e. voting rights) in the company in proportion to their shareholding.

Under the IBA, the term ‘company’ is used repeatedly to refer to Islamic banks. For example, ‘Islamic bank’ is defined as any company which carries on Islamic banking business and holds a valid license. It is also a requirement under IBA for an Islamic banking business to be transacted in Malaysia only by a company which is in the possession of a license in writing from the Minister authorizing it to do so. The definition of Islamic banks under IBA clearly reflects that all Islamic banks must be a company; vice-versa, the Companies Act 1965 also includes the definition of banking corporation.

The recognition on the status of Islamic bank as a body corporate can be seen in the case of Bank Islam Malaysia Bhd. v. Adnan Bin Omar. In this case, it was held inter alia that BIMB is a corporate body which has no religion, and consequently not within the jurisdiction of Shari’ah Courts. NH Chan, J held that the matter was rightly brought before the civil

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1 Abdul Rehman Tajudin DA, Workings of an Islamic Bank; Case study of Bank Islam, Malaysia,Berhad, 2000, A paper presented at 4th International Conference, Loughborough University, UK.
2 Ibid.
3 Ibid.
4 Section 2, IBA 1983.
5 Section 3, IBA 1983.
6 Section 4 of CA 1965: ‘Banking Corporation’ means a licensed bank, a licensed merchant bank and an Islamic bank.
7 (Kuala Lumpur High Court, Civil Suit No. S3-22-101-91) (unreported); (1994) 3 CLJ 735.
8 List II (State List) of the Ninth Schedule to the Federal Constitution provides for the jurisdiction of Shari’ah Courts only over persons professing the religion of Islam.
court because Islamic institutions, i.e. BIMB and Syarikat Takaful are corporate institutions created by statute and do not have a religion.

The justifications of body corporate as a legal person (shakhsiyah i’itbariyah) differ between the common law and the Islamic law. The existence of a body corporate as a legal entity under the common law is upon recognition of the law whilst justifications for artificial person under the Islamic law do not only lie in the entity but also on the obligation and responsibilities of the fictious person as required under Shari’ah. The contemporary Muslim scholars, such as Nyazee, advocate for the acceptance of the corporate personality with certain guidelines.9

This paper discusses the approach of the common law and Islamic law on the legal status of a company as a legal person.

2. The Common Law Doctrine of Corporate Personality

The doctrine of corporate personality is basically establishing the corporation, a non-human entity as a legal person. Although this doctrine has been accepted as an entrenched principle, it is commonly describes as an ‘essentially a metaphorical use of language, clothing the formal group with a single separate legal entity by analogy with a natural person’.10 This could be seen from the theories on corporate personality.

Majority of the theories on corporate personality contended that the legal entity of the corporation is artificial. The fiction, concession, symbolist and purpose theories supported the contention that existence of corporation as a legal person is not real. It only exists because the law of the state recognized it as legal person and it is recognized either for certain purpose or objectives.11 Being merely a metaphor or an analogy, corporate personality is not entirely arbitrary and therefore must respond to the organizational realities of the corporation as well as conforming with and making intelligible the treatment of organization as legal actors.12

The metaphor of personality is indeed useful in describing many of the corporation’s traditional and modern corporate attributes, namely, separate legal entity, the rights to own

9 Nyazee, Ibid at 317.
11 Note 6 at 556
property, to take its own legal proceedings, to sue and to be sued limited liability and perpetual succession. Placing these attributes under the head of separate legal entity has resulted to selection of these few salient features from what would otherwise be an overwhelmingly complex reality.

Under the common law, the corporate legal personality is based upon theories, which are concentrated upon the philosophical explanation of the existence of personality in beings other than human individuals. It is claimed that while each theory contains elements of truth, none can by itself sufficiently interpret the phenomenon of juristic person. Nonetheless, there are five principal theories, which are used to explain corporate personality, namely, the fiction theory, realist theory, the purpose theory, the bracket theory and the concession theory.

(i) Fiction theory

According to this theory, the legal personality of entities other than human beings is the result of a fiction. Hence, not being a human being, corporation cannot be a ‘real person’ and cannot have any personality of its own. This fiction theory emphasized that rights and duties attached to corporation as artificial person totally depend on how much the law imputes to it. It is claimed that the fiction theory is orthodox in English law if any theory is although it is distinctive that the English law had never adopted one complete theory as part of its law.

(ii) Concession Theory

The concession theory is basically linked with the philosophy of the sovereign national state. It is said to be essentially a product of the rise of the national state at a time when there were rivals between religious congregations and organizations of feudal origin.

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13 Section 16(5) of Companies Act (Malaysia) 1965.
15 See footnote 6, at p. 571. The reason for this contention is said to be that corporate personality is a technical legal advice, applied to multitude of very divers aggregations, institutions and transactions, which have no common political or social denominator, whereas each of the many theories has been conceived for a particular type of juristic personality.
16 Footnote 6 at 556
18 See footnote 23.
19 Ibid.
20 See footnote 6.
(communes and guilds) for the claim of national state to complete sovereignty.\(^{21}\) Under the concession theory, the state is considered to be in the same level as the human being and as such, it can bestow on or withdraws legal personality from other groups and associations within its jurisdictions as an attribute of its sovereignty.\(^{22}\) Hence, a juristic person is merely a concession or creation of the state. Different from the fiction theory which emphasizes on the philosophical theory that a corporation is merely a name and a thing of the intellect, the concession theory focus on the sources of which the legal power is derived.\(^{23}\) The distinguished English jurist, Pollock took the the opinion that the English law adopted the concession theory in explaining the nature of corporate personality.\(^{24}\)

(iii) Purpose Theory

This theory is also known as the theory of Zweckvermogen\(^{25}\). Distinguished advocates who are associated with this theory are E.I Bekker, Aloys Brinz and Demilius.\(^{26}\) Similar to the fiction and concession theories, it declares that only human beings can be a person and have rights.\(^{27}\) Entities other human is regarded as an artificial person and merely function as a legal device for protecting or giving effect to some real purpose.\(^{28}\) As corporations are not human, they can merely be regarded as juristic or artificial person. Under this theory, juristic person is no person at all but merely as a ‘subjectless’ property destined for a particular purpose and that there is ownership but no owner.\(^{29}\) This theory contends that the juristic person is not constructed round a group of person but based on object and purpose. \(^{30}\) The property of the juristic person does not belong to anybody but it may be dedicated and legally bound by certain objects.\(^{31}\) Purpose theory rationalized the existence of many charitable

\(^{21}\) Ibid.
\(^{22}\) Supra note 6, at pp.557-8.
\(^{23}\) Ibid.
\(^{24}\) Frederick Pollock, Has the Common Law Received the Fiction Theory of Corporations?, \textit{Law Quarterly Review}, 1911, at p. 219.
\(^{25}\) See footnote 25.
\(^{26}\) Ibid.
\(^{27}\) See footnote 23, at p.11.
\(^{28}\) Ibid.
\(^{29}\) Ibid.
\(^{30}\) Ibid.
\(^{31}\) Ibid.
corporations or organizations, such as trade unions, which have been recognized as legal persons for certain purposes and have continuing fund.  

(iv) Symbolist Theory

This theory is also known as the ‘bracket’ theory. It was introduced by Jhering and later developed particularly by Marquis de Vareilles-Sommires. According to Jhering, the conception of corporate personality is indispensable and merely an economic device by which simplify the task of coordinating legal relations. Under this theory, rights are not inherent attributes of the human will and that an individual is not a subject of right by reason that he possesses a will. On the contrary, the will is at the service of law and it is the interest of man which the law protects.

The symbolist theory is often acknowledged for its availability to justify corporate personality from non-legal facts but it has been repeatedly rejected by the courts in common law jurisdictions because it denies the law by deducing that the only legal relation which is fixed and certain can be discovered by removing the ‘brackets’ of the corporation and analyzing the relations of the human beings involved.

(v) Realist Theory

The founder of this theory was a German jurist, Johannes Althusius while its most prominent advocate is Otto von Gierke, who not only responsible for the scholarly wisdom of his writings but also as the challenger to the entire basis of Roman jurisprudence. According to this theory, a legal person is a real personality in an extra juridical and pre-juridical sense of the word. It also assumes that the subjects of rights need not belong merely to human beings but to every being which possesses a will and life of its own. As such, being a juristic person and as ‘alive’ as the human being, a corporation is also subjected to rights.

32 Ibid.
33 See footnote 23 and 25.
34 See footnote 23 and 25.
36 See footnote 23.
37 Ibid.
38 See footnote 22, at p. 670.
Under the realist theory, a corporation exists as an objectively real entity and the law is regarded as having no power to create an entity but merely having the right to recognize or refuse to recognize an entity. A corporation is referred as a social organism while a human is regarded as a physical organism. The realist theory contended that, action of the corporation is deem to be carried out on its own, similar to the way of the normal person and not by its agents or representatives like those of the incapable, such as the infant and insane. While human uses his bodily organ to do an act, the corporation uses men for that purpose. Some of the Realist theory followers even claimed that similar to the human being, juristic person also has organs. For example Nicholas of Cues, the great precursor of modern philosophy contended that as a juristic person, the State’s skeleton comprises of the land, the people formed as the State’s flesh whilst the law acted as the nerves.\(^{39}\) This theory is found to be favored more by sociologists rather than by lawyers.\(^{40}\) This justified the fact that realist theory is more popular in France and Germany compared to United Kingdom. The basis of English law was made by judges via their judicial reasons whilst in France and Germany, the jurists who are mainly sociologists took vital part in drawing the whole legal code.\(^{41}\)

Most of the realist jurists claim that the fiction theory failed to identify the relation of law with the society in general. The main defect of the fiction theory according to the realist jurist is the ignorance of sociological facts that evolved around law making process. Hence, by ignoring the ‘real capacity and functions’ of corporation in the real world, the fiction jurists have failed to see the ‘live’ possessed by a corporation. The realist contended that by rejecting the fiction theory, one would succeed to reject an abstract conception and untrue account of the reality with which the practical lawyer has to deal. According to the realist jurist, lawyers have to acquire the habit to depart from the plain meaning of law and go behind the scenes of the legal platform for the realization and justice which law is supposed to introduce to life.

\(^{39}\) See foot note 11, at pp. 498–499.  
\(^{40}\) Ibid. at 502.  
\(^{41}\) Ibid.
3. The Islamic Law approaches on artificial legal person

There are actually two different views among Muslim jurists or scholars on artificial person (al-saksiyah al-maknawi). Firstly, according to the modern Muslim jurists, they had viewed that the principle of separate legal entity is recognized in Islam as it has the similarity with other Islamic institutions such as mosque, baitul mal, waqf and the like. On the other hand, the traditional Islamic jurists were of the opinion that this principle does not exactly exist in Islamic ruling. This is because a company which is regarded as a person is only a fictitious person or artificial person as such, has no capacity to engage in any commercial transaction.

The discussion of separate legal entity principle under Islamic law is derived from the views of the Muslim Jurists on the entity of artificial person (الشخصية الاعتبارية). This entity has been discussed by many modern Muslim scholars for instance Imran Ahsan Khan Nyazee, Mustafa Ahmad al-Zurqa, Muhammad Abu Zuhrah and others. According to Imran, he made some comments with regard to this cooperate personality under Syariah law who quoted:

“There has been a prolonged debate about the existence of the concept of a fictitious person (shaksiyah i’itibariyah) in Islamic law. Most modern scholars insist that this concept was known to Islamic law, while some are doubtful whether Islamic law was aware of the concept, but they rejected it for the system they were dealing with. This does not mean that the concept cannot be accepted in Islamic Law’’.42

This shows that Islamic law does recognize this principle although it cannot be said to accept it blindly. This can be seen in which he further said:

“Accepting cooperate personality within the fold of Islamic law does not mean that all institutions based on this concept automatically become legal. The implementation based on the concept in different forms needs separate analysis.”

Thus, it is necessary for the jurists in adapting this principle to accord with the general principles of Islamic law of contract. He further added:

42 Islamic Law of Business Organization: Partnership by Imran Ahsan Khan Nayzee, page 316
‘Such an implementation needs some minor changes to the existing structure of the
business corporation, but these changes will enable the corporation to issue securities
that are free from riba, and it will also meet most of the requirements of the general
principles of the Islamic law of business organization.’’

According to Mustafa Ahmad al-Zarqa, a modern jurist in fiqh stated:

‘‘If these institutions which exist now recognized fictitious personality existed in the
early era of development in fiqh, it would be obvious that is would be recognized by
the fuqaha at that time through legal justifications which are similar to legal
justifications of the institution of Daulah, Bayt al-Mal, al-Waqf.’’

The word ‘‘these institutions’’ refers to Islamic institutions such as waqf, baitul mal,
mosque and others which are recognized by fuqaha as entity and therefore, the concept of
fictitious person had been applied. He and also Muhammad Abu Zuhrah are of the view that
the theory which recognizes the entity other than human being as a legal person can be
justified through the theory of fiqh known as al-Dhimmah.

The term of al-Dhimmah has been discussed by many Muslim jurists in various
opinions. According to Madhab al-Syafie jurists, they defined al-dhimmah as an attribute
of human being with duties (al-ilzam) and also obligations (al-iltizam). This definition is
similar to other 3 major Madhab Scholars (Maliki, Hanafi and Hanbali) which considered as
the main definition. Al-Sarakhsi defined it as a fixed attribute of a person accepting
obligations and duties. This concept relates to an obligation and capacity (al-ahliyyah) as
well. The application of this concept as discussed and applied by the jurists since the early era
of the development of fiqh does not connote the same definition. Majority of the fuqaha have
acknowledged the existence of other than human being which is entitled to some rights and
responsibilities. However, unlike English law, their discussion concerning the artificial
person not only relies on the entity itself but also whether it is subject to obligation and
responsibilities as required under Islamic law.

43 Al-madkhal ila nadzhariyyah al-ilzam fi al-fiqh al-islami by Mustafa Ahmad Zurqa at page 270
44 Al-zimmah wa Al-haq wa Al-iltizam, dirasah muqoronah by al-Kabashi at page 18
45 Kashshaf al-qonna’ by al-buhuti ; volume 3 at page 289
According to al Makashifi Thoha al-Kabashi\textsuperscript{46}, the \textit{fiqh} of Islam does recognizes the existence an artificial person (\textit{al-syakhsiyah al-I’tibariyyah}) like hospitals, \textit{waqf}, and \textit{syarikaat} and does imposes it \textit{al-dhimmah} as to have certain rights and obligations even though it is not defined as similar as other names in civil law. He also added that this artificial person enjoys the concept of \textit{al-ahliyyah al-kamilah} as similar to human being with having certain rights and obligations as it is stated under section 53 of the Egypt Civil Law which stated that artificial person enjoys full rights unless such rights are restricted only to human being.

Al-Imam Muhammad Abu Zuhrah defined the meaning of dhimmah as follows; “it is decided that dhimmah is an artificial and assumed thing, it is assumed to become the place for obligations and rights which is to become related with rights and obligations as human, and if it is an artificial thing, it is permissible to assume it in the situation of death (dead person)”\textsuperscript{47}.

In addition, Dr. Wahbah al-Zuhaili who is one of the famous contemporary Muslim jurists nowadays had defined the meaning of \textit{al-dhimmah} which is an artificial place existed into a person and such place bears debts or obligations\textsuperscript{48}. He also explained some characteristics of \textit{al-dhimmah} and one of them is that \textit{al-dhimmah} comes not only from a real human being but also from a fictitious person like \textit{syarikaat} institutions, \textit{waqaf} and mosque. In other words, it would appear that he acknowledged and accepted that the concept of \textit{al-dhimmah} is applicably extended to an artificial person.

Furthermore, according to Dr. Fauzi Muhammad Sami\textsuperscript{49}, a past lecturer of \textit{Umman Al-ahliyyah} University of UAE had opined that artificial person or \textit{as-syakhsiyah al-ma’nawiyyah} which is also known as \textit{al-syakhsiyah al-I’tibariyyah} is also extended to partnership (\textit{syarikaat}). It is a group of persons or properties in which collected in achieving certain objectives. Thus it is regarded as the only person who is clearly independent from other persons or properties earned by them. He gives two examples of this concept which are

\textsuperscript{46}Ibid at page 31
\textsuperscript{47}Ahkam al-tirkaat wa al-mawaris by Abu Zuhrah; Page 16
\textsuperscript{48}Fiqh and Perundangan Islam by Wahbah al-Zuhaili, volume 4 at page 52
\textsuperscript{49}Al-syarikaat al-tijariyyah al-Ahkam al-ammah wa al-khassah by al-ustaz Dr. Fauzi Muhammad sami UAE at page 37-43
partnership and university institutions. Partnership is an independent artificial person from other partners. Meanwhile, university is a fictitious which is for the purpose of education. He further mentioned that there are 2 essential elements of the artificial person itself which are: 1) there must be a body of persons or property as created as for certain roles and 2) such body or group must be recognized by the state either explicitly or impliedly. This recognition can happen either in general or specific way. Consequently, there are certain effects of this partnership becoming an artificial person such as al-dhimmah of the partnership is the property itself, there must be specific name for the company and it has the capacity of performing dispositions with dealing with certain rights and responsibilities.

In determining whether the partnership (as-syarikah) as considered as a fictitious person has this dhimmah had been discussed by Abd al-Muhsin Fadhllullah al-Husni al-A’mili. He said that dhimmah under al-syarikah can legally possibly be present under the protection of Islamic transaction until it is ruled as valid for its transaction. Regarding to his argument, although dhimmah as an attribute of a person as created by Allah for a living humankind, it is for Allah to consider such attribute of having a dhimmah for non-living thing, such as the ownership of waqf, masjid, baitul mal and others in general views. Besides, he made these institutions with certain rights and considered them as an independent legal person negotiated with giving (offer) and receiving (acceptance). Thus this will be the same as for the joint stock company (as-syarikah al-musahamah.) As it is known that Allah do not have an independent (single) approach to create what is for the people in the transactions, after he forbids of what has been forbidden, rejects any condition or adds it into another, amends or approves in the new or recent transactions, to accord with our intellectual mind all of it is based on the general authority of the obligation of performing the aqd (obligations) so that each transaction falls under His powerful authority. Then, the premeditation in all actions is based on Allah’s consideration in the validity of transaction and such consideration is that makes something artificial to have rights and responsibilities. Thus dhimmah is the phrase of something which is attached with the legal artificial.\textsuperscript{50}

\textsuperscript{50} Al-syariqaat baina al-syariah al-islamiyah wa al-qanun al-madani by al-husni al-amili at page 49-50
By contrast, there are also some traditional Muslim scholars who are doubtful whether Islam does recognize the doctrine of separate legal entity as mentioned above by Imran. For example, according to Z. Zainal A, the discussion of *al-dhimmah* to an artificial entity is heavily criticized by the majority of the jurists because it is said to refer to anything which has attributes of human being which shall denotes to it rights and obligations. Other jurists such as al-Bazdawi and al-Nawawi, take the view that *al-dhimmah* is a *dzat* which is real and cannot be fictitious because the Syariah only imposed obligations and rights on real person. Al-Tahanawi also emphasized that the term *al-dhimmah* is not applicable and has relevancy in relation to interpretation of liability and obligation. As Allah created a mankind as the place of amanah, entertaining him with aql and dhimmah until he becomes a member of possessing such rights and obligations, he mentioned that if the existence of aql (mind) is presumed without dhimmah, there will be no rights imposed to him. Consequently, the attribute is the reason for the existence of a person to have rights and obligations and aql is the requisite for it.\(^{51}\) Here, he tried to say that dhimmah is only obligatory to a human-self only in accordance with his attribute as the meaning of dhimmah is synonymous to human’s attribute. To support more, according to al-Sarakhsi, dhimmah is the trust that was offered to the mountains, but they refused; Man accepted it. Thus it is an attribute conferred by the Law-giver. It is a trust resulting from a covenant (*’ahd*). The fact that dhimmah is a covenant between Lawgiver and the *’abd* (servant of Allah) means that it can be assigned to a natural person alone.\(^{52}\) In other words, unlike in western law, dhimmah is not applicable to an artificial person.

This opinion is the same as Abdul Aziz Ahmad al-Bukhari (al-Bazdawi), who even stressed the meaning of dhimmah that: the Qadhi, al-Imam Abu Zaid said that dhimmah is phrase of *‘ahd* (covenant) as Allah created a mankind as the place of amanah giving him aql and dhimmah until he becomes a member of possessing such rights and obligations, enjoys the right of innocence (*‘usmah*), freedom and ownership and carries the duties as Allah’s rights towards him.\(^{53}\) In addition, he added that dhimmah is an attribute of a person as a member of having certain obligations and rights based on the previous ahd between the Lawgiver and His servant as Allah said:

\(^{51}\) Mausuah kashshaf istilah al-funun wa al-ulum by Muhammad Ali al-tahanawi volume 1 at page 826
\(^{52}\) Islamic Jurisprudence by Imran Ahsan Khan Nayzee, at page 110
\(^{53}\) Kashful asrar an usul fakhri al-islam al-bazdawi by abdul aziz al-bukhari, volume 4 at page 238
“And [mention] when your Lord took from the children of Adam - from their loins - their descendants and made them testify of themselves, [saying to them], "Am I not your Lord?" They said, "Yes, we have testified." [This] - Lest you should say on the day of Resurrection, "Indeed, we were of this unaware." ( surah al-a’raf :172)

Be that as it may, Mustafa Muhammad al-Zurqa’s definition of dhimmah on the other hand, avoided all the objections of the dhimmah’s definitions as mentioned by the scholars who are doubtful whether dhimmah is applicable to a fictitious person as had been said by his student, Dr. Nuh Ali Salman. He explained that according to his understanding on his teacher’s definition of dhimmah, it is something assumed, its existence is deemed for human being as such assumption is necessarily and consistently required to be logical with the rulings of Allah.  

Subsequently, the definition of dhimmah according to al-Zurqa is: a place of corporate body in a person accompanied by such rights which are specified of it. Dr. Nuh had briefly explained this definition starting from the word “place of corporate body” which means a fictitious place as a sign of the solution of rights in dhimmah but it is not a real place, but merely an assumed artificial one. Next, the word “in a person” refers to a statement to specialize for the real persons as well as the artificial persons. However, animals do not have any dhimmah for them. At the same time, the word “accompanied by rights” means that the importance of this assumption of place as to have rights gained by them regardless of whether such rights are from Allah or His servants. Lastly, the word “specified of it” here connotes whatever the reason of these rights is that each person will be having such rights specifically for him. Due to this good definition, he is of the view that he agreed and used this definition as for his research and said it is much correct than others.

Ahmad Mahmud al Khuli in discussing the concept of artificial person, defined the meaning of dhimmah as a legal or artificial or decreed meaning/order, assumed to be the place which attached with certain rights and obligations, as a person. In other words, dhimmah is the legal place which is similar to humankind, as to have both rights and

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54 Ibra’ al-dhimmah min huquq al-ibad by Nuh Salman at page 36
55 Nadhariyyah al-dhimmah fi al-fiqh al-islami by al-Zurqa at page 201
56 Ibra’ al-dhimmah min huquq al-ibad by Nuh Salman at page 37
57 Nazdhoriiyyat al-dhimmah by al-khuli ; page 90.
obligations. This new definition of dhimmah has its own elaboration made by him in order to exclude from the dispute between the fuqaha on the definition of dhimmah. The word “meaning or order” is changed from the word attribute as it refers to the human’s attribute or capacity (ahlîyyah). The word “legal” is used as it is approved by the Syarak. Furthermore, the word “artificial or decreed” is to stress the understanding of the decree (taqdir) of dhimmah as it is left with such a great disputes among scholars. The word “place” is used to differ from the capacity of human (ahlîyyah) or human’s attribute itself (dhimmah). Next, the word “attached with certain rights and obligations” means that both cannot be separated as some scholars who defined dhimmah as to have rights only without obligations or vice versa. Lastly, the word person or individual is to exclude the requirement of mandate (al-taklif) from Allah as it is only for a human kind. If the word al-taklif or human (al-insan) is used, its meaning will be much narrowed by referring only to human being. Nonetheless, the word person (al-shakhsu) can still be used as for example artificial person (al-shkahsu al-I’tibariyyu) so long it is referred to the meaning of dhimmah but not to the al-taklif.  

Abd al-Aziz Izzat Khayyat explained that the Muslim scholars were interested of the discussion of the syarikat. Nevertheless, they did not elaborated more on the existence of an independent partnership from its partners. Thus they did not recognized the concept of artificial person for partnership due to this theory was not well explained until the period of the middle Muslims Era. Thus there two reasons which show the reluctance of this artificial person.

Firstly, the nature of Islamic Fiqh is derived from the fixed relationship between human and his Lord, with numerous rulings related to ibadah and getting closer to Allah. All of these rulings are imposed to a human being who has al-taklif (mandate). Consequently, this mandate covers the capacity (ahlîyyah) of human who will be attached with rights and responsibilities such as ahliyyah wajub. Then, this capacity covers dhimmah and life, the humanity which refers to the presence of human in this world. In addition, life and dhimmah will not be present except in a living human, as he has the capacity of obligations as imposed by Allah. Thus, a non living human has no dhimmah as imagined by other Muslims and any partnerships, institutions and others will be having no dhimmah as an artificial person.

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58 Ibid page 92  
59 Al-sharikat fi al-shari’ah al-islamiyah wa al-qanun al-wad’I by khayyat at page 211-213
Secondly, the business and industry would not be developed in the Islamic world especially in Islamic countries as can be seen in Europe and the western world in our current modern era. Nonetheless, from the development of the Islamic world scope and the large community in it and the variety of works and labors, except for some people who participated in contracting syarikat, and Muslim people did not know the large amount in establishing the syarikat and such large-spread factories and works which need the large modals which are unable to collect them by individuals did not happened but need them (modals) from the state or huge groups of people. Basically the fuqaha in their ijtihads made its rulings to curb the reality of the issues. In other words, there are some problems which bring them deducing some rulings for it. When there is no problem in the life reality, the scholars usually will not be able to burden themselves to deduce the hukum by making an ijtihad.

However these two reasons do not mean he rejected the concept of syarikah as an artificial person. The definition of dhimmah is defined and taken by him as it means: an attribute one of the recognitions of Syariah which means giving it to be present is the ruling of absence, and the absence means the ruling of presence.

From this definition of dhimmah, it is true an attribute of human attached with rights and obligations then what makes to prevent this attribute to be changed to a non living human if it is capable of being proper in receiving rights and obligations of property? Thus we see that the scholars made this dhimmah for a non living human and considered such dhimmah as an independent legal person from individuals.

He added that Sheikh Ali al-Khafif commented as follows:

“To sum up, the theory of dhimmah and what has been decided? from it with some rulings is not (decided) except with a doctrinal legislative arrangement, it no means except by modifying the rulings and their consistency, and it is not an ijtihad thing which is permissible to change and develop in accordance with the necessities of transactions and their development and their changes of rulings and types. If the interest and custom necessitated it, which cannot be found in Quran, and in Sunnah whereas it (sunnah) prevents to assume dhimmah for non living human, it can be

60 Ibid at page 214
61 Ibid page 219
developed because it (sunnah) approved for syarikat, institutions, and general properties of what have been attached for them with dhimmah, not of what has been attached for human with capacity."

It is therefore clear that in approving the dhimmah for syarikat must be returned to the transaction and custom, and response of the economic development and the common transactions between people in these current periods and there is no great dispute which returns to the basic disputes among the scholars.

Khayyat said that as dhimmah is an attribute which relates with rights and obligations in ritual practices (ibadah) or property as its scope is wide in Islamic Fiqh. Meanwhile, dhimmah in civil law is restricted into the financial obligations. The civil law Scholars defined it as the collection of rights which exist or non-exist and existence or non-existence obligations in certain person. Thus dhimmah is a collection of property and it is a legal person. He then referred the distinction between dhimmah in Islam and In civil Law as explained by al-Sanhuri.

Al-Sanhuri explained that the dhimmah in Islamic Fiqh differs from the dhimmah in western law in three things. Firstly, dhimmah in Islam means an attribute attached with property or non property rights and obligations. In western law, dhimmah includes only the property rights and obligations. Secondly, even in the scope of property, dhimmah in Islam starts with human then t ends with property and non-property. By contrast, dhimmah in civil law starts with property and ends with person. Lastly, dhimmah in Islamic Fiqh does not make the property as a collection which annihilates its elements as it does in civil law. The property will not be made as a collection in Islamic Law even during restricted, death due to disease and even after death.

Last but not least, Sheikh Ali al-Khafif commented the meaning of dhimmah: covenant (ahd) always becomes the reason of demand, and if I wanted I said, becomes the reason because a person will demand or be demanded, and if the use of syara’(definition) appears as we explained which is- dhimmah is an artificial legal attribute attached with

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human to become the person for rights and obligations, thus the capacity (al-ahlīyyah) of a person is one of the consequences of dhimmah.\textsuperscript{63}

After discussing the theory of dhimmah as to whether Islam recognizes such doctrine of separate legal entity, the next issue arises which is whether the principle of cooperate personality is present based on the practice of Islamic institutions since the period of the Companions of Muhammad s.a.w. According to mufti of Pakistan, Taqi Usmani, the existence of the principle of separate legal entity under syariah law is based on precedents of other Islamic institutions and practice like \textit{waqf}, \textit{masjid}, \textit{baitul mal}, joint stock and inheritance under debt.\textsuperscript{64} He took the view that \textit{waqf} is a legal and religious institution wherein a person dedicates some of his properties for a religious or charitable purpose, creating a separate legal entity. After being declared as \textit{waqf}, the donor is no longer the owner of the property.

Next, \textit{masjid} is another example given by him whereby any donation given to mosque belongs to it and does not become part of \textit{waqf}. \textit{Baitul mal} is also an example to constitute as the separate legal entity in Islam. According to him, Imam al-Sarakhshi stated that \textit{baitul mal} has some rights and obligations which may possibly be undetermined. He added that the head of an Islamic state can pay salaries of the staff from the \textit{sedaqah} (zakat) department but the amount so taken shall be deemed to be a debt on the \textit{kharaj} department.

The principle of joint stock Company which is found in the \textit{fiqh} of Imam al-Shafie also formed the basis of his arguments on this principle of separate legal entity in Islam. When more than one person run their business in partnership and the assets are mixed with each other the \textit{zakat} will be levied on each of them individually. Nonetheless, the \textit{zakat} will be payable on their joint stock as a whole. Hence, it is treated by him as an entity distinct from the partners.

Be that as it may, all of these examples had been criticized by Majlis Ulama of South Africa in a book entitled “the concept of limited liability-untenable in shariah”.\textsuperscript{65} The writers contended that for \textit{waqf}, the assets purchased with the income of a \textit{waqf} do not become part

\textsuperscript{63} Ahkam al-muamalat al-syari’yyah by Ali al-Khafif; page 258
\textsuperscript{64} The Myth of Corporate Personality: A comparative Legal Analysis of the Doctrine of Corporate Peronality od Malaysian and Islamic Laws by Zuhairah Ariff Abd Ghadas
\textsuperscript{65} ibid
of the original *waqf* property simply as for anything to become *waqf* there has to be a *waaqif* who is person dedicates the asset in the path of Allah as *waqf*. If the *waqf* income becomes *waqf* automatically, the very aim of the *waqf* will be defeated and devoid of utility.

As for the mosque, it is concurred that the ownership vests in Allah and He is not fictitious. Ownership of the *masjid* in this context means ownership of the owner of the *masjid*. Allah who is the true owner of the *masjid* becomes the owner of all assets made for the expenditure of the *masjid* and of all income generated by these *waqf* assets.

Baitul mal which is applied by Taqi Usmani as the basis for the recognition of separate legal entity is also criticized by Majlis Ulama of South Africa. The different classes of wealth such as zakat and kharaj have to be expanded in different avenues or for different purposes. If for example zakat money is used to construct a *masjid* the obligation of zakat will be not discharged. If zakat money is thus spent in a category of expenditure, which does not result in the discharge of the zakat obligation, it will have to made good by person who had used the funds for another purpose.

As for the joint-stock company, the Majlis Ulama highlighted that according to the Shafie madhab the stock of a non-muslim and the stock of a muslim are combined, *khultah* has taken place. Obligation of zakat only applies to muslims. If the obligation of zakat devolves on the joint inanimate rice and barley, which were mixed or on any other combined stock, it would follow that zakat will have to be paid regardless of one partner being a muslim and one a non-muslim. Only the muslim will pay zakat on his share of the mixture.

Actually, not all traditional Islamic scholars of fiqh or jurists had rejected these Islamic institutions as an artificial person. However, they did not give any specific name with regards to this matter. According to al-Kabashi, he explained that the concept of artificial person is not only referred to *waqf, baitul mal, and masjid*, but it is also extended to a state and *syarikaat* as well. Subsequently, he discussed and regarded both *waqf* and *baitul mal* as the fictitious institutions and his opinion is supported by other traditional Muslim Scholars’ rulings.

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66 Al-dhimmah wa al-haq wa al-iltizam by al-kabashi at page 32
Al-Kabashi said that waqf appears as an artificial person as it has certain rights and obligations. One of its rights as determined by fuqaha is it holds the possession of waqf, inheritance (wasiyyat) and al-hibah as well. Thus, it is valid that masjid or others becomes mauqufan ‘alaih (persons who receives waqf) due to that it has dhimmah and ahliyyah wujub, determined by them. There are numerous jurists who viewed about this waqf.\(^{67}\)

According to Maliki scholars, waqf is a legal person who has the ownership regarding to the property until there is a requisite that mauqaf alaih must be a person of having legal ownership such as masjid or a person himself\(^{68}\). Apart from that, Syafi‘e scholars explained that masjid is free to have possession of the property of inheritance, waqf and hibah in general rules. Besides that, in the book of tahfatul muhtaj (syafi‘e fiqh book) it is said that even Imam al-Ghazali asserted that generally al-hibah is permissible for any institution like masjid to posses it and it is also permissible to become waqf\(^{69}\). Moreover, Hanbali jurists said that the validity of waqf for a masjid as stated in al-Mughni is due to the reason that unlike human being, masjid is incapable of possessing any property. It is permitted due to the fact that such waqf is for the interests of all Muslim people at large\(^{70}\). Lastly, according to Hanafi jurists, waqf for masjid is permissible and it is not required for a masjid to be an artificial or not. Besides, al-kasani, the hanafi scholar mentioned that for wasiyyat, a person who will receive it must be a real person is not even required for example a mosque which is not a real one. It is valid because the purpose of this wasiyyat is to get closer to Allah (taqarrub ila Allah)\(^{71}\). In al-Kabashi’s book, he stated that the milk (possession) of the property by masjid as it does not have this milk from the beginning is not the mere objective as long as such waqf gives numerous benefits to this institution.

Then, he further elaborated other right of waqf is that if someone abuses or recklessly misuses this waqf, he must compensate it of its property even though it is made by the waaqif (donor) himself. Thus such property of compensation is rightfully for the waqf\(^{72}\). Likewise, as waqf is considered as an artificial person, there must be some transactions which will be

\(^{67}\) Ibid at page 32  
\(^{68}\) Ibid at page 33  
\(^{69}\) Hawashi tuhfatu al-muhtaj bisharhi al-minhaj volume 6 at page 298  
\(^{70}\) Al-Muqni by ibnu qudamah 6; 365  
\(^{71}\) Al-dhimmah wa al-haq wa al-iltzam by al-kabashi at page 35  
\(^{72}\) Ibid
made between waqf and other persons. Each transaction entered between waqf and the waqif (donor) or the caretaker in *ijarah* (hire purchase contract) for instance, all of the waqf’s rights returned to the waqf or waaqif but not the caretaker. Similarly, if a caretaker or beholder dies, such *ijarah* contract is not terminated due to his death. It is because the hirer is the waqf and not the caretaker himself.\(^\text{73}\)

Secondly, *baitul mal* is derived from the all properties in which are eligible for Muslim people to take as their owners are unknown. It is also an artificial institution as explained by him in his book because it deals with some rights and obligations as well. One of the rights of this *baitul mal* is it is the inheritor to the property in which the true owner is undetermined. Besides that, the loss properties which found without knowing their owners will be possessed by *baitul mal*.\(^\text{74}\) *Baitul mal*’s right is also extended to the ability of accepting *wasiyyat* or returning it as acted on behalf or *al-muusi* (person who made a will) to those who are eligible. If a person who receives a will (*al-mausa lahu*) after the death of *al-muusi* before making an acceptance of such will, then the true inheritor of such will be vested to *baitul mal* and the acceptor of such will be made by the authority.

Despite explaining the rights of *baitul mal*, there are also some obligations of *baitul mal* that must be looked upon. Firstly, *baitul mal* must spent few expenditures (*nafqah*) to the poor people who are unemployed. Secondly they must spend to be shrouding the dead Muslims who have no property to spend for the funeral expenditure. Next, they must also give some expenses for the persons who pick the lost property if there is a need to give such expenses to them.\(^\text{75}\) Fourthly, *baitul mal* can also be present as the indebted institution. Thus, it is permissible for a person to apply some loans from *baitul mal* in dire situation in the need of money for example or necessity.\(^\text{76}\) This can be supported with the opinion of al-Mawardi who said “if two claims are made on the *baitul mal* which can hardly meet both, but which is able to meet the claim of one of them, then it should nevertheless meet the claim of both, by becoming indebted itself, if it cannot meet both claims, then the person in charge may, if he

\(^{73}\) Ibid at page 38  
\(^{74}\) Ibid at page 40  
\(^{75}\) Ibid at page 41  
\(^{76}\) Ibid at page 42
fears that harm will be done, charge the baitul mul with any debts incurred, it is then up to his successor to repay the debt once it is enough in Baitul mul”. 77

The significance of inserting these two Islamic institutions of waqf and baitul mul as explained by al-Kabashi is that he made some justifications that the existence of rights and obligations is depends on the existence of ahliyyah wujub. This ahliyyah (capacity) is built on carrying dhimmah as explained by the fuqaha. Thus as these two baitul mul and waqf institutions have some rights and obligations such dhimmah must be present. 78 Thus it is undeniable that our Islamic law does deal with the doctrine of separate legal entity as its discussion is based on the theory of dhimmah as well as artificial person (al-shakhsiyyah al-I‘tibariyyah). This is followed by the views of the fuqaha who already recognized such principle during the development of fiqh era. Nevertheless, they were deemed not to name this principle as made by civil law specifically.

Similarly, according to Muhammad bin Salim Bayusuf al-Bariki, he also mentioned that although the Muslim Scholars do not name al-syarikat as a fictitious person, they attached it with certain rights like other institutions (as discussed above). This is to say, all the rulings of these institutions will not be stand unless they have such independent dhimmah upon them. Thus, dhimmah here is the same as ahliyyah al-wujub which they obligate them some rights and obligations and finally, they attached them as an artificial person just like a modern term recently 79. From my point of view, it is a good justification made by both scholars in order to rebut the arguments of Majlis Ulama of South Africa as mentioned above and to support the sayings of Taqi Usmani regarding to this principle on certain Islamic institutions.

Mustafa Zurqa had mentioned that the concept of artificial person (al-syakhsiyyah al-hukmiyyah/ al-ma‘nawiyyah/ al-I‘tibariyyah) has long been discussed by the fuqaha. This concept can be seen in three Islamic institutions 80 as mentioned above which are; baitul mul, waqf, and al- daulat (the state). Firstly, in baitul mul, it contains the treasures of the general

77 Al-ahkam al-sultoniyyah by al-Mawardi at page 215
78 Al-dhimmah wa al-haq wa al-ilizam, dirasah muqoronah by al-kabashi at page 43, al-madkhal ila nadzhoriyyah al-ilizam al-a‘amah by Mustafa al-zurqa; page 196-197
79 Syarikah al-ashkhas fi al-fiqh al-islami wa qanun al-imarat ma‘a al-tarkiz a’la syarikat al-muhassaah by Muhammad salim solih bayusuf al-bariki; at Page 129
80 Al-madkhal ila nadzhoriyyah al-ilizam al-a‘amah by Mustafa al-zurqa at page 270-275
state as Islam comes with the theory of separation of baitul mal from the property of authority or ruler (sultan) as its own specific ownership. Allah considered baitul mal as the real strength independent institution, representing the interests of ummah in a general properties and it possess certain rights and it is possessed by others (obligations), deserves for isolated inheritances from wasiyyah and acts as a party in disputes and lawsuits.

The person who represents all of these matters as the trustee of baitul mal as the representative of the ruler or authority is the caliph or any people at the same level. He further mentioned that there is no authority which has an individual right over baitul mal unless for the capability of his work and there is no person who can deal with it except for that he has rights over it in accordance with syara’.

4. Observation

Although there is a great distinct opinion between traditional and modern Muslim scholars, some of the traditional scholars did not reject totally this doctrine of separate legal entity under Syariah Law. Indeed they acknowledged it from the very beginning but they rejected it due to its system as developed in civil law as mentioned by Imran. Their justification pertaining to this matter had been briefly written by Imran Ahsan Khan Nayzee in his book81 who mentioned as follows:

‘‘This does not mean that the jurists were not aware of the concept. They were aware of it, but did not acknowledge it for Islamic law. The main reason appears to be that dhimmah is ‘‘ahd (covenant) with the Lawgiver and the fictitious person cannot be expected to enter into such a covenant primarily because it cannot perform religious duties. In other words, the law derived by the jurists does not need this concept and will reject it.’’

After explaining the reason of those Muslim scholars, he then continued stating that such ruling of this principle of separate legal entity must be made to accord with the Islamic law as he said:

‘‘Nevertheless, the modern world is organized around the concept of the corporation or the fictitious personality. Modern scholars will therefore, have to work hard to

81 Islamic Jurisprudence by Imran Ahsan Khan, at page 117
accommodate this concept into the fold of Islamic law. This means that adjustments will have to be made in the law wherever this concept clashes with it. The fictitious person may be deemed to have deficient capacity that is not fit for the performance of religious duties, like the payment of zakat.”

Imran tries to mention that justifying the legal validity of a fictitious legal personality under Syariah law may not be very difficult if the general principles of this law are applied. It is therefore clear that he advocates for the acceptance of the cooperate personality with certain guidelines. Imran contended that the ruler may assign a restricted or limited dhimmah to a non-human on the following conditions:

1) That no religious duties will be expected of a fictitious person. In other words, the fictitious person will not be subject to the khitab of ibadat and will not be liable for any religious duty or obligation that may flow from it. Thus, it will have no liability for zakat, for sadaqah, or for any other religious task. These duties pertain to the ‘ahd of the ‘abd with the creator.

2) That some form of ‘aql must be associated with the fictitious person. This ‘aql may be that of one individual or group of individuals like the board of directors. The ahliyyat al-ada’ will always be associated with this source of ‘aql, and so will the liability for such acts.

3) That a concept of dual title of ownership must be associated with a fictitious person. Any property held by the fictitious person in its own name must be assumed to be held on behalf on behalf of the members of this fictitious person as a result of khalt or mingling of capitals. In addition, the body corporate may have full right of disposal and transaction in the property if so permitted by its members.

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82 ibid
83 Islamic Law of Business Organization: Partnership by Imran Ahsan Khan at page 317
5. Conclusion

Referring to the discussions, it is obvious that there are some similarities and also differences of views between the common law jurists and the Muslim jurists as regards to the status of the body corporate as a fictitious person. The best conclusion is derived from Nyazee, who clearly highlighted that the common law doctrine of corporate legal personality as an artificial person could be accepted under Shari’ah but subject to certain modifications and therefore shall not be a direct application.
APPLICATION OF WAQF PROPERTY AS A FINANCIAL INSTRUMENT FOR THE INTERNALLY DISPLACED PERSONS (IDPs) IN NIGERIA

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ABSTRACT

An estimated total of 1,538,982 persons are internally displaced in Nigeria due to terrorist insurgency and other conflict. This paper examines the use of waqf properties as a financial instrument to empower Nigeria’s internally displaced persons. The value and importance of waqf endowment cannot be underestimated and ignored. Cash waqf is a modern financial instrument for socio-economic development in solving social issues and challenges confronting Muslims globally. The objective of the study is to discuss how waqf properties can be used to provide short- and long-term assistance for IDPs across Nigeria. The discussion focuses on shelter, immediate and urgent needs, medical, human development, and other related challenges. The study adopt a quantitative method to reach solutions to outstanding problems.

Key Words: Waqf property, IDPs, financial instrument, security, challenges and solution.
1. Introduction

Nigeria has the highest number of internally displaced persons in Africa due to discord or conflicts among tribes or religious conflicts. The highest number of IDPs in Nigeria was reported by the Internal Displaced Monitoring Centre (IDMC) and the Norwegian Refugee Council (NRC) for the Global Overview 2014. The director of IDMC argued that:

"Violence, abuses, and forced evictions all add to the conflict-mix in many of these situations, while in places such as Nigeria we see how challenging life becomes for those already displaced by conflict when they are struck down again by severe floods and storms."

The report of IDPs in Nigeria stated that there are 3.3 million IDPs in Nigeria and 470,500 individuals were displaced in 2013 alone. On a global scale, Nigeria is only ranked behind Syria with 6.5 million IDPs and Colombia with 5.7 million IDPs respectfully. The causes of IDPs in Nigeria are tribal conflict, insurgency, religious conflict, natural disaster and others. The unprecedented increase and rise of IDPs across the nation is caused by the increased number of Boko Haram attacks that forced many victims out of their houses. In addition, cattle herdsmen and inter-communal violence contributed to the huge number of IDPs in Nigeria. The attacks by Boko Haram recorded huge numbers of dead across the nation while many children, pupils, women and men were abducted and some were killed by the terrorist. The attacks concentrate in the Northern states of Nigeria where Boko Haram is terrorising the citizens. They attack schools, colleges, universities, mosques, churches, markets, public gathering and other populated places. They have attacked government houses, polices stations, and car parks. The horrible attacks forced many civilian out of their house in search of safety. Communal clashes is another factor contributing to the high number of displaced persons in Nigeria. Clashes between farmers and herdsmen over grazing lands in states such as Lagos, Oyo, Ogun, Osun, Benue, Taraba, Zamfara, Adamawa, Kano, Borno, Yobe, and parts of Kaduna have left many innocent civilians dead (Oduwole, 2013).

To ease the plight of IDPs, the waqf institution in Nigeria can render aid and assistance to the victims. Nigerian IDPs’ needs can be categorised into short- and long-term financial support. Concerning short-term financial assistance plans, waqf institutions across Nigeria should render adequate provision for the short-term needs of victims such as food,
clothes, drinkable water, sanitation, medical treatment for pregnant IDPs, immunization for children, accommodation and other short-term needs. Regarding long-term financial assistance plans for IDPs, education, resettlement, empowerment, security, counselling, and long-term needs of IDPs should be provided by waqf management through the endowed properties.

2. Challenges of IDPs in Nigeria

Many Nigerians are confronting hunger, housing, health, security protection, and lack basic facilities due to poverty. The challenges of basic amenities is the main calamity confronting Nigerian IDPs. This study argues that waqf management can assist the victims from endowed and gifted waqf properties. Nigerian IDPs are suffering from the following challenges:

2.1. Insufficient Food/Hunger

Nigerian IDPs have insufficient food with many young and old going hungry. Some non-Muslims NGOs and some states are striving to provide food supplement for the victims. Children are particularly vulnerable to food insecurity. Waqf management should provide food for the IDPs within their capability and income (Oduwole, 2013).

2.2. Shelter

Many IDPs left their personal or family house, home, village or state heading to unknown places for survival due to war or natural disaster that forced them from their homes. Shelter is a basic and immediate need. IDPs are forcefully evicted from their homes. It is difficult for an ordinary person to single handedly cater and provides for many victims at a term or across the whole country. In such a situation, there is need for temporary secure places to settle (Oduwole, 2013).

2.3. Health risks

IDPs often face malnutrition, lack of drinkable and clean water, fever, tiredness, respiratory illnesses, diarrhoea, and parasitic diseases. Many citizens are facing health challenges due to the past corrupt government. The present government should do everything possible to provide basic and primary healthcare for all regardless whether they are internally displaced or not because citizens have a right to medical and healthcare. A primary obstacle
to receiving healthcare services by the IDPs is inadequate medical provision due to the failure of the Nigerian government. The state government of where IDPs are settling should work with other states to jointly provide medical treatment for the IDPs. The victims should not be left uncared for medically and socially. They should be given free medical healthcare throughout their dilemma (Oduwole, 2013).

2.4. Psychological Trauma and problem

Unexpected, unprepared, sudden humiliation and frustration confronting IDPs result in psychological trauma. In such a situation, poor living conditions, insecurity, and confined movement affect their dignity and personality. The mental health needs of conflict affected people suffering from severe malnutrition, loss and violence-induced psychological problem of many IDPs in Nigeria require spiritual intervention and psychologists to counsel, advise, and guide the IDPs on how to overcome and control their psychological problems (Oduwole, 2013).

2.5. Insufficient Income

Insufficient income and financial constraints is another challenge facing IDPs due to their unprepared and unexpected transit. IDPs are often unemployed resulting in an ability to provide for themselves and their families. There is a need for them to work in order to be able to provide the basic needs for themselves such as toilet paper, sanitary napkins, soap, sponge, detergent, cream and toothpaste for their daily use. Nigerian authorities should do everything possible to empower the IDPs through human development. IDPs should be socially and economically developed in order to overcome their financial constraints. It might be difficult for IDPs to be employed or secure jobs due to the rate of unemployment in Nigeria. Nevertheless, the authority or NGOs like waqf management across the nation should team up to solve such challenges. Waqf in Nigeria should render support to IDPs economically, financially, spiritually, morally, religiously, medically, physically, and mentally. The failure of waqf management on this issue will give ample opportunity for non-Muslim NGOs to provide provisions for needy IDPs. This will provide them a platform for preaching their faith. In order to protect from religious conflict, Muslim NGOs should do everything possible to assist IDPs by providing adequate and timely provisions and aid (Oduwole, 2013).
2.6. Vulnerability and Exposure to Abuse

The increasing deadly attacks on border communities and the destruction of properties, businesses, and farmlands have forced many IDPs to flee their homes. The violence and abuse has been almost on a daily basis in some places due to insurgency, terrorism, tribal conflict, and other causes. There is growing recognition among agencies that assistance provision must be linked to protection of IDPs’ physical security and human rights before and during displacement and during return/resettlement. The Nigerian government should do everything possible to protect lives and properties during and after the conflict. The security agencies should not abuse the IDPs sexually under the pretext of protection. Displaced people are often denied a variety of rights that can affect their livelihood opportunities due to the conflict peculiarity. Moreover, the loss of property rights and entitlements has a direct impact on food security (Oduwole, 2013).

2.7. Religion

Religion is a prime factor for displacement in Nigeria where Muslim and non-Muslims are always at loggerheads due to purported injustices to other. Such conflicts occur in many states. Nigerians should understand their differences and similarities in order to avoid the unwanted and irrational conflict and maintain peaceful co-existence. Human dignity and personality must be respected. Nigerians should be conscious of any act that may trigger religious conflict.

2.8. Tribalism

The three major tribes in Nigeria are Hausa, Yoruba, and Igbo all of whom have different languages. There continues to be many conflicts among the three tribes. Communal clashes is a factor contributing to the high number of displaced persons in Nigeria. Clashes between farmers and herdsmen over grazing lands in states such as Lagos, Oyo, Ondo, Benue, Taraba, Zamfara, Osun, River, and parts of Kaduna have left many people dead due to tribal conflict.
3. Application of Waqf Property As Financial Instrument for the Internal Displaced Persons (IDPS) in Nigeria

The needs of IDPs in Nigeria vary from one person to another. Waqf management boards across Nigeria should prioritise the needs of IDPs such as food, security, housing, healthcare, education, income-generating sources, counselling, spiritual teaching, and security. Waqf management can utilise part of the endowed properties to provide for the short- and long-term needs of IDPs since the primary objective waqf is socio-economic development.

IDPs victims are entitled to be taken care off during this testing period. Their needs can be categorised into short- and long-terms needs requiring the appropriate financial assistance plan. The majority of states where IDPs have settled are overwhelmed. Since cities are of particular concern as both the displaced and residents live in overcrowded and unsanitary conditions. In such a situation, waqf should extend financial support to the affected states.

Children are the prime victims of IDPs. Many children of IDPs do not receive social security or vaccination and medical treatment. Nigerian children suffer the serious effects of minimal and irregular medical care. Displaced children also face educational setbacks because they would not be able to attend school while displaced.

Many female IDPs report cases of abuse and violence against them. Traditionally, women play a central role in developing coping mechanisms and in reducing the vulnerabilities faced by families and communities. Many of them become unemployed thereby robbing them of an important mechanism for coping with the new environment (Shamsiah, 2011, Editorial, 2009).

3.1. Nigerian IDPs Victim Needs

Studies have shown that the priority needs of Nigerian IDPs are related to food security, housing, healthcare, education, income-generating sources, and security. The Nigerian government and NGOs like the waqf institution should do everything possible to avoid delays in securing shelter, security and employment for IDPs. In addition, informal schools should be created for children until they resettle or register formally in another school with full scholarship. The following are the needs of IDPs:
3.2. Food

Many Nigerians are forced to leave their family, house, property, community, state, farms, animals, and jobs. IDPs are unable to provide adequate and sufficient provision for their own food, at least temporarily while displaced. During their trying period, Nigerian IDPs face multiple basic subsistence needs and are more vulnerable than other needy Nigerians. The IDPs prime and major delimit is to find shelter, food, and water. The needs and challenges of IDPs cannot be single handedly managed by a person; it needs government intervention, collective contribution, and NGOs like waqf institutions to extend their support (Zeinoul, 2011, Amuda, 2013).

3.3. Clean Water

Human life is connected with water and no one can do away with the use of water for drinking, cooking, bathing, and other related things regardless of being displaced or not because it is a basic human need. It is also the government’s duty to provide clean and pure water for adults, women men and children for drinks, baths, and other relevant things. Potable and clean water cannot be unilaterally provided by the parents in a terrible condition parents find themselves as IDPs. It is the government’s role to make water accessible to all citizens as their responsibilities towards their citizens are to provide amenities for all necessary and unavoidable daily needs. In the failure or inability of the government to provide water for victims, waqf management should render assistance to the needy IDPs by providing clean and portable water. Waqf management can also dig wells at temporary accommodations or camps for access to clean water (Zeinoul, 2011, Amuda, 2013).

3.4. Shelter

An urgent need for IDPs is a secure place to sleep. They need temporary camps or homes where they can strike out a new living. Their new accommodation will give them the opportunity to rebuild their livelihoods. As the situation stabilises, displaced persons try to re-establish some continuity with their old life and educational opportunities become important for their school children. Nigerian IDPs need shelter fully or partially equipped with facilities such as toilets, bathroom, kitchen, and clean water. It should be close to schools where their children can learn religious and western education. Waqf aims to provide the Muslim
community with financial support, education, payment of debt, medical health, and shelter. Nigerian IDPs are homeless and in serious need of temporary and long-term accommodation. Waqf management can use the physical property endowed such as houses, halls, shops for the temporary shelter of IDPs until proper accommodation is provided. Waqf can also rent a house for them for the short period in case there is no waqf home to accommodate a huge number of IDPs (Zeinoul, 2011, Al-Omar, 2006, Amuda, 2013).

3.5. Medical Treatment

Health is another government task that should be provided for the citizens. Many Nigerians are suffering from a lack of standard health facilities with children and women the major victims of medical problems. Many IDPs lack potable and clean water leading to infection. This emphasises the need for waqf institutions across the nation to provide medical treatment for the IDPs. Waqf should provide good care health such as dispensaries, first aid, and toilet facilities in order to ease their suffering. Waqf management could educate Muslim medical doctors on how to render free services for the IDPs. The duty and responsibility of waqf management is to provide medication for IDPs. Wilful medical Muslim doctors with their own practice could treat IDPs free of charge (Khaf (b), 2011, Amuda, 2013).

3.6. Education

Globally, many children are suffering from educational problems due to their parents’ inability, the ineffectiveness of the government, and because of their parents’ separation as husband and wife. However, some are suffering from reasons and challenges that forced them out of school. Educational institutions have important roles to play in formal and informal curricular to prepare the next generation and create a literate society. Displaced children face educational setbacks because they are unable to attend school. Many schools are attacked by insurgents and terrorists farcing many children out of school. Many children are also abducted. In the interest of the displaced school children, waqf management should use the waqf gifted property to educate and provide sound education for children IDPs. Places can be converted into temporary classrooms until they formally register in government schools. Similarly, private schools can be also approached to accommodate and admit children IDPs in their schools free of charge. Evening classes can be also organised for children IDPs to
keep them busy. Muslim children IDPs can attend Arabic schools in the morning and evening classed for Western education. After the children IDPs have been registered in government schools for western education, waqf management should organise evening classes for religious study (Khaf (a), 2011, Mansour, 2006, Amuda, 2013).

3.7. Security

It is the duty and responsibility of state and federal government to provide adequate and absolute security for citizens. The waqf management could organise local security to protect the IDPs from any further attacks. Waqf management could also approach the state or federal security for their needs such as special police patrol for IDPs. Finally, the waqf needs to educate communities on how to protect and respect the IDPs.

3.8. Counselling

Many IDPs suffer trauma and psychological problems. Lost family members, breadwinners, wives, children, husbands, fathers and relatives causes psychological problem. Many properties are destroyed and damaged during conflict. Waqf management could provide the basic needs for victims which would help reduce the psychological problems. Waqf management should also provide counselling on how to overcome stress, trauma, and psychological problem. The counselling should include how the IDPs will re-establish and empower themselves after resettlement. Waqf management could also invite experts to counsel the victims based on their experience and specialisation. The psychologists will be able to reduce the tension, stress, and psychological problems of the victims.

3.9. Religious Teaching

According to Islam, it is the parents’ obligation and duty to teach their biological to children how to be obedient to Allah in order to be devoted and committed to Allah’s commands. Parents can send their children to Islamic schools where they can learn proper and sound Islamic studies. Muslims should be conscious of their character and approach towards Islam and devotion. It is a parental duty to train themselves and their children and inculcate faith into their minds on how to worship and be dedicated and committed to the will of Allah. In teaching and commanding them how to worship their creator, the parents would
be held responsible and accountable for their children going astray if they are religiously abandoned. In situations where parents, children and adults find themselves displaced, it is the duty and responsibility of the government and NGOs like waqf to teach the IDPs. Teaching them Islamic studies and how to love and respect other faiths is important to allow peaceful co-existence in the community. Islam recognises the culture of respect for everybody regardless of their religion affiliation and gender. Waqf management should use the resources within their capacity to invite religious scholars to give weekly and monthly lectures for all IDPs, especially the Muslims among them that Islam is against any act of terrorism and killing innocent human beings. The punishment of heinous crimes in this life and the next should be clearly expounded to the audiences in attendance. The punishment of suicide bombers or taking one’s life should be clearly explained to IDPs (Khaf, 2011).

3.10. Resettling Nigerian IDPs

Once safe, many IDPs would will like to return to their homes to continue their lives peacefully. Waqf management should provide provisions for their transportation home and ensure basic infrastructure and amenities such as clean water, food, and education for school children before returning home. Waqf management should utilise the endowed resources to support the IDPs to re-establish their lives.

4. SUGGESTIONS

1. Waqf management across Nigeria should develop mechanism for interaction with state and local authorities and many other NGOs whose interest is to provide financial support to IDPs in Nigeria.

2. Proper documentation of correct information about the number of IDPs and their needs is essential. It will help waqf management provide adequate provisions for the IDPs.

3. There must be transparency and accountability on how waqf management is managing and monitoring the endowed properties for the IDPs. The management must give detailed accounts of endowed movable and immovable properties and total amount spent for the needy IDPs.
4. Waqf management should work with other waqf management across to render support for IDPs.

5. In order to empower the IDPs, waqf management can organise training, workshops, and education for adult IDPs to keep them busy and reduce their thinking that can result in psychological problem. They can invite speakers to give talks and lectures that will benefit the victims.

6. Public funds can be organised by the state waqf management to generate income to cater for the less privileged Muslims.

5. **CONCLUSION**

The previous discussion explained the needs of IDPs in Nigeria. The primary aims and objectives of establishment of waqf in the Muslim community is to render aid and financial support to those who are in need or the less privileged. Waqf provides education, food, homes, accommodation, medical treatment, security, debt payment, and financial support as human development. It can be concluded that waqf management across Nigeria should partition part of its endowments to support IDPs by providing immediate, short- and long-term support to the victims regardless of their gender, status, religion, tribe, and state they came from. Waqf management should be transparent and exercise proper documentation.

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THE REGULATION OF EQUITY CROWDFUNDING IN MALAYSIA

Hingun, M.* & Mohd Sulaiman, A.N.**

Abstract:

The power of the internet to connect various interest groups has spawned novel ways of conducting transactions giving rise to the genesis of new service providers who aspire to unlock the potential of emerging business models in the electronic marketplace. Equity crowdfunding, an important form of crowdfunding enables the ‘crowd’ on the internet to finance new business ventures and start ups through online crowdfunding platforms in exchange for equity in the business. The objective is to gain access to an unprecedented source of capital created by the small contributions of members of the public. The inherent risk of investors losing money in new business ventures coupled with the increasing incidence of fraudulent online schemes call for regulatory measures to protect the investors in addition to facilitating the provision of the service. Malaysia has laid down the legal foundations for the provision and regulation of this new form of fundraising through the 2015 amendment to the Capital Markets and Services Act 2007 and the issue of Guidelines on Regulation of Markets. The objective of this paper is to analyse the legal provisions and guidelines governing issuers seeking finance, the platforms providing the electronic facilities and the protection of investors wishing to invest in equity crowdfunding. Reference will be made to the more active global crowdfunding jurisdictions with a view to drawing valuable lessons on how Malaysia, one of the earliest Asian countries to offer this service could enhance its existing legal regime.

Keywords: Equity Crowdfunding, Regulation, Guidelines

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1. Introduction

The widespread use of the internet among all strata of the population of a World Wide Web literate society has enabled consumers and providers of services and products to forge new and startling models of conducting business and some of these ventures powered by the internet are among the most successful in the world.\(^1\) The internet as a communication tool has enabled the meeting of consumers and providers to form perfect matches and all this can be achieved fast without much cost implication. The financial services industry has also benefitted immensely by the internet revolution and more recently micro-financing and crowdfunding opportunities have materialised as new forms of financing start ups and small businesses.

2.1 Concept of Crowdfunding

The concept of crowdfunding involves raising small amounts of capital from a large pool of individuals to finance a business venture. It capitalises on ‘the easy accessibility of vast networks of friends, family and colleagues through social media websites like Facebook, Twitter and LinkedIn to get the word out about a new business and attract investors’.\(^2\) Global crowdfunding has proven immensely successful growing from $1 bn in 2011 to $30 bn in 2015 and according to a World Bank commissioned report, it is predicted to grow to between $90 billion and $95 billion by 2025.\(^3\) Of the four models\(^4\) of crowdfunding this paper’s focus is on equity crowdfunding in which small companies and start ups with good growth potential

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\(^1\) "[In 2015, ] Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world’s most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world’s largest accommodation provider, owns no real estate. Something interesting is happening.” See Tom Goodwyn, The Battle is for the Customer Interface, TechCrunch: http://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/


\(^3\) The crowdfunding market is in its infancy, especially in developing countries, but the potential market is significant. It is estimated that there are up to 344 million households in the developing world able to make small crowdfunding investments in community businesses. These households have an income of at least US$10,000 a year, and at least three months of savings or three months savings in equity holdings. Together, they have the ability to deploy up to US$96 billion a year by 2025 in crowdfunding investments. The greatest potential lies in China, which accounts for up to US$50 billion of that figure, followed by the rest of East Asia… See p. 10 of the Report available at http://www.infodev.org/infodev-files/wb_crowdfundingreport-v12.pdf

\(^4\) The Crowdfunding market is broadly divided into four types: Reward, Debt, Donation and Equity
but lacking the credentials to acquire capital from the traditional sources of finance may offer equity to investors from the ‘crowd’ in exchange for working capital through internet platforms.

Attempts to sensitize the Malaysian public on the potential to introduce equity crowdfunding (ECF) can be traced to the introduction of a Public Consultation Paper dated 21 August 2014\(^5\) by the Securities Commission (SC) inviting written comments from the public on the SC’s proposed regulatory approach to ECF which consisted of proposals to regulate the operators of ECF platforms, the investors and the issuers. This was followed by a Public Response Paper to the Consultation Paper in September 2014\(^6\). The same month SC with the Malaysian Business Angel Network (MBAN) co-organised ‘The Synergy and Crowdfunding Forum’ the first equity crowdfunding forum in Malaysia, bringing together over 600 entrepreneurs and investors to create public awareness on the potential of equity crowdfunding as an alternative source to raise capital by small and new business enterprises.

### 2.2 Legal Regulation of ECF in Malaysia

In Malaysia, the Capital Market and Securities Act 2007\(^7\) (CMSA 2007) has consolidated a number of previous statutes relating to securities law to regulate and to provide for matters relating to the activities, markets and intermediaries in the capital markets. Section 7 was amended to provide for, among others, the inclusion of ‘a recognised market’ as a component of the stock market.\(^8\) Section 34(1) of the Act which provided for the registration of electronic facilities was amended in 2015 to provide for the registration of recognised market operators while Section 34(2) enables the SC to add, vary, amend or revoke any terms and conditions imposed under subsection (1) from time to time. Section 377 is an important provision which empowers SC generally in respect of CMSA 2007 or in respect of any of its particular provision, to issue such guidelines and practice notes as the

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Commission considers desirable. It can revoke, vary, revise or amend the whole or any part of any guidelines and practice notes issued under this section. The first set of Guidelines was published in February 2015\(^9\) but it was replaced in December 2015.\(^{10}\)

### 2.3 Guidelines on Recognised Markets

The December 2015 Guidelines which supersedes its predecessor of February 2015 is the reference for the current rules governing ECF in Malaysia and through its application it regulates the market operator, the issuer and the investors. SC’s general approach to regulating capital markets depends on the proposed market characteristics, including the structure of the market, sophistication of market users and rights of access, types of products traded and risks posed by such markets.\(^{11}\) Unlike Bursa Malaysia Securities Bhd which operates the main approved market for the transaction of securities and therefore requiring a high level of sophistication, a recognised market such as ECF essentially covers an alternative trading venue, marketplace or facility that brings together purchasers and sellers of capital market products and the level of regulation in comparison to approved markets is not as stringent.\(^{12}\)

### 3.0 The Registration and Regulation of a Recognised Market Operator (RMO)

The RMO must be a body corporate or a limited liability partnership\(^ {13}\) and must have sufficient financial, human and other resources for the operation of the recognised market, at all times.\(^ {14}\) It must satisfy a number of criteria for registration.\(^ {15}\) An applicant for registration must satisfy the SC that it will be able to operate an orderly, fair and transparent market in relation to the securities or derivatives that are traded through its electronic facilities.\(^ {16}\)

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\(^9\) Guidelines on Regulation of Markets under Section 34 of CMSA SC-GL/2-2015

\(^{10}\) Guidelines on Recognised Markets: SC-GL/6-2015. These Guidelines on Recognised Markets (Guidelines) are issued by the Securities Commission Malaysia pursuant to section 377 of the CMSA 2007 and must be read together with Subdivision 4, Division 2 of Part II CMSA 2007

\(^{11}\) SC-GL/6-2015, para 1.07

\(^{12}\) 1.07

\(^{13}\) 1.03

\(^{14}\) 3.01(g)

\(^{15}\) See Chap 3

\(^{16}\) 3.01
The applicant’s board, chief executive, controller, and any person who is primarily responsible for the operations or financial management of the body corporate must be fit and proper persons with no convictions of crimes involving fraud or dishonesty or violence including a long list of crimes involving securities, financial and investment fraud.\textsuperscript{17} The net is cast very wide to ensure that the applicant has not been engagement in or associated with any conduct that cast doubt on his ability to act in the best interest of investors, having regard to his reputation, character, financial integrity and reliability.\textsuperscript{18}

The RMO is required to appoint a chief executive or any person who is primarily responsible for the operations and financial management, by whatever name called who at all times will be the responsible person to undertake the role of the main contact person for the purpose of liaising with the SC and to perform any duty as may be directed by the SC.\textsuperscript{19} An application may be granted subject to terms, conditions and directions\textsuperscript{20}

The continuous obligations imposed requires the operator, among others, to establish and maintain policies and procedures to manage conflicts of interest, monitor trading and other market activity to detect non-compliance with the securities laws or its rules, to deal with complaints relating to the operations of market or the conduct of its participants and to ensure compliance with all relevant laws and regulations.\textsuperscript{21} It is required to notify the SC immediately of any irregularity or breach of any provision of the securities laws, the Guidelines or its rules, including any alleged or suspected violations of any law or guidelines in relation to money laundering and terrorism financing by its participants, of any material change in the information submitted to the SC and if it becomes aware of any matter which adversely affects or is likely to adversely affect its ability to meet its obligations or to carry out its functions under these Guidelines.\textsuperscript{22} Under its reporting and disclosure obligations it is required to submit an annual compliance report and its latest audited financial statements.\textsuperscript{23}

\textsuperscript{17} See 3.01(b)(i)-(vii)  
\textsuperscript{18} 3.01(b)(vii)  
\textsuperscript{19} Chap 4  
\textsuperscript{20} See 5.02  
\textsuperscript{21} 6.01(c)  
\textsuperscript{22} 6.01(d)  
\textsuperscript{23} 7.1(a), (b)
3.1 The Equity Crowdfunding (ECF) Platform Operator

The RMO which operates an ECF platform is known as the ECF operator. It must be locally incorporated, and among others, it is required to carry out a due diligence exercise on prospective issuers planning to use its platform to ensure compliance with its rules. As part of its due diligence exercise the operator must take reasonable steps to conduct background checks on the issuer to ensure fit and properness of the issuer’s board of directors, officers and controlling owner and to verify the business proposition of the issuer. The operator must maintain one or more trust account designated for the fund raised by an issuer hosted on its platform and shall only release the fund if the targeted amount has been successfully raised in the absence of any material adverse change relating to the offer during the offer period. It can only release the money after a cooling-off period of at least six business days.

As part of its obligation to manage conflicts of interest it must design a system which can effectively and efficiently manage actual and potential conflicts of interest which may arise in the course of the ECF operator carrying out its functions. The operator and its individual directors and shareholders, must disclose to the public on its platform if it holds any controlling shares in any of the issuers hosted on its platform or if it pays any referrer or introducer, or receives payment in whatever form, in connection with an issuer hosted on its platform. To enhance the exclusion of conflicts of interest, an operator’s shareholding in any of the issuers hosted on its platform shall not exceed 30% and it is prohibited from providing any financial assistance to investors to invest in shares of an issuer hosted on its platform.

3.2 Offer of Islamic Capital Market Product

Where an Islamic capital market product is offered the RMO is required to appoint a qualified Shariah advisor whose function is to advise on compliance with Shariah principles relating to the offering of Islamic capital market product, to provide Shariah expertise and
guidance on all matters, particularly in documentation, structuring and investment instruments, to ensure compliance with relevant securities laws and guidelines issued by the SC and to ensure compliance with Shariah rulings, principles and concepts endorsed by the Shariah Advisory Council. In relation to this type of offer the RMO is required to disclose the name of the Shariah advisor and the information relating its structure.

4.0 The Equity Crowdfunding Issuers

Issuers must be locally incorporated companies and since the main objective of crowdfunding is to assist small businesses and start ups in procuring capital, established and sophisticated businesses are excluded from raising funds through an ECF platform. Issuers are also prohibited from being hosted concurrently on multiple ECF platforms.

The limits placed on the amount to be raised is RM 3million within a year’s period irrespective of the number of projects an issuer seeks funding for within the twelve month period and the maximum amount raised cannot exceed RM 5million excluding issuer’s own capital contribution.

Issuers are also bound by certain disclosure requirements. General disclosure includes the key characteristics of the company, its business plan, the purpose of fundraising and the targeted amount. Specific disclosures are linked to the amount sought to be raised. Certified financial statements/information by the issuer’s management, if it is required by the operator for verification purposes for offerings below RM300,000; audited financial statements of the company where applicable (e.g. where the issuer has been established for at least 12 months) and where audited financial statements are unavailable (e.g. the issuer is newly established), certified financial statements/ information by the issuer’s management for offerings between 

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31 11.03
32 12.15(a)-(f) excludes commercially or financially complex structures (i.e. investment fund companies or financial institutions); public listed companies and their subsidiaries; (c) companies with no specific business plan or its business plan is to merge or acquire an unidentified entity (i.e. blind pool); (d) companies other than a microfund that propose to use the funds raised to provide loans or make investment in other entities; (e) companies other than a microfund with paid up share capital exceeding RM5 million.
33 12.18
RM300,000 – RM500,000 and for offerings above RM500,000 the audited financial statements of the company.  

5.0 Investors from the ‘Crowd’

Since the ‘crowd’ will include a broad range of investors, the rules are designed to caution the novice investors and at the same time to encourage seasoned and sophisticated investors to commit higher levels of investments in this new market place.

The ECF operator must disclose and display prominently on its platform, any relevant information, including the specific disclosures linked to the amount sought to be raised, investor education materials, information on how the platform facilitates the investor’s investment including providing communication channels to permit discussions about issuers hosted on its platform, general risk warning and appropriate risk disclosure in participating in ECF and information on rights of investor relating to participation in ECF. It must also display information about complaints handling or dispute resolution and its procedures and imposition of fees, charges and other expenses on an issuer or investor.

The rules provide for three specific types of investors in the ECF market although the largest group in this field would be retail investors who are ordinary members of the public. Sophisticated investors would include, among others, unit trust schemes, licensed dealers in securities and fund management, licensed banks, approved pension funds and individuals with net assets exceeding RM3 million. These investors are not subject to any restrictions on the amount of investment. Angel investors who are accredited by the Malaysian Business Angels Network (MBAN) are allowed to invest a maximum amount of RM500,000 within a twelve-month period. Retail investors are limited to investing a maximum of RM5,000 per issuer with a total amount of not more than RM50,000 within a twelve-month period.

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34 12.20(d)  
35 Ibid.  
36 12.21  
37 The term “sophisticated investor” is not explicitly defined in the Capital Markets and Services Act 2007 (CMSA). However, Sch 6 &7 exempt a number of investors and transactions from prospectus requirement given that they have the resources and financial clout to protect themselves.  
38 12.22
In June 2015 SC selected six platforms operators which were picked from a list of twenty seven applications. The operators will charge fees ranging between 5% and 8% of the total fund raised, or a flat management fee, or a combination of both.\textsuperscript{40}

Conclusion

As of March 2016 there seems to be hardly any news on how the platforms are faring. The fact that Malaysia moved with great speed to incorporate and regulate ECF as one of the components of its capital market it is too early to assess the direction and success of this service given the evolving financial ecosystem. Malaysia’s dynamic economy has produced a mature RM2.8 trillion capital market, to assist qualified seekers of finance but there is an urgent and growing need to finance small and medium enterprises and start-ups which collectively taken form an important pillar of the economy.

The rules and regulations in most jurisdictions have a common feature- to protect the ordinary members of the public when investing by informing them of the speculative risks they face, difficulties of evaluating a business in the absence of a prospectus, the relatively illiquid nature of their investment and lack of professional advice.

Some jurisdictions where crowdfunding has succeeded include UK\textsuperscript{41} which shows great potential for growth\textsuperscript{42} although in USA, the world’s largest capital market it has received a lukewarm response\textsuperscript{43}. It should also be noted that in more mature economies equity crowdfunding is also offered with debt crowdfunding or Peer-to Peer Lending which is yet to be introduced locally. Malaysia should undertake research to investigate the factors responsible for the success of crowdfunding and how it can be emulated locally.\textsuperscript{44}

\textsuperscript{39} Alix Global, Ata Plus, Crowdonomic, Eureeca, PitchIN and Propellar Crowd+
\textsuperscript{40} The Star, June 12, 2015.
\textsuperscript{41} http://www.inc.com/ryan-feit/equity-crowdfunding-by-the-numbers.html
\textsuperscript{42} http://www.fca.org.uk/consumers/financial-services-products/investments/types-of-investment/crowdfunding
\textsuperscript{44} See Andrew Sheng, “Will crowdfunding help start up the economy?” Starbizweek 20 February 2016: http://www.thestar.com.my/business/business-news/2016/02/20/will-crowdfunding-help-start-up-the-economy/
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PROTECTION OF CHILD LABOUR: THE INTERNATIONAL INSTRUMENTS AND DOMESTIC LAWS OF MALAYSIA


Abstract:

The first legally binding international instrument to incorporate a complete range of human rights for children, including civil, cultural, economic, political and social rights is the United Nation’s Convention on the Rights of the Child. The Convention defines child as a person below the age of 18 years. It promoted inter alia, basic human rights of children such as the right to protection from economic exploitation and the right to education. Apart from the above, the International Labour Organisation (ILO) also promoted the protection of child labour vide its two Conventions namely, Convention on Minimum Age for Admission to Employment (Convention No. 138) and Convention on the Worst Forms of Child Labour (Convention No. 182). The ILO's Convention No. 182 has been ratified by more than 90 percent of the ILO's 186 member States since its adoption in 1999. In light of the above international instruments, a vast majority of countries around the globe have adopted legislative measures with a view of placing restrictions on the employment and work of children. Hence, this paper discusses the above international instruments relating to child labour and with some reference to the Malaysian Children and Young Persons (Employment) Act 1996.

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1. Introduction

Child labour is defined as work carried out by children in the formal and informal sectors. The formal settings includes a variety of industries such as in agriculture, manufacturing, fishing, construction and domestic services. While the informal sector are such as scavenging, shining shoes or on family enterprises. In some extreme cases, child labour involves children being enslaved, separated from their families, expose to serious hazards and illnesses. Children in general refer to a person who is still under the age majority and legally refers as a minor. They have to be protected and need special safeguards, assistance and care in maintaining their life because of their physical and mental immaturity including legal protections before as well as after births as indicated in the 1959 Declaration of the Rights of the Child, the first major international consensus on the fundamental principles of children’s rights adopted by the United Nations General Assembly in Resolution No. 1386 (XIV).

The term ‘child labour’ according to the International Labour Organisation (ILO) deprives children of their childhood, their potential and dignity, and is harmful to their physical and mental development. In 2015, the ILO celebrated their annual event on the ‘World Day Against Child Labour 2015’ with the theme "NO to child labour -YES to quality education!" In conjunction with the said event, the ILO promoted free, compulsory and quality education for all children and to take more concerted efforts to ensure that national policies on child labour, and education are consistent and effective.

The first legally binding international instrument to incorporate a complete range of human rights for children, including civil, cultural, economic, political and social rights is the United Nation’s Convention on the Rights of the Child. The Convention defines child as a person below the age of 18 years. It promoted inter alia, basic human rights of children such as the right to protection from economic exploitation and the right to education. Apart from the above, the International Labour Organisation (ILO) also promoted the protection of child labour vide its two Conventions namely, Convention on Minimum Age for Admission to Employment (Convention No. 138) and Convention on the Worst Forms of Child Labour (Convention No. 182). The ILO's Convention No. 182 has been ratified by more than 90
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(i) Convention on the Rights of the Child

Children’s rights have been recognised internationally some 91 years ago when the Declaration of the Rights of the Child (1924 Declaration) was adopted by the League of Nations in November 1924. The Declaration, also known as Declaration of Geneva, highlighted the social and economic entitlements of the child and also laid the foundation for setting future international standards for children’s rights\(^2\). The rights of children were again emphasised in the 1959 Declaration of the Rights of the Child (1959 Declaration)\(^3\) where it reiterated the rights of children to special care and assistance as canvassed in the previous 1924 Declaration. The 1959 Declaration subsequently led to the drafting of the United Nation’s Convention on the Rights of the Child 1989 (UNCRC).\(^4\) Van Bueren described the 1959 Declaration as the ‘conceptual parent’ of the UNCRC.\(^5\) The 1989 convention which came into force less than 10 months after its adoption is the most widely ratified treaty in the world.

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\(^3\) Declaration of the Rights of the Child which was the first major international consensus on the fundamental principles of children’s rights adopted by all 78 Member States of the United Nations General Assembly in Resolution 1386 (XIV) in 1959.


world. The Convention was introduced to ensure full and harmonious development of child’s personality who should grow up in a family environment and in an atmosphere of happiness, love and understanding.

The UNCRC which contains 54 articles is divided into three parts. Part 1 contains 41 articles elaborating on the rights, freedoms and duties of the child. Part 2 which consists of 4 articles provides on the implementation and monitoring of the Convention. Meanwhile, Part 3, contains 9 articles are the final clauses which enumerate on the signatory, ratification, amendment and other related issues. Article 1 defined ‘child’ as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’

The Convention also has listed down the rights of the child specifically in labour matters. Protection of child against economic exploitation is contained in article 32(1). The above article provides that ‘States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.’ To ensure the implementation of the above article, clause 2 provides that ‘States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.’


In July 1990, the African Union (AU) adopted the African Charter on the Rights and Welfare of the Child 1990 (ACRWC) and came into force in November 1999. The adoption of the said Charter by the AU was deemed necessary due to the unique factors of African socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child’s physical and mental immaturity wherein they require special safeguards and care. This was explicitly mentioned in the Preamble of the Charter. ACRWC is divided into two parts. Part 1 which contains 31

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articles elaborates on the rights, freedoms and duties of the child. Meanwhile, Part 2 which consists of 18 articles provides on establishment and organisation of the committee on the rights and welfare of the child.

Child is defined in article 2 as ‘every human being below the age of 18 years.’ Child labour is specifically mentioned in article 15 where it provides that ‘(1) Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.’ Clause 2 of the said article requires the States Parties to the present Charter to take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organisation's instruments relating to children. In particular, the States Parties shall: (a) provide through legislation, minimum wages for admission to every employment; (b) provide for appropriate regulation of hours and conditions of employment; (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article; (d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

The similarities and differences between UNCRC and ACRWC are further highlighted below.

(i) **Definition of a Child:** the UNCRC and ACRWC impose obligation on member state to set age limit for children. ACRWC defines child as ‘every human being below the age of 18 years’, while UNCRC defines child as ‘any human being under eighteen unless under laws applicable to the child, majority is attained earlier’. However, compared to the clear and concise definition by ACRWC, definition under UNCRC is rather loose and flexible. It is argued that this is to cater various views from various communities that may view duration of childhood differently.  

(ii) **Best Interests of the Child:** The principle of best interest of child which has been advocated since the 1924 Declaration is embodied in both UNCRC and ACRWC. The only difference is the words used in the provisions. Article 4 of the ACRWC states that the best interests of the child must be the primary consideration in all action concerning children; while article 3 of the UNCRC introduces the principle of the best interests of the child as a primary consideration in all actions concerning the child. The usage of ‘the’ and ‘a’ does have significant practical implications. The word ‘the’ denotes the principle will usually take priority over others. On the other hand, the word ‘a’ means that other principle can be taken into account alongside with the principle. Thus, ACRWC has a firmer definition and higher standard than that contained in the UNCRC. It must be added that the best interest of the child must always be read together with article 19 UNCRC and article 16 ACRWC that protect children from any form of things that is prejudicial to children. For example, the child’s involvement in labour will not be in their best interest as it affects the child’s health as well as their right to education.\(^8\)

(iii) **Right to Education:** Education is a one of the crucial elements in children development. The recognition of the right to education and providing the necessary access to it is one of the effective ways to eliminate child labour. Article 28 of the UNCRC requires the State parties to make primary education compulsory and free to all. Likewise, article 11(3)(a) ACRWC provides that State parties to provide free and compulsory basic education. ACRWC goes further by requiring the State parties to take special measures to ensure access to education for ‘female, gifted and disadvantaged children.’ Further, it places an obligation on states to ensure that pregnant girls are allowed to continue with their education.

(iv) **Right to Health:** Apart from right to education, right to health, which is considered as the economic, social and cultural rights under the international human rights law, is guaranteed both in the UNCRC and ACRWC. Article 24 of the UNCRC provides that State parties ought to recognise the right of the child to the enjoyment of the highest attainable standard of health. The State parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. On the other hand, Article 14 of the ACRWC

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provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

(v) **Protection from Economic Exploitation:** The UNCRC and ACRWC provide that every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development. There is an extension of rights by UNCRC to include as well right to be free from work that interferes with a child’s education. UNCRC also obligates the State parties to provide for a minimum age for admission to employment. However, such provisions are absent in ACRWC.9

(vi) **Protection from Child Abuse and Torture:** It is common that children engaged as child labourer are usually open for abuse and torture for example, being required to carry heavy loads, long working hours and subject to sexual exploitation particularly, the female. In the course of works, they are tortured under the disguise of being disciplined by adults. The UNCRC and ACRWC have provisions which require that children should be protected from physical and mental violence. States parties to the UNCRC are required to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. Similarly, the ACRWC protects the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.

(vii) **Recruitment for Military Service:** As ACRWC emphasised on the elimination of child labour, it also prohibits children from being recruited for military service, regardless of any age. The inclusion of such prohibition is deemed necessary for African countries where children are usually manipulated to take part in war and violence.10 On the other hand, UNCRC do not provide for the above. However, it sets age of recruitment of armed forces at the age of fifteen years old.

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9 See footnote 2, at p.152.
10 Ibid, p 151.
3. ILO’s Convention on Minimum Age for Admission to Employment (Convention No. 138)

The ILO Convention No. 138 which emphasised on the minimum age for admission to employment came into force on 19th June, 1976. Its adoption has been held in Geneva during the 58th International Labour Conference (ILC) Session on 26th day of June, 1973. The Convention No. 138 shall be construed side-by-side with the Minimum Age Recommendation 1973 (Recommendation No. 146). The Convention provides inter alia, that Member States should: (i) pursue a national policy to ensure the effective abolition of child labour; and (ii) progressively raise the minimum age for employment or work to a level consistent with the fullest physical and mental development of young persons.

The core obligation imposed by the above Convention is found in Article 2 which states that each Member State must specify a minimum age for admission to work, which should not be lower than the age for the completion of compulsory education which must not be less than 15 years. The above article does not make a link with primary education but refers to compulsory schooling in general. The employment of children below the age of fifteen years is thereby considered to be illegal. Article 2(4) of the ILO Convention No. 138 further provides an exception for countries whose economy and educational facilities are insufficiently developed. Such countries may initially specify a minimum age of 14 years after consultation with the organisations of the employers and workers concerned.

Article 3 of the ILO Convention No. 138 allows Member States to permit young persons above the age of sixteen years to participate in work or employment provided that such young persons are fully protected and have been given adequate instruction and vocational training to undertake such work. The article is commended for its flexibility in permitting children above the age of sixteen years to be able to participate in such employment. The conditions that the Convention also puts in place, viz those of adequate instruction and vocational training, also seem reasonable to protect young persons from potential harm. Article 8 provides an exclusion from the minimum working age of 15 in relation to artistic performances. Following consultation, a permit may be granted by the competent authority for participation in artistic performances by children and young people.
The permit must limit the number of working hours and prescribe the conditions in which employment is allowed.

Article 5 provides that a Member States with an insufficiently developed economy and administrative facilities may, following consultation, limit the scope of application of the Convention. However, the following industries cannot be exempted from the scope of application of ILO Convention No. 138 namely, (1) Mining and quarrying; (2) Manufacturing; (3) Construction; (4) Electricity, gas and water; (5) Sanitary services; (6) Transport, storage and communication; (7) Plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.

Article 7 of the ILO Convention No. 138 provides that light work may be permitted for persons between the ages of 13 to 15. The term ‘light work’ is defined as work that is: (i) not likely to be harmful to their health or development; (ii) not such as to prejudice their attendance at school or in a vocational, orientation or training programme. The types of work which constitute ‘light work’ should be determined by the competent authority who must prescribe the number of working hours and conditions in which the ‘light work’ may be undertaken. Paragraph 13 of the ILO Recommendation No. 146 provides a yardstick and further requirement as to the question of ‘light work’ emphasised in article 7 of the ILO Convention No. 138.

It must be added that article 3 of ILO Convention No. 138 prohibits children below 18 years old from engaging in work that is likely to jeopardise their health, safety or morals. The Convention did not specify what constitutes ‘hazardous work’. Therefore, it is left to the Member State to form the ‘hazardous work list’. In this regard, the ILO’s Worst Forms of Child Labour Recommendation, 1999 (No. 190) has set-out the guidelines as what constitutes ‘hazardous work’ as follows:-

(a) work which exposes children to physical, psychological or sexual abuse;
(b) work underground, under water, at dangerous heights or in confined spaces;
(c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
(d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;

(e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

In short, the term ‘child labour’ refers to employment of children below the prescribed minimum age. ILO Convention No. 138 has prescribed minimum age for different types of employment which are; (i) age 13 for light work, (ii) age 15 for ordinary work, and (iii) age 18 for hazardous work. Thus, if a 12 years old child is working even though in light work, he is considered as child labour. Similarly, if a 17 years old child carried out hazardous work, it is considered as child labour. The Convention places a positive duty on Member States to specify a minimum age for employment in any occupation. This minimum age is not limited to children within a specific industry or sector, such as in agriculture, but to all children in any form of work or employment. The use of the words ‘employment’ or ‘work’ means that all labour performed by children, whether or not it is performed under a contract of employment or contract for employment, is subject to the terms of the Convention. The contents of this provision mean that legislation should be extended to those working in family undertakings and in the home, irrespective of whether they receive remuneration or whether they work under any kind of formal agreement.

4. Minimum Age Recommendation No. 146

The Minimum Age Recommendation No. 146 is a supplement the ILO’s Convention No. 138. The Recommendation recognises the effective abolition of child labour and the progressive raising of the minimum age for admission to employment as component in the

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11 According to Article 7 of ILO Convention No. 138, “light work” means work which is not likely to be harmful to children health or development; and not prejudice children attendance at school, participation in vocational orientation or training programmes approved by the competent authority or capacity to benefit from the instruction received.

12 Article 2 of ILO Convention No. 138 provides that minimum age for employment is 15 years old. However, there may be instances where the minimum age is 14 years old. This exception is provided for state-member whose economy and educational facilities are insufficiently developed.

13 Article 3 of ILO Convention No. 138 provides that minimum age for employment in hazardous work shall not be less than 18 years.
protection and advancement of children and young persons. Paragraph 1 of the Recommendation No. 146 provides that priority should be given to planning and meeting the needs of children and young persons in developing national policies and programmes which cover ‘a national commitment to full employment; economic and social measures to alleviate poverty; the development of social security and family welfare measures; the development of educational and vocational orientation; and the development of appropriate facilities for the protection and welfare of children and young persons.’ Such provision is to supplement Article 1 of the ILO Convention No. 138 which provides that each Member State undertakes to pursue a national policy designed to ensure the effective abolition of child labour.

By virtue of Paragraph 7 of the Recommendation No. 146, Member states should aim to progressively raise the minimum age for admission to employment to 16 years. Such paragraph is generally complement the core obligation imposed by the Convention No. 138 under article 2 which states that each Member State must specify a minimum age for admission to work, which should not be lower than the age for the completion of compulsory education and in not any case, less than 15 years.

On the issue of light work, paragraph 13 of the Recommendation No. 146 states that there should be measures in place to safeguard and supervise the conditions of employment for children and young people who have reached the minimum working age or who undertake ‘light work’ including ‘the provision of fair remuneration; the strict limitation of the hours spent at work in a day and in a week, and the prohibition of overtime; the granting minimum of 12 consecutive hours' night rest; the granting of an annual holiday with pay of at least four weeks; coverage by social security schemes; and the maintenance of satisfactory standards of health and safety.’ This is basically a yardstick and further requirement as to the question of light work emphasised under article 7 of the Convention No. 138.

As far as hazardous employment or work is concerned, paragraph 9 of the Recommendation No. 146 which is a supplement to article 3 of the Convention No. 138 provides inter alia that: ‘Where the minimum age for admission to types of employment or work which are likely to jeopardise the health, safety or morals of young persons is still
below 18 years, immediate steps should be taken to raise it to that level.’ The above paragraph is generally safeguarding article 3(1) of the Convention No. 138 which prescribes a minimum age of 18 years for hazardous work. Article 3(2) of the ILO Convention No. 138 requires Member States to determine a list of the types of employment or work which constitute hazardous work. It is noteworthy that the definition of hazardous work has never been mentioned in Convention No. 138 and ILO Recommendation No. 146. The clear description of hazardous work has been stated in article 3(d) of the ILO Convention No. 182 on the worst forms of child labour. Article 3(d) of the ILO Convention No. 182 defined ‘hazardous work’ as ‘work which, by its nature or the circumstances in which it is carried out, is likely to jeopardize or harm the health, safety or morals of children.’

5. **ILO’s Worst Forms of Child Labour Convention 1999 (Convention No. 182)**

The ILO’s Worst Forms of Child Labour Convention 1999 (Convention No. 182) and the Worst Forms of Child Labour Recommendation 1999 (Recommendation No. 190) addresses on the need to effectively eliminate the worst forms of child labour. As of October 2015, the Convention has been ratified by 180 out of 186 ILO member states. For the purpose of ratification of Convention No. 182, a country commits itself to taking immediate action to prohibit and eliminate the worst forms of child labour. The Convention is enjoying the fastest pace of ratifications in the ILO’s history since 1919.14

The Convention No. 182 requires inter alia, all children under the age of 18 must be protected from the worst forms of child labour. The worst forms of child labour includes child slavery, child trafficking, children forced to join armed conflicts, child prostitution or pornography, use of children for crimes, including drug trafficking and work that harms the health, safety and moral of children.

The Member States must act immediately to end the worst forms of child labour and governments must consult with employers and workers organisations to identify the work that is harmful for children. The Member States must develop a way to monitor the implementation of this Convention. Recognising how important education is for ending child

labour, governments must take the following measure: (i) prevent children from performing harmful work, (ii) help and educate children leaving harmful work, (iii) reach out to children at risk, and (iv) make special efforts for female child labour.

The Convention requires governments to establish or designate appropriate mechanisms to monitor the implementation of the Convention. At the international level, the Convention will be subject to the ILO's monitoring procedure. All countries that ratify the Convention must report to the International Labour Office on what they have done to implement it. Their reports are then closely examined by a high level Committee of Experts which may request for more information, point out shortcomings, and request that corrective steps be taken.

The above Convention has offered a concrete protection to the child, addressing the following parameters: ‘(i) represents a major step forward in the struggle against child labour; (ii) consolidates the global consensus against the worst forms of child labour and will lead directly or indirectly to the liberation of millions of children who are trapped and exploited; (iii) covers a wide range of situations of extremely harmful child labour and offer enough flexibility to be adapted to the priorities in different countries; (iv) emphasises immediate and effective action by outlining in very specific terms how to realistically end the worst forms of child labour; and (v) motivate government to carry out their responsibility without delay.’

The structures and processes that this convention establishes at the country level will also be important for the longer term goal of ending child labour.

However, from the review of the Convention 182, there are few pitfall as follows: ‘(a) it does not explicitly define as one of the worst forms of child labour which by its very nature blocks children's access to education; (b) the Convention explicitly bans the forced recruitment of children for armed conflict, including conscription but doesn't refer to the participation of children in those conflicts; (c) the Convention should formally require that children and their families be consulted in the design and implementation of programmes of action; (d) no mention is given in the text of the Convention to the situation of children in

hidden work sectors, such as children working as domestic servants in homes of others; (e) the only mention of females in the Convention is in article 7, which calls for governments to take account of the special situation of females in the measures they undertake. While these general references can serve as the basis of significant government action, the seriousness of the problem of female child labour deserves much more specific commitments; (f) the Convention does not give a fixed deadline by which the worst forms of child labour must be eliminated. It will ultimately depend on the level of public concern, the political will of governments and the resources invested for exploited children. Governments that take a light approach will likely see children exploited in their country for many years to come, but those that take a sincere and comprehensive approach to ending the problem may achieve results in a very short time frame.  


The provisions of the Recommendation the Worst Forms of Child Labour Recommendation 1999 (No. 190) include the following: (i) what programmes of action referred to in article 6 of the Worst Forms of Child Labour Convention should aim at; (ii) what should be considered when ratifying countries determine in terms of article 3(d) of the Convention what the worst forms of hazards faced by children at work in those countries are; (iii) that detailed information and statistical data on the nature and extent of child labour should be compiled and kept up to date; (iv) that ratifying countries should establish or designate appropriate national mechanisms to monitor the implementation of national provisions for the prohibition and elimination of the worst forms of child labour; (v) that ratifying countries should, in so far as it is compatible with national law, cooperate with international efforts aimed at the prohibition and elimination of the worst forms of child labour; (vi) that ratifying countries should provide that the pre-defined worst form of child labour are criminal offences and also provide for other criminal, civil or administrative remedies to ensure the effective enforcement of national provisions for the prohibition and elimination of the worst forms of child labour; (vi) a list of other measures that could be used to prohibit and eliminate the worst forms of child labour; and (vii) enhancement of  

16 Ibid.
international cooperation and/or assistance among ratifying countries for the prohibition and effective elimination of the worst forms of child labour should complement national efforts.

7. **Children and Young Persons (Employment) Act 1966**

In Malaysia, the Government has taken a pro-active step to protect children and young persons in the workforce. The Malaysian Parliament has enacted the Children and Young Persons (Employment) Act 1996 which regulates the employment of children and young persons, and provided them with rights and protection in the course of employment. ‘Child’ and ‘young person’ is defined in section 1A of the Act as a person who is below the age of 14 and 16 respectively. Recently, however the Children and Young Persons (Employment) (Amendment) Act 2010 which came into effect on 01st day of March 2011, has increased employability age of children and young persons, in tandem with the ILO’s Minimum Age Convention 1973 (No. 138) which Malaysia ratified in 09th day of September 1997. Specifically, the word ‘child’ has been revised to refer to a person who has not completed his fifteenth year of age, while a ‘young person’ is construed as a person who, not being a child, has not completed his eighteenth year of age. In essence, the revision of the definition of ‘child’ and ‘young persons’ protects those under the age of 15 and 18, respectively.

The type of work that can be performed by child is stated in section 2(2) of the Act namely; ‘(a) employment involving light work suitable to his capacity in any undertaking carried on by his family; (b) employment in any public entertainment, in accordance with the terms and conditions of a licence granted in that behalf under this Act; (c) employment requiring him to perform work approved or sponsored by the Federal Government or the Government of any State and carried on in any school, training institution or training vessel; and (d) employment as an apprentice under a written apprenticeship contract approved by the Director General with who... a copy of such contract has been filed.’ The reasons for the above restriction is to protect the child workers from employment which may be unfavourable, dangerous and exploitative.
In relation to young person, section 2(3) of the Act provides the type of work that can be performed by a young person: ‘(a) any employment mentioned in section 2(2); and in relation to paragraph (a) of that subsection any employment suitable to his capacity (whether or not the undertaking is carried on by his family); (b) employment as a domestic servant; (c) employment in any office, shop (including hotels, bars, restaurants and stalls), factory, workshop, store, boarding house, theatre, cinema, club or association; (d) employment in an industrial undertaking suitable to his capacity; and (e) employment on any vessel under the personal charge of his parent or guardian.’ However, there are certain limitations imposed by the Act on female young person namely ‘(1) no female young person may be engaged in any employment in hotels, bars, restaurants, boarding houses or clubs unless such establishments are under the management or control of her parent or guardian; and (2) a female young person may be engaged in any employment in a club not managed by her parent or guardian with the approval of the Director General.’

As from the above, children and young persons are allowed to do ‘light work’ in family enterprises and licensed public establishments besides engaging in approved internships, apprenticeships and Government-sponsored work. However, the Children and Young Persons (Employment) Act 1966 does not define the term ‘light work’. This term was defined in the Children and Young Persons (Employment) (Amendment) Act 2010 as "any work performed by a worker" which entails "while sitting, moderate movement of the arm, leg and trunk" or "while standing, moderate movement of the arm". The term ‘hazardous work’ was also defined in the 2010 Act as "any work that has been classified as hazardous work based on the risk assessment conducted by a competent authority on safety and health determined by the Minister of Human Resource". In this regard, greater efforts have been made to ensure that children and young persons who enter the job markets are safe from harmful or dangerous working environments which might be detrimental to their rights and interests.

The Children and Young Persons (Employment) (Amendment) Act 2010 also imposes heavier punishment for offenders and provides for a term of imprisonment of one year or a fine not exceeding RM5,000.00 or both. In the case of a second or subsequent offence, the amended section 14 provides a term of imprisonment not exceeding three years or a fine of
not more than RM10,000.00 or both. The increase in penalties would go some way in ensuring fuller compliance of the Act and serve as an effective tool to help protect working children and young persons. Further, the 2010 Act also provide for offences committed by a body corporate, partnership, society or trade union, whereby persons representing an offending body may be charged jointly or severally in the same proceeding.

8. CONCLUSION

The exploitation of children and young persons in the workplace is a global phenomenon. States parties have shown their commitment to curb child labour which does not stop at the mere ratification of the international instruments. It requires implementation in the domestic laws and followed by proper enforcement. Most of countries have enacted and/or modified their laws so as to comply with their obligations under the international instruments. For example, Malaysia, through its Children and Young Persons (Employment) (Amendment) Act 2010 has taken various measures to curb this problem. The 2010 Act requires concerted efforts from all sections of the society to eradicate the problem. Vigorous enforcement of the Act is necessary and must be made a priority so as to ensure that young workers are not exposed to any form of exploitation or danger that may interfere with their education, health, moral or social development. Continuous commitment and support from all sections of the society shall play a great role in realising the aim of combating child labour.

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CRYPTOCURRENCY: TO REGULATE OR NOT TO REGULATE?

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Abstract

Cryptocurrency, like Bitcoin, is a digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank. It is an emerging financial technology enabled by innovation, increasingly popular among global Internet users, and more interestingly, it challenges the existing financial and regulatory rules on the currency and payment systems of the world today. On the other side, certain cryptocurrency like Bitcoin has been actively used as payment tools for illicit transactions. Both the "promising" and "challenging" faces of cryptocurrency triggers causes for concerns for policy makers, not only from financial sector, but also legal and technological sectors. The decentralized nature of cryptocurrency creates unique problems for the government to regulate or impose any regulatory requirements. This paper argues that, in order for Malaysia to remain at the forefront of financial and digital innovation it is timely to look at the question on whether to formulate certain policy and regulatory framework on the use of cryptocurrency in Malaysian market. The answer can pave the way for Malaysian digital citizens to potentially grab the opportunities made possible by the cryptocurrency technology. For this purpose, the researchers seek to study the features of cryptocurrency and the experiences from policymakers in other jurisdictions in dealing with the matter. Both doctrinal legal research and comparative study will be employed and it is expected that the researcher will recommend certain policy issues for Malaysia to consider.

Keywords: Cryptocurrency, Bitcoin, Digital Money, Electronic Commerce, Regulations

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1. Introduction

Cryptocurrency is a digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank. It is an emerging financial technology enabled by innovation, increasingly popular among global Internet users, and more interestingly, it challenges the existing financial and regulatory rules on the currency and payment systems of the world today. One of the leading cryptocurrency is Bitcoin. For that matter, this paper looks at how Bitcoin emerges and “challenges” our traditional concept of the currency.

The main reason why Bitcoin –and many other cryptocurrencies– is getting increasingly popular is because of its efficiency and low-cost transaction fees as there is no intermediary involved. It offers significantly less banking bureaucracy for one to set up, send and received payments across borders. This innovation is undoubtedly the key for leveraging small and medium enterprises as it becomes alternative to expensive credit cards and solution for micropayments. Bitcoin was created and introduced to the world since 2009 by the pseudonym hacker Satoshi Nakamoto (Trautman, 2014: 14). To date, Bitcoin is the most well-known virtual currency and is also addressed as cryptocurrency since it is created through a special process based on cryptography (Kurbalija, 2014: 128).

Be innovative as it may, it was found that cryptocurrency is actively used as payment tools for illicit transactions. According to the US Secret Service, Bitcoin, the leading cryptocurrency today, is preferred by criminals because it offers the greatest degree of anonymity for both users and transactions, the ability to quickly and confidently move illicit proceeds from one country to another, and widespread adoption in the criminal underground. Both the "promising" and "challenging" faces of cryptocurrency triggers causes for concerns for policy makers, not only from financial sector, but also legal and technological sectors. The decentralized nature of cryptocurrency creates unique problems for the government to regulate or impose any regulatory requirements. The lack of a centralized entity has made it more difficult because there is no entity that can be held accountable to users, merchants or investors for any harm that is caused.
In this paper, we will discuss what Bitcoin is technically and the pros and cons of Bitcoin. Then we will review the countries that allow and ban Bitcoin with justifications from those with and against it. Currently, as Kurbalija (2014:129) notes, it is left to the sovereign states to regulate virtual currencies. The focus of discussion is then directed towards legality of Bitcoin in Malaysia, the Bitcoin digital communities in Malaysia and cyber law and cyber crime in Malaysia. With relation the concept of economic efficiency and cashless society in Malaysia we will then discuss and justify on why Bitcoin should be regulated in Malaysia with respect to the current global development, awareness, acceptance and growth in the digital currency technology as well as its relation with Central Bank of Malaysia Financial Blueprint 2011-2020 and the Malaysian Financial Service Act 2013.

2. How Cryptocurrency Works: An Emerging case of Bitcoin

Bitcoin is the world’s best-known virtual or cryptocurrency widely used for commercial transactions (Quest, 2015:1). Made up entirely of complex code & algorithms, Bitcoin has no physical existence. Saunders (2015: 2) explained that there are no physical notes or currency prints denominated by Bitcoin. Quest (2015: 1) further stated that Bitcoin is a form of electronic cash that allows users to make online payments or transactions directly and efficiently from one party to another without using financial institutions as intermediaries. Bitcoin was created to be free and independent of any regulations from any financial institutions. To achieve this the Bitcoin utilizes a decentralized structure which is made up of users collectively collaborating via peer-to-peer (P2P) networks to authenticate and maintain a public ledger of Bitcoin transactions (Chan, 2014: 2). This means that unlike conventional currencies, the Bitcoin is free from any form of central authority or control.

The core of Bitcoin’s decentralized system lies inside its highly innovative publicly downloadable ledger named ‘blockchain’. Every user’s Bitcoin transaction worldwide has to be entered into the linked public ledger (blockchain) to be authenticated via complex computer encryption, rendering it impossible to create forged Bitcoins (Saunders, 2015: 2). Using open-source and downloadable software available at <www.bitcoin.org> anyone can generate a unique & anonymous alphanumerical address, known as the ‘Bitcoin wallet’,
which can receive or send Bitcoin to make online purchases or payments (Quest, 2015:2). Similar to creating an email account, creating a Bitcoin wallet does not require any validated information about the person who created his/her wallet. This means that even though all transactions are recorded and can be viewed in the ‘blockchain’, the individual user’s wallet owner still remains predominantly anonymous. All Bitcoin transaction can be viewed real time at <www.blockchain.info>.

Naturally, one may ask how Bitcoin itself is obtained. Since it’s creation, there are three major means of obtaining Bitcoin – all which require the users to have (download & register) a Bitcoin wallet prior to any transactions. First is converting (or buying) normal fiat currency via online Bitcoin Exchange Companies; Second mean is by accepting Bitcoin for goods and services sold. The third mean is by ‘mining’ new Bitcoins (Volastro, 2015). While the first and second means of obtaining Bitcoin are the most common and similar to buying or selling a Malaysian product or service using a foreign currency, the third method, i.e. ‘mining’ needs to be put into a practical context for easier understanding of this new concept.

As an example, let us take the analogy of the ‘conventional money’ which is – for this exercise - tied to an intrinsically valued material such as gold (Nakamoto: 4). Gold deposits are limited as they are non renewable source. Gold miners in a certain country generally needs to spend their own money capital for mining equipment to extract gold in a certain location. Once that gold is mined, they are registered and added to the ‘money circulation’ in the country. Earlier gold explorers (the pioneering group) needs lesser equipment to successfully mine gold in that location. As more gold are extracted, and as time goes by, gold mining becomes harder and deeper, and more expensive mechanical equipment and resources are needed to obtain gold to add gold to the financial circulation.

Similar to that above analogy, Bitcoin numbers itself is limited. As per its coding protocol the total number of Bitcoin designed by its founders allowed to be ‘mined’ is limited to 21 million Bitcoins only (Chan, 2014: 2). These Bitcoin are ‘mined’ by miners using their computers and electricity to solving algorithms to verify Bitcoin transaction in the ‘blockchain’ (Nakamoto: 4). In line with its decentralization nature, anyone can become a Bitcoin miner provided they have sufficient computer power to solve the ‘blockchain’ algorithms. All appropriate mining software can be easily found & downloaded online. Chan
(2014: 2) noted that currently miners who successfully solved verifying transaction algorithms is awarded 25 unique new Bitcoins. Additional incentives is that the miner is also rewarded by the fees paid by users sending transactions.

Just like the gold analogy, in the earliest stage of Bitcoin introduction in 2009 where there are only a few Bitcoin users and transactions to be verified, mining activities are easily solved with normal consumer PC’s (Volastro, 2015: 17). However, over the last few years – as Bitcoin goes mainstream; miners had to use faster computers, including application specific integrated circuits (ASIC) to solve harder equations. Some Bitcoin miners collaborate & pool with each other to combine computing power and the percentage of reward are divided equally as per respective contributions.

3. **Pros and Cons of Bitcoin**

Bitcoin is considered as an emerging financial technology. Top universities in the world such as Harvard and Oxford universities are advocating its students to use Bitcoin to learn and witness the progress of this technology. There are advantages and disadvantages of using Bitcoin. The main reason why people are attracted to use Bitcoin is that it avoids the high transaction fees from banks because there is no third party intermediary. When making a Bitcoin transfer, the transaction is cheaper and faster than the bank transaction (Saunders, 2015: 3). Bitcoin offers significantly less capital cost and banking bureaucracy for one to set up, send and received payments globally across country boarders. All one need to do is to simply register and download the Bitcoin application software to make global money transaction. Hence, Bitcoin contribute small businesses alternatives to expensive credit cards and facilitate micropayments.

Additionally, as an inexpensive fund-transfer system, Bitcoin enable migrants& foreign labor workers to make cheaper remittances of payments to their difficult families in developing countries by providing less than 0.0005 BTC transaction fees on the Bitcoin network. In contrast, transaction fees using Western Union and MoneyGram is extremely expensive. For instance, in the first quarter of 2013, the global average fee for sending remittances was 9.05 percent. In fact, it will take several business days to transfer the funds (Brito & Castillo, 2013: 14).
Bitcoin offers the promise of improving the quality of life for the world’s poorest and has the potential to combat poverty and oppression from tyrant regimes or escaping criminal-laden environments. People who are living in developing countries are having difficulties in making payment because of the impediments to developing traditional branch banking in poor areas. Thus, people in developing countries have turned to mobile banking services for their financial needs (Brito & Castillo, 2013: 15). It is very hard and challenging with regard to the issue of reducing world poverty especially in reducing the transaction costs of remittances. The World Bank reported in its Remittance Market Outlook that "remittance prices are high for many reasons, including underdeveloped financial infrastructure in some countries, limited competition, regulatory obstacles, lack of access to the banking sector by remittance senders and/or receivers, and difficulties for migrants to obtain the necessary identification documentation to enter the financial mainstream."

In turn, issues of global poverty are directly related to the propensity for outbreaks of civil war and terrorism. Bracking and Sachikonye (2008) find that: “Remittances are critical to household wellbeing in Zimbabwe… Indeed, it has become a commonplace in the research area of migration and development, and its subfield of poverty reduction and remittance studies, that international migration can have a positive impact on poverty reduction through the generation of migrant remittances, and, for the vast majority of researchers, that remittances are positively associated with economic growth. Within international development, much hope has been invested that remittances provide an accessible pathway out of poverty, and an alternative to inter-governmental and official systems of development assistance.”

There are also disadvantages associated with using Bitcoin. The Bitcoin system is a fairly new system and is still at its infancy stage with incomplete features that are in development. Thus, Bitcoin poses unique risks because it is stored electronically and if the transaction has been made and processed, the transaction are not reversible (Tu & Meredith, 2015: 299). Just like cash money, Bitcoin can be lost or stolen. For example, Stefan Thomas who is the Bitcoin user has accidently erased two copies of his e-wallet and lost the account password to his third copy. He suffered lost immediately about 7,000 Bitcoins worth $140,000 in 2011 (Simser, 2015: 8).
Besides, as Bitcoin becomes more prevalent, the risk of theft is likely to increase (Simser, 2015: 8). Users’ Bitcoins could be stolen through malware and hacking and it does not only limited to personal individual computers but also businesses are been targeted (Tu & Meredith, 2015: 299). For instance, it was reported by the BBC in 2013 that Bitcoin users have been warned by the Bitcoin Foundation stating that some Android wallet applications had programming flaws resulting on lost of Bitcoin money by hackers theft or false code. A research fellow at the Oxford Internet Institute, Dr Joss Wright said that cryptographers relied heavily on a computer's ability to generate random numbers in order to keep information secure. But, he added, that computers did not always do this reliably. "Choosing good random numbers is the key issue," Dr Wright said. "If the random numbers can be predicted by somebody else, this could lead to all sorts of security problems."

In a virtual currency such as Bitcoin, which operates without central administrator and it is pseudonymous in nature, criminals can use it to transfer and process the money for illicit goods and services. According to US Secret Service, digital currencies like Bitcoin is preferred by criminals because it offers the greatest degree of anonymity for both users and transactions, the ability to quickly and confidently move illicit proceeds from one country to another, and widespread adoption in the criminal underground (Trautman, 2014: 3). For example, Bitcoin have been linked to numerous types of crimes, including facilitating marketplaces for: assassins, attacks on businesses, exploiting children (including pornography), corporate espionage, counterfeit currencies, drugs, fake IDs and passports, high yield investment schemes (Ponzi schemes and other financial frauds), sexual exploitation, stolen credit cards and credit card numbers, and weapons.

We can refer to an underground black-market website known as Silk Road which emerged as the most sophisticated and extensive criminal marketplace on the internet. In October 2013, the Guardian reported that the US authority immediately shut down it’s operation and confiscated all Bitcoins associated with Silk Road in a seizure totaling 26,000 BTC, worth $3.6 million at the time of the transfer. Recently in 2015, Reuters also reported that Ross William Ulbricht who is the owner and operator of Silk Road have been arrested and he was found guilty by a federal jury in Manhattan. He was guilty of narcotics and other
charges for helping to enable around $200m of anonymous online drug sales using Bitcoins and he faces up to life in prison for the criminal action.

From the above discussion, for some, the most attractive aspect of Bitcoin is that it provides a low-cost of transacting across borders and faster than bank transaction. However, due to its anonymous characteristic, it may attract criminals and terrorist to use it for their illicit activities. Besides, the decentralized nature of Bitcoins creates unique problems for the government to regulate or impose any regulatory requirements. The lack of a centralize entity have make it more difficult because there is no entity that can be held accountable to users, merchants or investors for any harm that is caused.

4. Governments’ Responses

There are many governments in the world that have taken their own standpoint towards Bitcoin – whether on legalizing and regulating the usage of Bitcoin; ban it altogether; or only issuing official statements by the relevant authorities in that specific country. From a survey made by Global Legal Research Directorate Staff from the Law Library of Congress, only two countries have imposed specific regulations regarding the usage of Bitcoin which are China and Brazil (Global Legal Research Center, 2014). Bitcoin has proven to be a growing contentious issue among regulators and law enforcers in an attempt to control and regulate its uses. This is due to the fact that while there are many benefits from digital currency, it also has a potential utilization for criminal activities such as money laundering and facilitating transaction of illegal goods, possible impact on national currencies and the implication on its use for taxation.

The Global Legal Research Center also reported that among the countries that allow usage of Bitcoin and have established regulations on it include the United State (US), Brazil, Australia, Norway, Canada, Denmark, European Union (EU), France, Germany, Hong Kong, Netherlands, New Zealand, and Russia.

As in the United States, Gatto and Broeker (2015: 430) explained that the main objectives for public policy that was considered for virtual currencies regulations are: (1) providing consumer protection, (2) preventing money laundering, (3) maintaining the safety and soundness of the financial system, and (4) preventing tax evasion. These are in
accordance to the existing legal and regulatory framework applicable to virtual currencies. In March 2013, an agency within the US Treasury Department namely Financial Crimes Enforcement Network (FinCEN) issued interpretive guidance clarifying the applicability of the Bank Secrecy Act (BSA) to virtual currencies and defining circumstances on how virtual money users, administrators or exchangers could be categorized as money service businesses (MSB) (Middlebrook & Hughes, 2013).

Under the Currency and Foreign Transactions Reporting Act of 1970 (commonly referred to as the "Bank Secrecy Act" or "BSA") registered US financial institution are required to assist US governments agencies to detect and prevent money laundering. Hence under FinCEN’s guideline the administrator or exchanger of Bitcoin falls under provisions inside the “BSA Regulation” which requires establishment of extensive customer verification, recordkeeping, reporting, and other anti-money laundering requirements for financial institutions (Gatto and Broeker, 2015: 430).

FinCEN Director Jennifer Shasky Calvery observed that the impact of troublesome and illicit virtual currencies (Bitcoin) providers are mitigated by the positive innovative contributions provided by virtual currencies, and the financial inclusion that they might offer society. There are many whole hosts of emerging technologies in the financial sector have proven their capacity to empower customers, encourage the development of innovative financial products, and expand access to financial services. These positive advances -- which comply with FinCEN’s guidelines and regulation -- are desired to be continued (Trautman, 2014: 10). We can say based on the fact that Bitcoin does helps illicit business dealings, but so does the regular $100 bill, is one of main argument point which gave birth to the regulation of Bitcoin in United States.

Meanwhile, the same Global Legal Research Center also reported in 2014 that countries that allow the usage of Bitcoin but still let it unregulated are Argentina, Belgium, France, India, Indonesia, Malaysia, Japan, Singapore, South Korea and Turkey. These countries however issued official statements not recognizing Bitcoin as a legal tender and consequently warns users of its associated risks in using the virtual currency. At the time of writing, the central banks in these countries appear to be disassociating themselves with the high uncertainties in Bitcoin, especially in the technical and regulatory challenges as
compared to normal currency (De Vries, et.al., 2014). Hence in these countries, Bitcoin exists in a legal gray area where it is not recognized, but not outlawed either.

It is worth to note that many of these developed countries such as the USA, South Korea, Japan, Singapore, Germany, Australia, Canada have their financial institution and investment banks partnering in Bitcoin Blockchain startup companies to take leverage in using the innovative Blockchain technology to improve efficiency of current banking system. Singapore, for example, has started to follow suit on considering Bitcoin and related cryptocurrency development and regulation. It’s prime minister Lee Hsien Loong has urged Singaporean banks to be innovative specifically in leveraging emerging technology such as the blockchain for real-time gross settlement or better trade finance verification. Moreover, the Singapore central bank in 13 March 2014, stipulate that it plans to regulate virtual currencies to address potential money laundering or terrorism finance risks they might pose. Deputy Managing Director of Monetary Authority of Singapore (MAS), Mr. Ong Chong Tee, said in an official media release in March 2014, that “MAS is taking a targeted regulatory approach to virtual currencies to specifically address money laundering and terrorist financing risks. Consumers and businesses should take note of the broader risks that dealing in virtual currencies entails and should exercise the necessary caution.”

At the opposite end of the spectrum are those countries that explicitly outlaw or discourage the use of Bitcoin, such as China, Iceland, Thailand and Vietnam. Banks and financial institutions in China are prohibited from dealing or accepting in Bitcoin or any of its related products. In a “Notice on Precautions Against the Risks of Bitcoins” issued by the People’s Bank of China, the Ministry of Industry and Information Technology, China Banking Regulatory Commission, China Securities Regulatory Commission, and China Insurance Regulatory Commission dated Dec. 3, 2013, it states that “at this stage, financial and payment institutions may not use Bitcoin pricing for products or services, buy or sell Bitcoins, or provide direct or indirect Bitcoin-related services to customers, including registering, trading, settling, clearing, or other services; accepting Bitcoins or using Bitcoins as a clearing tool; and trading Bitcoins with Chinese Yuan or foreign currencies”. De Vries et. al. (2014) opined that the main reason on why these countries ban Bitcoin or other cryptocurrencies is that they are viewed in potentially damaging the national currency (as
means to government to maintain capital control) and potentially be misused to assist in untraceable illicit activities, service and trades.

5. **Regulating Bitcoin in Malaysia?**

   According to a check made by the Sunday Star news dated 30th March 2014, Malaysia has at least twelve local Bitcoin-related groups on Facebook, including Malaybtc Bitcoin, Bitcoin Malaysia #1 Group, Bitcoin Malaysia Open Group, Bitcoin Malaysia (Trader), Cryptocurrency Malaysia (Bitcoin, Litecoin, Dogecoin, etc) and Malaysia Bitcoin Info. As of July 2014, there are about 21 Bitcoin-accepting merchants in Malaysia and they are primarily located in the Klang Valley or online small businesses (Colbert, 2014). A Singaporean based company Numoni Pte. Ltd. which developed and launched the Bitcoin Auto Vending Machine (AVM) in Malaysia estimated that there were some 2,000 Bitcoin users in Malaysia. Overall, the numbers of Bitcoin user in Malaysia is still low and is at its infancy stage as compared to the 5.3 million worldwide users of Bitcoin as of December 2015, as reported by the website `<blockchain.info>` (Bitcoin open public ledger).

   An official statement by Bank Negara Malaysia dated 2nd January 2014 stated that “Bitcoin is not recognised as legal tender in Malaysia. The Central Bank does not regulate the operations of Bitcoin. The public is therefore advised to be cautious of the risks associated with the usage of such digital currency.” Apart from this Central Bank’s announcement, there is no other specific comment or announcement on Bitcoin found other potentially-interested agencies in Malaysia. Based on this, few things can be preliminarily understood: Firstly, that Bitcoin is not legally recognised as a mean of tender in Malaysia. Which means, their use may not be enforced in the courts in cases of dispute. Secondly, the Bank Negara has not issued any regulations on the operation of Bitcoins. Yet, this statement can also be understood that there is no prohibition of using it on personal basis. Therefore, as of now there is no single regulation on usage of virtual currency in Malaysia. Southurst from Coindesk (2014) argued that it is still speculative whether the central bank is only disassociating themselves with Bitcoin responsibilities or whether they will banning it in the future.
As cryptocurrency is not recognized as a legal tender in Malaysia there is a potential significant gap on the efforts to wholly achieve the efficiency of a cashless society and e-payment. This is because as we are living in a open information technology age, where an idea or concept could be embraced by people quickly once gone viral, the application of cryptocurrency or specifically Bitcoin is only awaiting time before it becomes mainstream among the Malaysian people. This is true especially where almost everyone in Malaysia connected and have access to the Internet.

Nevertheless, it is clear that the Malaysian Government had started to look at the issue of cryptocurrency. It is argued that more needs to be done to take a closer look and consider further regulatory framework on the growth and usage of Bitcoin or any other cryptocurrency innovation. This paper limits itself to this speculative comment and reserves the remaining work for further research. The writers argue that there is a strong reason for Malaysian government to look further at regulating the cryptocurrency in near future due to some concerns. Firstly, that we are moving towards a cashless society. The convergence of mobility, social media, IT cloud models and fast data movement catalyses the digitisation of banking channels thus paving way towards a ‘cashless society’ in Malaysia. “Cashless Society” concept is where the usage of physical payment methods such as cash and cheques diminish and give way to more cashless mediums such as debit and credit cards, online cards, online credit transfers, mobile payments, banking portals, digital wallets, cryptocurrencies and more.

Malaysia is currently in the transitioning stage from cash to cashless society. This upward trend is influenced by factors such as ease of access to financial services, uptake of cashless payment solutions by merchants, technology and infrastructure readiness, and macroeconomic and cultural aspects. For banks and many businesses in the financial sector, a cashless society will substantially lower their costs by removing the need to handle cash on a daily basis. For the end users (customers), going cashless means ease of payment and ensures safer environment towards any losses due to potential crime activities such as pick-pocketing, house breaching and wallet stealing.
According to Bank Negara Malaysia’s financial blueprint 2011-2020, the migration to e-payments (cashless) is identified as a key enabler for greater economic efficiency, productivity and growth as Malaysia transitions towards a high value-added, high-income economy. This can be accelerated by making the payment landscape in Malaysia to be cost effective, safe, fast and easy to use. BNM has been a major driver for the greater adoption of e-payments with coordinated efforts with several economic sector and the Malaysian government to achieve this agenda. Hence, based on the discussions above it is highly recommended that the Malaysian Government utilizes the FSA 2013 to also extend its regulatory framework to Bitcoin and other digital currencies. This regulation of Bitcoin and virtual currencies enables it to be legally used by the masses with consumer protection and financially liberalized it, thus opening up for more extensive ‘legal’ positive technological innovations for the Malaysian financial system.

6. Conclusion

From the overall discussion we can see that the cryptocurrency and Bitcoin is getting more popular and growing in terms of users and transaction volumes. Like any other innovation, cryptocurrency carries enormous advantages and disadvantages at the same time. From legal and regulatory perspective, this innovation provides yet another avenue for creativity and anticipation. Governments worldwide differ in their attitude and responses. Malaysia had so far issued a minimalist approach while possibly adopts a wait-and-see attitude on the cryptocurrency. This paper argues that the Government needs to take a closer look and consider putting a clearer regulatory response, which will make the innovative cryptocurrency as a solution rather than another source of problems. The writers proposed for a further research on the types of regulatory framework that can be considered for this digital currency innovation.
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ME-C APP: ENHANCING LEGAL KNOWLEDGE VIA SMARTPHONE

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Abstract

Knowledge and advancement in technology are indispensable in today’s living. One of the most popular products of the advance in technology is the smartphone. As smartphones continue to grow in popularity, it is important to look into how legal education and understanding could be enhanced via the applications (apps) which are available in the smartphone. This paper discusses a new invention of smartphone applications which could enhance the understanding of the public, academics and legal practitioners on Malaysia Federal Constitution. The app, named as ME-C contains all provisions of the Constitution and can be utilized for educational purposes and without any payment. ME-C contains the features of Contents; Provisions; and Other Links, which can be downloaded for free. Users may also subscribe to additional features such as cases summary; professional reviews; other documents; and other useful functions: search; share; and settings, via in-app purchase. This paper involves a multidisciplinary research of IT and law.

Keywords: application, smartphones, constitution, law, Malaysia

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1. Introduction

Mobile application (app) is a self-contained program or piece of software designed to fulfill a particular purpose that users can download onto a mobile device such as smartphones and tablet computers. Most devices are sold with several apps bundled as pre-installed software such as a web browser, email client, calendar, mapping programme, and other media apps, which users can utilize them conveniently at no cost. These preinstalled apps can be removed by an ordinary uninstall process or simply be disabled if unnecessary. Where the software does not allow the uninstallation, some devices can be rooted to eliminate the unwanted apps. This process can be done with some manuals reference or expert consultation.

Apps that are not preinstalled are usually available through distribution platforms called app stores like the Apple App Store, Amazon Appstore, Blackberry App World, Google Play, Nokia Store, Samsung Apps, Windows Phone Store, and Windows Store (for tablets and laptops running Windows 8 and above), depending on the operating system of the devices. Some apps are free, which users can download and install it on their mobile devices, while others come with a price. Paid apps would cost vary based on their functions and features, and the same app can cost a different price depending on the mobile platforms.

In the mobile realm, terms like native app, mobile web app and hybrid app\(^5\) are often used and some might get confused to differentiate between the terms.

2. Native Apps

Native apps live on the device and are accessed through icons on the device home screen. Native apps are installed through an application store (such as Google Play or Apple App Store). They are developed specifically for one platform, and can take full advantage of all the device features — they can use the camera, the GPS, the accelerometer, the compass, the list of contacts, and so on. They can also incorporate gestures (either standard operating-\(\ldots\)

system gestures or new, app-defined gestures). And native apps can use the device’s notification system and can work offline.

3. Mobile Web Apps

Web apps are not real applications; they are really websites that, in many ways, look and feel like native applications, but are not implemented as such. They are run by a browser and typically written in HTML5. Users first access them as they would access any web page: they navigate to a special URL and then have the option of “installing” them on their home screen by creating a bookmark to that page. Web apps became really popular when HTML5 came around and people realized that they can obtain native-like functionality in the browser. Today, as more and more sites use HTML5, the distinction between web apps and regular web pages has become blurry.

4. Hybrid apps

Hybrid apps are part native apps, part web apps. (Because of that, many people incorrectly call them “web apps”). Like native apps, they live in an app store and can take advantage of the many device features available. Like web apps, they rely on HTML being rendered in a browser, with the caveat that the browser is embedded within the app. Often, companies build hybrid apps as wrappers for an existing web page; in that way, they hope to get a presence in the app store, without spending significant effort for developing a different app. Hybrid apps are also popular because they allow cross platform development and thus significantly reduce development costs: that is, the same HTML code components can be reused on different mobile operating systems. Tools such as PhoneGap and Sencha Touch allow people to design and code across platforms, using the power of HTML.

In short, native and hybrid apps are installed in an app store, whereas web apps are mobile-optimised webpages that look like an app. Both hybrid and web apps render HTML web pages, but hybrid apps use app-embedded browsers to go online.
5. Types of Mobile Apps

Technically, users would usually see 20 to 30 individual categories of apps that can be downloaded in the app stores, from education to business to shopping, so on and so forth. This categorization is to ease users to find the apps they need. However, apps fall into three main types or categories: utility, productivity, and immersive.\(^6\)

i. Utility apps

Utility apps are quick-access apps that get users to the information or tasks they need performed right away. Apps featuring weather information, stock market, traffic reports and sports scores are example of utility apps. From a programming perspective, characteristics of most utility apps include minimal setup; simple flow and layouts; standard user interface elements; and one or two screens.

ii. Productivity apps

Productivity apps are more complex and fully featured than utility apps, and the most varied of the three categories. Anything from social media monitoring and updating apps to Spotify and Instagram would technically be considered productivity apps. Though they are a diverse bunch of apps, from Facebook and Apple's Mail and Calendar apps to Netflix and Safari, most productivity apps can be identified by the following hallmarks: hierarchical structure; accelerators and shortcuts; lists and detail views along with toolbars and tab bars; text entry capabilities; content creation and or management; and alerts. Both productivity and utility apps follow the Human Interaction Guidelines (HIG) for iOS or Android, though Android are not enforced.

iii. Immersive apps

Immersive apps focus solely on content. These apps are designed to create a unique experience without standard controls or reliance on the iOS HIG. Each immersive app is a unique snowflake, so there are no defining characteristics of this category. But they are very

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often video games or other super-interactive apps like music-making apps, e.g. Angry Birds, Candy Crush, Ocarina, and Figure.

6. Development of mobile apps

The term “app” is a shortening of the term “application software”. Mobile apps were originally introduced for general productivity and information retrieval, including email, calendar, contacts, stock market and weather information. But, public demand and the availability of developer tools drove rapid expansion into other categories, such as those handled by desktop application software packages, i.e. productivity and immersive apps. According to Gartner.com the top 5 apps which most people spend time to every month are:


Apparently, usage of mobile apps has become increasingly prevalent across mobile phone users. A study by comScore in May 2012 reported that 51.1% mobile subscribers used apps, while 49.8% browsed the web on their devices. A market research firm Gartner estimated that 102 billion downloads of app recorded in 2013 (91% of them are free), which could generate USD26 billion in the United States alone. By second quarter 2015, the Google Play and Apple App Store have generated USD5 billion. In 2016 alone, the expected revenue for app downloads is USD24.5 billion and in 2017, it is estimated that over 268 billion downloads of app and USD77 billion in revenue will be made. An analyst report estimates that the app economy creates revenues of more than €10 billion per year within the

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European Union, while over 529,000 jobs have been created in 28 EU states due to the growth of the app market.\textsuperscript{12}

Google Play (formerly known as the Android Market) is an international online software store developed by Google for Android devices. It opened in October 2008 and remain the number one smartphone platform in 2012. In July 2013, the number of apps downloaded via the Google Play store surpassed 50 billion, of the over 1 million apps available. While in June 2014, the Apple App Store reached 75 billion app downloads and features 1.2 million apps in the Apple iTunes store.\textsuperscript{13} In August 2014, there were approximately 1.3+ million apps available for Android and the estimated number of app downloads from Google Play was 40 billion. As of February 2015, According to Statista.com the number of apps available on Google Play exceeded 1.4 million.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
 & Share (%) of Smartphone Subscribers &  &  \\
 & Feb-12 & May-12 & Point Change \\
\hline
Total Smartphone Subscribers & 100.0\% & 100.0\% & N/A \\
Google & 50.1\% & 50.9\% & 0.8 \\
Apple & 30.2\% & 31.9\% & 1.7 \\
RIM & 13.4\% & 11.4\% & -2.0 \\
Microsoft & 3.9\% & 4.0\% & 0.1 \\
Symbian & 1.5\% & 1.1\% & -0.4 \\
\hline
\end{tabular}
\caption{Top Smartphone Platforms 3 Month Avg. Ending May 2012 vs. 3 Month Avg. Ending Feb. 2012 Total U.S. Smartphone Subscribers Ages 13+ \textsuperscript{12}Source: comScore MobiLens}
\end{table}


7. **Malaysia Federal Constitution**

The Federal Constitution of Malaysia is the supreme law of Malaysia, which came into force in 1957. The Federation was initially called the Federation of Malaya (in Malay, Persekutuan Tanah Melayu) until the formation of Malaysia in 1963. The Constitution establishes the Federation as a constitutional monarchy having the Yang di-Pertuan Agong as the Head of State whose roles are largely ceremonial. It provides for the establishment and the organisation of three main branches of the government: the bicameral legislative branch called the Parliament, which consists of the House of Representatives (in Malay, Dewan Rakyat) and the Senate (Dewan Negara); the executive branch led by the Prime Minister and his Cabinet Ministers; and the judicial branch headed by the Federal Court.

The constitution came into force on 27 August 1957 but formal independence was only achieved on 31 August 1957. The constitution was then amended in 1963 to admit Sabah, Sarawak and Singapore as additional member states of the Federation and to make the agreed changes to the constitution that were set out in the Malaysia Agreement, which included changing the name of the Federation to “Malaysia”. A statement by the Malayan permanent representative to the 18th session of the 1283 meeting of the United Nations General Assembly stated that, “constitutionally, the Federation of Malaya, established in 1957 … and Malaysia are one and the same international person. What has happened is that, by constitutional process, the Federation has been enlarged by the addition of three more States … and that the name ‘Federation of Malaya’ has been changed to ‘Malaysia’.” Thus, the establishment of Malaysia did not create a new nation as such but was simply the addition of new member states to the Federation created by the 1957 constitution, with a change of name.

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14 See Article 32(1) of the Constitution which provides that “There shall be a Supreme Head of the Federation, to be called the Yang di-Pertuan Agong...” and Article 40 which provides that in the exercise of his functions under the Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or an authorised minister except as otherwise provide in certain limited circumstances, such as the appointment of the Prime Minister and the withholding of consent to a request to dissolve Parliament.

15 For the establishment of the legislative branch see Part IV Chapter 4 – Federal Legislature, for the executive branch see Part IV Chapter 3 – The Executive and for the judicial branch see Part IX.

The Federal Constitution is the supreme law of Malaysia, whereby according to Article 4(1), any law passed after 31 August 1957 which is inconsistent with the Constitution shall be void. Article 162(6) also states that any court or tribunal applying the provision of any law in operation immediately before 31 August 1957 may apply it with such modifications as may be necessary to bring it into accord with the Constitution. Fundamental liberties in Malaysia are set out in Article 5 to Article 13 of the Constitution, inclusive of liberty of the person; slavery and forced labour prohibited; protection against retrospective criminal laws and repeated trials; equality; prohibition of banishment and freedom of movement; freedom of speech, assembly and association; freedom of religion; rights in respect of education; and rights to property.

8. **Malaysia E-Constitution App**

Malaysia E-Constitution (ME-C) is a mobile app that can be categorized under native productivity app, whereby it lives on mobile devices and has all the contents that can be accessed offline. Due to the fact that there is none apps about the Malaysian laws available on app stores, ME-C is the first-of-its-kind in Malaysia. The app is constructed for educational purposes to enhance public knowledge on law, specifically the Malaysian laws. The development of this app is basically to ease Malaysians in general to understand the contents of the Federal Constitution, the supreme law of Malaysia. Objectively, it can be utilized for educational purposes or as general information by anyone, be it students, academics, researchers, legal practitioners, policy makers, or laymen.

The app has basic features such as Contents; Provisions; and Other Links, which is very helpful to get the legal information as it is handy and can be accessed anytime, anywhere. To make it friendly and useful for everyone, the app also features Cases Summary; Professional Reviews; and Related Documents, with other functions: Search; Share; and Settings. However, for the time being, these additional features are still under research and development, and that is to be embedded in the app in the next build. Tentatively, users may subscribe to the additional features at a reasonable fee via In-App Purchase (IAP). The subscription allows users to get accessed to thousands of legal documents from paid online...
databases, for instance The Malayan Law Journal (MLJ) – LexisNexis Malaysia; The Current Law Journal (CLJ); eLaw; Common LII; et cetera.

Building the app

The time where mobile apps development is only for elite programmers who know the native platform language is over. People who do not have any prior programming knowledge can also develop mobile apps on their own. With the dawn of hybrid mobile app technology, it is possible for anyone to create mobile apps using HTML, CSS and JavaScript. Nevertheless, creating an app without coding on a web-based software would result to a simple mobile app, while building a complex mobile app needs more skillful programming to begin with. Certainly, there are plenty of web services that enable developers to create simple mobile app for free, namely Appy Pie; Nativ; Kinetise; Apps Bar; AppMakr; Mobincube; AppsGeyser; Infinite Monkeys and iBuild App.

The ME-C app is built on an online-based app maker software namely the Appy Pie at appypie.com. It is a mobile app platform released on Android and iOS platforms that allows users to create different types of mobile apps which can be released to the public and monetized. The programme is launched in 2013 and designed to be accessible to people without experience about computer programming and coding skills to develop an app. Thus, it makes sense to its catchy slogan, “Make an App, As Easy as Pie”. The creation of the ME-C app using the Appy Pie is indeed simple and facile. There are three basic steps to start with: firstly, choose a category of apps; secondly, add contents and customize accordingly; and finally, publish the app to the web or install it on the device. Nonetheless, publishing the apps would need developer to subscribe to one of four plan options ranging from Free Plan, Sliver Plan, and Gold Plan to Platinum Plan.

9. Commercial value

In discussing of how the app could make social change, some key questions are worth to bring up in this discussion. Do we really need an app to learn and understand law since there are lots of digital sources like e-books available online? How this app could help people

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or users comprehend the contents it offers? What would be the perception of Malaysians about this app? How the app would sustain and compete in the fast-growing mobile apps technology?

Why do we need apps?

Mobile app is no comparable to e-books available online. E-book or digital book is a book-publication in digital form, consisting of text, images, or both, readable on computers or other electronic devices such as an e-reader, tablets and smartphones. It is sometimes defined as ‘an electronic version of a printed book’, but many e-books available online are those without any printed equivalent. Commercial e-books began in 1990s when Sony Corporation launched the Data Discman, an electronic book reader that could read e-books that were stored on CDs. E-books come in various native formats such as AZW, PDF, TXT, EPUB, IBA, RTF, DOC, HTML, DOCX, DJVU, CHM, CBR, TCR, PRC, BBeB, and FB2, and are supported by various e-book readers available in the market. Some popular brands of e-book readers are, Amazon Kindle, Fire Tablets, Barnes & Noble Nook, Nook Tablet, Apple iPad, Sony Reader, Kobo eReader, Kobo Arc, PocketBook Reader, and PocketBook Touch.

Popularity of e-books is growing together with the emerging of new technology that accommodates users to enjoy reading the e-books. However, most e-books contain only text and images, which lack of interactivity element as compared to mobile apps. According to a study by Pennsylvania State University, the disadvantages of e-books, among others are incompatibility formats; security vulnerabilities; piracy problem; eyestrain effect; and higher cost compared to mobile apps. Furthermore, e-book readers can cost money; anti-virus programme may change registry information; incompatibility issue; limited storage; and it requires power to access the e-books. Apparently, mobile app is far more interactive and creating less problems to handle with. Thus, app is highly relevant and helpful for users to get information fast and convenient in lieu of the e-books, especially for educational purposes regardless in a formal class of informal learning.

20 https://wikispaces.psu.edu/display/IST432TEAM10/Disadvantages+of+E-Books
How it works?

The ME-C app contains, among others, 15 parts with 230 articles and 13 schedules of the Malaysia Federal Constitution. It means the entire content of a physical constitution book is translated into an interactive mobile app. Building an app without interactive element is a no go. Hence, the ME-C app offers its users to access full authoritative judgments of legal cases related to the constitution. Selected provisions will be annexed via hyperlink with popular and important cases, so that people can read and understand the cases well. For instance, when users tap on “Freedom of Religion” (Article 11 in Part II), they will be directed to the judgment case of *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & 2 Ors 2005 [CA]*, so on and so forth. The selection of cases is based on the importance of that particular cases to the public and are commonly discussed in the classrooms. Therefore, further discussion is highly encouraged among law students and academics.

The app also includes professional reviews on the subject matters, so that the thought-provoking opinions can stimulate further discussions and arguments. Professional are of prominent lawyers, academics as well as analysts. The app will also be supported with other legal documents such as acts and statutes to ensure users comprehend the laws better and be attentive to the rights and freedoms that are highlighted in the constitution. Having said that, the authors believe that the app could make a change in the society, not just for educational purposes, but to elevate public’s way of thinking in terms of legal and thus creating a law-abiding society. The ME-C app has been brought to the public in an innovation exhibition, and it received good insights from the visitors. In general, it can be concluded that anything, specifically apps, that could ease people’s lives would be embraced.

Sustainability of the app

There are millions of mobile apps available in the app stores. In order to make an app stands out and reliable, the app should regularly be updated with latest contents or amendments. A software bug is an error, flaw, failure or fault in a computer programme or app system that causes it to produce an incorrect or unexpected result, or to behave in unintended ways. Hence, users’ feedbacks and reports are important to improving the app
service. On the other hand, price of an app is also a thing to be looked into, should it upgrades to pro version or has in-app purchase option. The ME-C is expected to charge users for subscription to additional features like Cases Summary; Professional Reviews; and Related Documents, and other functions: Search; Share; and Settings. The subscription fee would be charged at reasonable price according to one-time, monthly or yearly subscription options.

10. Conclusion

The use of mobile apps in today’s life is probably the most time people are spending with. Apps have helped people in their daily chores, for instance finding information, making decisions, completing tasks, et cetera. The more apps one has, the easier his or her life is, provided that the apps are of productivity apps. There are three types of apps namely: Utility, Productivity and Immersive apps, used for various objectives from getting information to social media and mobile games. Knowledge and advancement in technology are indispensable in today’s living. Integrating technology with law is an innovation that could help many people in learning and understanding the laws using a mobile app. The ME-C app comes at the right time and at the right place since currently there is no mobile app on the Malaysian laws available in the Google Play Store or Apple App Store. The app offers the contents of the Malaysia Federal Constitution that can be a reference for students, academics, researchers or anybody who are interested to learn it.

With its latest features and functions, the authors believe that the app can make a change to the society, not just for educational purposes, but also to encourage people to think further in legal terms and therefore creating a law-abiding society.
ADAKAH YANG BAHARU DALAM KAJIAN ‘KESELAMATAN INSAN’ DI ASIA TENGGARA?

Mat, B., 1 Othman, Z., 2 & Omar, M.K. 3

Abstrak:

Perang Dingin telah lebih dua dekad berlalu namun isu keselamatan masih terus di perdebatkan samada keselamatan untuk rakyat atau untuk rejim yang memerintah. Persoalannya bagaimanakah pendekatan kajian keselamatan mempengaruhi landskap politik terutama di Asia Tenggara? Asia Tenggara amat relevan untuk di selidik kerana kepelbagaian isu yang masih belum reda, antaranya terorisme, krisis makanan, kemiskinan, bencana alam, pendemokrasian, pelarian suaka dan sebagainya. Isu ini mungkin boleh mempengaruhi kestabilan rantau di tambah dengan kepelbagaian sistem politik, ekonomi, agama, bangsa, dan tamadun negara yang kompleks. Kajian ini menghujahkan walaupun negara di rantau ini agak kebelakang dalam mengaplikasi konsep keselamatan insan, namun kes menunjukkan ada yang telah berjaya mengarusperdakan nya. Thailand telah mengujudkan Kementerian Pembangunan Sosial dan Keselamatan Insan, sementara Malaysia pula menubuhkan Suruhanjaya Hak Asasi Manusia. Namun yang lebih menyediikan kedua-dua pelaku negara dan pelaku bukan negara menjadi ancaman terhadap kelangsungan insan. Objektif kajian ini adalah untuk menelusuri kehadiran konsep dan wacana keselamatan insan terutama di Asia Tenggara dan menganalisis adakah yang baharu terutama dalam dunia yang mengimpikan masyarakat yang sivil dan sejahtera. Metod kajian

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Kata kunci: Asia Tenggara, kelangsungan hidup, keselamatan insan, masyarakat sivil, undang-undang

I. Pendahuluan

Perang Dingin telah lebih dua dekad berlalu namun isu keselamatan masih terus di perdebatkan. Justeru bagaimanakah pendekatan kajian keselamatan mempengaruhi landskap politik terutama di Asia Tenggara? Asia Tenggara amat relevan untuk di selidik kerana kepelbagaian isu yang masih belum reda, antaranya terorisme, krisis makanan, kemiskinan, bencana alam, pendemokrasian, pelarian suaka dan sebagainya. Isu ini mungkin boleh mempengaruhi kestabilan rantau di tambah dengan kepelbagaian sistem politik, ekonomi,


II. Evolusi Konsep Keselamatan

Dalam kajian Hubungan Antarabangsa (HA), konsep keselamatan yang digunakan lebih menjurus kepada keselamatan negara. Dalam konteks ini, keselamatan individu terjamin sekiranya keselamatan negara dapat dikekal dan dipelihara (Krause & Williams, 1997). Dengan kata lain, keselamatan negara di dahulukan berbanding keselamatan penduduknya (rakyat). Konsep dan pemahaman ini popular ketika era Perang Dingin di mana ianya di pengaruhi oleh pemahaman realisme, iaitu pendekatan perdana disiplin HA.

Menurut perspektif realisme, istilah keselamatan disamakan dengan kepentingan menjaga kelangsungan dan kepentingan negara atau nasional. Manakala, kepentingan nasional pula diukur dari sudut kuasa berasaskan definisi klasik Hans Morgenthau sebagai “... anything that establishes and maintains the control of man over man” (Morgenthau, 1999:46). Pemikiran ini akhirnya telah menyediakan asas politik yang mudah, membawa kepada kewujudan konsep strategi nuklear dan cegahrintang yang telah mendominasi pemikiran mengenai keselamatan dan polisi negara sepanjang era Perang Dingin (Nye Jr & Lynn-Jones, 1988:8).


ini kemudian mengakibatkan wujud suasana saling tidak percaya dan ketidaktentuan, yang dinamakan sebagai dilema keselamatan (Mearsheimer, 2001:36).

Dengan berakhir era Perang Dingin (1946-1989) pula, telah memberikan tamparan hebat kepada realisme. Keadaan inilah yang akhirnya menyediakan ruang kepada kelahiran aliran alternatif dalam sub-bidang pengajian keselamatan khususnya, melalui usaha meluaskan dan memperdalam tumpuan perbincangan kajian keselamatan yang sebelum ini dilihat dari sudut yang terhad dan sempit (Hough 2004:6-10).


III. Konsep Keselamatan Insan: Anjakan Paradigma?


\(^6\) *Human Development Report* (HDR) adalah satu penerbitan rasmi yang dikeluarkan oleh UNDP setiap tahun (annual publication). HDR 1994 adalah siri laporan pertama dikeluarkan di atas inisiatif kumpulan ahli pemikir yang diketuai oleh ahli ekonomi Pakistan, Mahbub Ul-Haq.

Kedua-dua teras di atas sebenarnya boleh dirujuk kepada sejarah penubuhan Pertubuhan Bangsa-Bangsa Bersatu (PBB) yang termaktub dalam daripada Piagam Atlantik (1941), yang antara lain menyatakan,

“(Sixth), after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want”.

Jaminan yang terkandung dalam penyataan tersebut telah digunakan oleh Kuasa Pakatan untuk mengesah dan mengistiharkan peperangan dalam Perang Dunia Kedua. Istilah tersebut juga kemudian menjadi teras kepada penubuhan (PBB) yang tercetus daripada usul Persidangan San Francisco (1945). Dalam menjelaskan matlamat penubuhan PBB, Setiausaha Negara Amerika Syarikat, Edward R. Stettinius Jr., secara spesifik menjelaskan,

“........the battle for peace has to be fought on two fronts. The first is the security front where victory spells freedom from fear. The second is the economic and social front where victory means freedom from want. Only victory on both fronts can assure the world of an enduring peace [...] No provisions that can be written into the Charter will enable the Security Council to make the world secure from war if men and women have no security in their homes and their jobs” (Okubo, 2011:22).

Kedua-dua idea itu kemudian menjadi asas kepada dasar-dasar dan program PBB mengenai pembangunan dan hak asasi manusia sejak perlembagaannya ditandatangani pada tahun 1945. Untuk mencapai keamanan, terdapat dua syarat yang perlu dipenuhi iaitu, pembangunan manusia dan keselamatan insan. UNDP telah mendefinisikan pembangunan manusia sebagai satu proses memperluaskan pelbagai pilihan individu dan keselamatan insan.

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IV. Keselamatan Insan: Konsep Serupa Pendekatan Berbeza


Pandangan yang sama turut dikongsi oleh Norway dan beberapa negara Eropah yang lain yang membincangkan keselamatan insan. Norway telah mengenalpasti beberapa agenda keselamatan insan utama iaitu termasuklah tindakan pencegahan, kawalan senjata api ringan dan kecil, dan operasi pengaman. Kedua-dua negara iaitu Kanada dan Norway bersepedandapat bahawa penekanan terhadap usaha melindungi individu (dalam suasana konflik) adalah amat penting untuk menjayakan konsep keselamatan yang penting dan baru seperti keselamatan insan. Di atas dasar ini, akhirnya, Human Security Network (HSN) atau Lysøen Group yang berjaya menarik penyertaan badan-badan bukan kerajaan dan wakil-wakil kerajaan dari sekitar 13 buah negara termasuk Austria, Kanada, Chile, Greece, Ireland, Jordan, Mali, Netherlands, Slovenia, Switzerland dan Thailand (Alkire, 2003).

V. Wacana Konsep Keselamatan Insan di Asia Tenggara


8 Demonstrasi jalanan juga meningkat di Malaysia dan Indonesia sehingga menggugat kestabilan rejim pemerintah, dan secara tidak langsung turut menjejaskan keselamatan Negara (Zarina, 2009). Krisis ekonomi kemudiannya mendedahkan keadaan kehidupan rakyat seperti di Indonesia yang terjejas teruk. Kejatuhan nilai matawang yang mendadak bukan hanya telah melemahkan aktiviti ekonomi, tetapi juga menimbulkan kegawatan sosial dan politik di mana isu seperti pautan kewangan dan kekeruhan kehidupan rakyat menjadi isu utama. Krisis ekonomi ini ialah rusuhan yang menjejaskan golongan minoriti kaum Cina di Indonesia, dan diikuti pula oleh beberapa siri konflik etnik dan agama di beberapa tempat seperti Ambon dan Lombok di Indonesia (Zakaria & Ghoshal,1999; Arabinda & Amitav, 2001). Kejatuhan Suharto pula memberi laluan kepada...

Kumpulan penyelidikan dari Bangi, Selangor, Malaysia, khususnya yang berpusat di Universiti Kebangsaan Malaysia (UKM) seterusnya telah mengutarakan kerangka baru yang mewakili penambahan elemen keselamatan sosial dalam senarai lapan ancaman yang telah dikembangkan oleh UNESCO sebelum ini, iaitu elemen keselamatan sosial dengan menggelarkannya sebagai Bangi Approach to Human Security (BAGHUS). Walaupun mengakui model yang dicadangkan oleh agensi PBB itu lebih universal, mereka berhujah bahawa BAGHUS adalah lebih sesuai dilaksanakan di rantau Asia Tenggara dengan mengambilkira keunikan dan perbezaan yang wujud di rantau ini khususnya. Masyarakat memerlukan keselamatan sosial yang munasabah, sebagai contoh jaminan dari sudut keselamatan sosial dan ekonomi untuk lebih berdaya maju. Dalam erti kata lain, keselamatan insan di rantau ini mengambilkira keselamatan dari dalam (kebebasan dari ketakutan) dan juga, keperluan terhadap pembangunan manusia untuk memenuhi elemen


9 Thailand percaya bahawa kemakmuran juga bergantung kepada pendekatan pembangunan mampam (sustainable development) yang bertujuan untuk melindungi alam sekitar, mengurangkan ketidakseimbangan ekonomi dan meluaskan peluang untuk mengecapai kehidupan lebih baik kepada setiap segmen penduduknya. Matlamat untuk membentuk individu yang kuat dan memperkukuhkan infrastruktur sosial negara telah dijadikan sebahagian daripada agenda kebangsaan. Pada tahun 1999, kerajaan Thailand juga telah mengeluarkan enakmen National Education Act untuk menjamin peluang yang lebih adil dalam system pendidikan negara, di samping turut memperbaiki taraf pendidikan dari sudut kemahiran professional, penyelidikan dan juga pembangunan. Akta Perlindungan Pekerja (Labour Protection Act) juga telah diperkenalkan pada tahun yang sama untuk melindungi dan meningkatkan tahap kebajikan golongan pekerja (ASEAN Secretariat, 2000).
kebebasan dari kemahuan. Manakala, keselamatan personal pula adalah saling berkait rapat dengan keselamatan komuniti kerana wujud perkaitan yang rapat dalam hubungan individu dan komuniti. Menurut pendekatan BAGHUS juga, dalam konteks keselamatan insan di Asia Tenggara, keselamatan budaya juga memberi tumpuan kepada kesamaan gender, berbeza dengan UNDP yang memberi tumpuan kepada usaha melindungi etnik atau kumpulan minoriti (Rashila, Zarina, Nor Azizan & Sity, 2012).

**Rajah 1 Pendekatan Bangi terhadap Keselamatan Insan**

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<thead>
<tr>
<th>Pendekatan Bangi Terhadap Keselamatan Insan (BAGHUS)</th>
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<tbody>
<tr>
<td><strong>Rantau</strong></td>
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<td><strong>Negara</strong></td>
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<td><strong>Manusia</strong></td>
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<td><strong>Elemen</strong></td>
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<tr>
<td>1. Keselamatan Ekonomi</td>
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<td>2. Sekuriti Makanan</td>
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<td>3. Keselamatan Alam Sekitar</td>
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<td>4. Keselamatan Kesihatan</td>
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<td>5. Keselamatan Sosial</td>
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<td>6. Keselamatan Personal</td>
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<td>7. Keselamatan Komuniti</td>
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<td>8. Keselamatan Politik</td>
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<td>9. Keselamatan Budaya</td>
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<td>Ancaman Keselamatan Insan</td>
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<tr>
<td>Ancaman Ketenteraan (Terhadap Keselamatan Negara)</td>
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Rashila, Zarina, Nor Azizan, Sity, 2012.

kawalan juga turut menimbulkan masalah lain seperti pengedaran dadah, pelacuran, penyebaran penyakit, penyeludupan dan lain-lain lagi (Paitoonpong, 2006:11).


Kesan dari sudut yang pertama boleh dilihat dari aspek tindakan ini memberi kesan kepada keselamatan insan, dengan prospek polisi, langkah-langkah, undang-undang dan juga pelaksanaan yang dilaksanakan memberikan elit pemerintah kuasa yang besar terhadap orang awam. Contohnya ialah kuasa untuk menahan tanpa tuduhan (charge) terhadap individu yang disyaki melakukan tindakan subversif. Di rantau Asia Tenggara atau ASEAN, fenomena seperti ini telah lama wujud terutama melalui kewujudan Akta Keselamatan Dalam Negara (ISA). Jika sebelum ini ada dibincangkan cadangan mengkaji kewujudan keperluan ISA di Singapura dan Malaysia, tetapi berlakunya peristiwa 9/11, cadangan tersebut telah dipendamkan. Inilah sebabnya isi UU ketika terhadap usaha untuk mengubah paradigm keselamatan daripada negara sebagai objek rujukan utama dan aspek ketenteraan sebagai ancaman sebenar tidak mencapai objektif yang diharapkan (Collins, 2003; Evans, 2004). Kesedua terhadap kajian keselamatan ialah lebih kepada perbincangan akademik (academic discourse). Tumpuan yang diberikan oleh kerajaan untuk mengekang ancaman penggangsah melalui pelbagai strategi yang diaplikasi sejak sekian lama akan mengakibatkan tindakan memperlihatkan dan memperdalamkan tumpuan bidang kajian keselamatan akan terhalang oleh tindakan individu yang cuba...
kepada hak asasi manusia juga dilihat mencabar status negara sebagai unit yang utama, khususnya rejim pemerintah. Oleh kerana itu, walaupun kerajaan cuba memenuhi keperluan asas penduduk dan memberi tumpuan kepada pembangunan ekonomi yang juga menjadi salah satu teras keselamatan insan, dalam masa masih terdapat kekurangan khususnya dari sudut isu hak-hak asasi manusia yang menjadi intipati konsep keselamatan insan (Zarina, 2009; Amitav, 2006a).

Jika idea keselamatan insan kurang mendapat perhatian di kalangan pimpinan atasan, ia sebaliknya mendapat sambutan hangat di peringkat akar umbi, dan komuniti akademik. Lebih menarik juga, bermula dari tahun 1997 selepas Asia dilanda krisis kewangan, jaringan Track-Two di Asia termasuklah ASEAN-ISIS dan CSCAP telah mula memasukkan konsep keselamatan insan di dalam tema keselamatan mereka. Di Asia Tenggara, kewujudan NGO dan aktivis seperti ASEAN People’s Assembly (APA) yang berkempen supaya agar agenda pembangunan dan keselamatan lebih bersifat “human centered” menunjukkan bagaimana aktivis dan organisasi masyarakat sivil [civil society organisation (CSO)] transnasional boleh berfungsi sebagai pentas di mana wacana yang membina boleh dibentuk dan disalurkan (Caballero-Anthony, 2004).

12 Satu perkembangan yang dialu-alukan dalam konteks ASEAN ialah pengenalan ASEAN Charter yang dilancarkan secara rasmi pada 15 Disember 2008, oleh negara-negara anggota pertubuhan itu di Jakarta, Indonesia setelah berjaya ditandatangani secara rasmi pada 20 November 2007 sempena Sidang Kemuncak ASEAN ke-13 di Singapura. Perlembagaan tersebut telah menunjukkan kejayaan negara-negara anggota melahirkan kerangka undang-undang (ia mengandungi 13 Chapters, 55 Articles, dan 4 annexes) dan keistimewaan ASEAN, yang dijelaskan sebagai berpaksikan manusia, dengan sekurang-kurangnya 10 daripada 15 matlamat ASEAN dalam Chapter I menjelaskan mengenai kehidupan dan kesejahteraan insan. Walaupun perlembagaan tidak menyebut terminologi keselamatan insan secara jelas, terdapat perkembangan besar ditunjukkan dengan kesediaan menjadikan isu demokrasi dan hak asasi manusia sebagai satu komitmen bersama. Hal dijelaskan sebagai “to strengthen democracy, enhance good governance and the rule of law, to promote human rights and fundamental freedoms” (Perlembagaan ASEAN, Bab 1, Artikel 1[7]). Selain itu, perlembagaan ASEAN juga turut menjelaskan komitmen negara-negara anggota untuk menubuhkan badan hak asasi manusia sebagai salah satu organ ASEAN untuk mengurus dan melindungi hak asasi dan kebebasan manusia, yang merupakan isu yang seringkali mencetuskan kontroversi di rantau ini.

13 Akhir-akhir ini APA juga menghadapi persaingan dengan beberapa forum dan jaringan masyarakat sivil yang baru dari seluruh rantau. Forum-forum seperti ASEAN Civil Society Conference (ACSC), Kumpulan Kerja Solidarity for Asian Peoples’ Advocacy (SAPA) mengenai ASEAN, ASEAN People’s Forum (APF) dan ASEAN Social Forum (ASF), merupakan antara contoh-contoh forum dan jaringan masyarakat sivil yang baru timbul selepas APA (Chandra, 2009). ASEAN Civil Society Conference (ACSC) ialah satu badan masyarakat sivil yang diusahakan oleh kerajaan Malaysia sebagai acara serentak dengan Sidang Kemuncak ASEAN ke-11 yang...
Kajian Kes 1, Keselamatan Insan di Asia Tenggara: Etnik Rohingya di Myanmar


masjid-masjid dan melakukan tangkapan ganas terhadap orang Islam Rohingya dan melakukan sekatan bantuan kemanusiaan terhadap pelarian Islam.


Menurut Tun Khin, presiden The Burmese Rohingya Organisation UK (BROUK), dari 3 sehingga 28 Jun 2012, pasukan keselamatan Myanmar terdiri daripada tentera dan polis bersama-sama sami Buddha dan pengganas Buddha telah membunuh 650 orang Islam Rohingya tidak termasuk 1,200 orang Rohingya yang masih hilang dan menyebabkan 80,000 orang Rohingya menjadi pelarian.

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(ii) **Kajian Kes 2, Keselamatan Insan di Asia Tenggara: Insiden Lahad Datu di Malaysia**

Pencerobohan Lahad Datu telah memberikan satu kejutan kepada Malaysia kerana ia melibatkan aktor bukan negara dari negara asing, iaitu sekumpulan angkatan bersenjata rakyat Filipina yang mendakwa penyokong kuat Kesultanan Sulu, Jamalul Kiram III. Malah pencerobohan yang melibatkan rakyat Filipina ini turut memberi impak terhadap hubungan diplomatik antara Malaysia dan Filipina. Walau bagaimanapun, dalam hal ini kerajaan Filipina telah menafikan penglibatan mereka malah laporan media Filipina bertindakbalas dengan menyatakan perisikan Filipina mendapati individu dalam pembangkang negara ini adalah dalang kepada isu pencerobohan Lahad Datu (*Sinar Harian*, 3 Mac 2013).

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Presiden Aquino juga mengarahkan ‘Sultan Sulu’ untuk memanggil semula pengikut mereka untuk menyerah diri bagi membincangkan tuntutan yang dilakukan (Poling et al. 2013). Presiden Aquino menyatakan bahawa tindakan yang dilakukan oleh Tentera Kesultanan Sulu (TKS) ini antara lainnya adalah untuk memalukan beliau dan kerajaan pimpinan beliau di samping bersetuju dengan andaian yang menyatakan ianya sebagai satu cubaan untuk merosakkan perjanjian damai yang sedang diusahakan antara Malaysia-Filipina dengan Bangsamoro ketika itu. Tindakan yang dilakukan oleh Kiram ini telah meletakkan kedudukan rakyat Filipina di Sabah ketika itu, termasuk lebih kurang 800,000 orang-Suluk, berada dalam keadaan tidak selamat. Dalam hal ini pihak polis telah dikerahkan pada peringkat awal pencerobohan untuk menanganinya sebelum ianya diambil alih oleh pihak tentera (Khor 2013).


Jadual 1: Kronologi Peristiwa Lahad Datu, Sabah

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<thead>
<tr>
<th>Tarih 2013</th>
<th>Peristiwa</th>
</tr>
</thead>
<tbody>
<tr>
<td>9 Feb</td>
<td>Kumpulan penceroboh memasuki perairan negara menggunakan bot pancung dan berkumpul secara berperingkat di Felda Sahabat 17, Kampung Tanduo, Lahad Datu</td>
</tr>
<tr>
<td>11 Feb</td>
<td>Lebih 100 lelaki berpakaian ala tentera dan bersenjata api dikesan berkampung di Kampung Tandou. Laporan polis dibuat oleh nelayan tempatan yang mengesan kehadiran kumpulan ini pada waktu malam.</td>
</tr>
<tr>
<td>12 Feb</td>
<td>Kumpulan penceroboh berpecah di beberapa lokasi di Kampung Tandou - di kawasan sungai bakau, sebuah surau dan di rumah penduduk tempatan.</td>
</tr>
<tr>
<td>14 Feb</td>
<td>Polis mengenal pasti kumpulan warga Filipina yang mendarat di pesisir pantai Lahad Datu, sebagai pewaris berketurunan 'Raja Sulu'.</td>
</tr>
<tr>
<td>16 Feb</td>
<td>Menteri Dalam Negeri mengesahkan kumpulan tersebut penyokong 'Kesultanan Sulu'.</td>
</tr>
<tr>
<td>24 Feb</td>
<td>Kerajaan Filipina menghantar sebuah kapal untuk membawa pulang 180 'tentera diraja' termasuk 30 pengawal bersenjata.</td>
</tr>
<tr>
<td>26 Feb</td>
<td>Tempoh penguisiran tamat. Namun, rundingan masih dijalankan</td>
</tr>
<tr>
<td>28 Feb</td>
<td>Agbimuddin Kiram menggesa Kerajaan Malaysia mengadakan rundingan secara terus dengan abangnya, Jamalul Kiram III di Manila agar 180 'tentera diraja' meninggalkan Felda Sahabat 17,</td>
</tr>
<tr>
<td>1 Mac</td>
<td>Pertempuran tercetus antara pasukan keselamatan dan penceroboh</td>
</tr>
<tr>
<td>2 Mac</td>
<td>Pertempuran berlaku di Kampung Sri Jaya, Siminul, Semporna</td>
</tr>
<tr>
<td>4 Mac</td>
<td>Presiden Benigno Aquino III berjanji menyelesaikan pencerobohan di Sabah melalui jalan keamanan.</td>
</tr>
<tr>
<td>5 Mac</td>
<td>Pada jam 7 pagi, pasukan keselamatan melancarkan serangan ke Kampung Tanduo. Perdana Menteri mengumumkan ‘Ops Daulat’ bagi menjaga maruah dan kedaulatan negara.</td>
</tr>
<tr>
<td>6 Mac</td>
<td>13 mayat penceroboh ditemui di Kampung Tanduo. Sembilan daripada mayat ditemui dalam sebuah kubur.</td>
</tr>
<tr>
<td>7 Mac</td>
<td>Jamalul Kiram III mengumumkan gencatan senjata. Namun, Perdana Menteri menolak gesaan gencatan senjata dan penceroboh meletakkan senjata tanpa syarat</td>
</tr>
</tbody>
</table>

*Pertempuran tercetus antara pasukan keselamatan dan penceroboh, dua anggota polis terkorban, tiga lagi cedera dan 12 penceroboh terbunuh.*

*Seramai 12 orang terbunuh, termasuk enam anggota polis.*

*Presiden Benigno Aquino III berjanji menyelesaikan pencerobohan di Sabah melalui jalan keamanan.*

*Pada jam 7 pagi, pasukan keselamatan melancarkan serangan ke Kampung Tanduo. Perdana Menteri mengumumkan ‘Ops Daulat’ bagi menjaga maruah dan kedaulatan negara.*

*13 mayat penceroboh ditemui di Kampung Tanduo. Sembilan daripada mayat ditemui dalam sebuah kubur.*

*Empat lelaki ditahan dipercayai mempunyai kaitan dengan kumpulan penceroboh di Kampung Sri Jaya Siminul, Semporna.*

*Jamalul Kiram III mengumumkan gencatan senjata. Namun, Perdana Menteri menolak gesaan gencatan senjata dan penceroboh meletakkan senjata tanpa syarat.*

*Perdana Menteri juga mengumumkan pembentukan sebuah kawasan keselamatan meliputi wilayah pantai timur Sabah dari Kudat ke Tawau.*
8 Mac
- Seramai 52 orang penceroboh terbunuh.
- Lebih 50 orang ditahan mengikut Akta Kesalahan Keselamatan 2012.

9 Mac
- Seorang penceroboh ditembak mati pada jam 8 pagi.
- Pasukan keselamatan menahan seramai 27 suspek
- Jamalul Kiram III, meminta diadakan ‘perbincangan’ tetapi tawaran’ini ditolak.
- Seramai 53 orang penceroboh ditembak mati dan 79 suspek ditangkap.

10 Mac
- Seorang remaja lelaki ditembak mati dan seorang lelaki dewasa cedera
- Di Semporna, enam orang ditahan dalam dua kejadian yang berasingan.
- Di Tanjung Batu, dua anggota pasukan keselamatan telah cedera

11 Mac
- Gerakan operasi ‘mopping-out’ giat diperhebat di kawasan Kampung Tanjung Batu dan Sungai Bilis.
- Seramai 54 penceroboh Sulu telah terbunuh, 97 orang telah ditahan

12 Mac
- Seorang tentera Malaysia terkorban dan tiga penceroboh ditembak mati.

13 Mac
- Pesuruhjaya Polis Sabah percaya ketua kumpulan penceroboh militan Agbimuddin Kiram masih terkepung di kawasan operasi.
- Dua mayat penceroboh ditemui.
- Angkatan Tentera Malaysia (ATM) membawa masuk helikopter dari Pasukan Udara Tentera Darat dan 12 kereta perisai

14 Mac
- Seorang lelaki ditahan bersama dua bilah pedang samurai serta tiga parang panjang.
- Seramai 35 pengikut waris Jamalul Kiram III ditahan di Filipina.
- Malaysia bercadang menubuhkan Suruhanjaya Diraja (RCI) atau membuka kertas putih bagi menyiapkan kedatangan kerjaan.
- Kementerian Pertahanan kini menjaga perairan timur Sabah yang sebelum ini di bawah tanggungjawab Jabatan Perdana Menteri (JPM).

15 Mac
- Ketua kumpulan penceroboh, Azzimudie Kiram dipercayai telah melarikan ke tempat asalnya di Selatan Filipina.
- Anggota keselamatan menjumpai tiga kubur baru di Kampung Tanduo yang mengandungi 15 mayat.
- 61 orang penceroboh telah ditembak mati.
16 Mac
- *Eastern Sabah Security Command* (ESSCOM) ditubuhkan segera bagi menjamin keselamatan dan kedaulatan negara.
- Anggota keselamatan telah menahan seorang lelaki yang dipercayai penceroboh Sulu di kawasan Felda Sahabat 17

17 Mac
- Anggota keselamatan telah berjaya ditembak mati
- Seramai 104 orang telah ditahan dibawah Akta Kesalahan Keselamatan (Langkah-langkah khas) 2012 (SOSMA) manakala 241 orang lagi telah ditahan

18 Mac
- Pasukan keselamatan telah bertempur dengan saki baki penceroboh Sulu di kampung Tanjung Batu, Felda Sahabat 22,
- Sebanyak 17 kenderaan perisai jenis ‘armoured personnel carrier’ (APC) Adnan tiba di Lahad Datu dan 17 trak tentera yang dipenuhi anggota tentera.
- Jumlah tangkapan seramai 104 dan jumlah musuh yang telah ditembak mati seramai, 62. Ops Daulat telah mengorbankan sembilan anggota keselamatan negara, manakala sembilan lagi cedera.

20 Mac
- Satu mayat musuh telah ditemui
- Seorang anggota ATM tercedera

21 Mac
- Seorang musuh dibunuh dan seorang wanita ditangkap
- Lapan warga Filipina berdepan dengan hukuman mati dan penjara seumur hidup kerana melancarkan perang ke atas Yang di-Pertuan Agong dan menjadi ahli kumpulan penceroboh

22 Mac
- Jumlah penceroboh yang ditewaskan seramai 63 orang. Jumlah anggota keselamatan negara yang gugur seramai 10 orang.

Sumber: Astroawani (9 Mac 2013) “Kronologi pencerobohan pantai timur Sabah”

**KESIMPULAN**

Kesimpulannya, penerimaan terhadap konsep keselamatan insan walaupun dari satu sudut adalah agak perlahan dan kurang disenangi, dari aspek lain, terdapat indikator yang menunjukkan ada berlaku perubahan dasar. Dalam kajian ini, menunjukkan walaupun negara pada aslanya adalah tempat untuk rakyat berlindung namun dalam kes etnik Rohingya,

Rujukan


AMALAN HIBAH DI BAHAGIAN PENGGUATKUASAAN JABATAN AGAMA ISLAM NEGERI-NEGERI: TINJAUAN TERHADAP PERANAN PEGAWAI-PEGAWAI PENGUATKUASA AGAMA

Badarulzaman, M.H.

ABSTRAK


Kata kunci: Hisbah, Jabatan Agama Islam Negeri, Undang-Undang Syariah

*Artikel ini merupakan sebahagian daripada dapatan dan analisis Skim Geran Penyelidikan Fundamental (FRGS) bagi Kod S/O 13054 di bawah Kementerian Pendidikan Tinggi Malaysia.
1.0 PENGENALAN


2.0 KONSEP DAN PENSYARIATAN HISBAH

(1956) yang banyak menceritakan salah satu rukun Hisbah iaitu Muhtasib turut memuatkan elemen yang sama namun elemen tersebut bercampur aduk dan tidak tersusun. Keempat-empat rukun ini amat penting bagi memastikan institusi Hisbah berjalan menurut syariat Islam.


“dan hendaklah ada di antara kamu satu puak yang menyeru (berdakwah) kepada kebajikan (mengembangkan Islam), dan menyuruh berbuat Segala perkara Yang baik, serta melarang daripada segala yang salah (buruk dan keji). dan mereka Yang bersifat demikian ialah orang-orang yang berjaya.”

(Surah Al Imran :104)


Maksudnya: “Sesiapa di antara kamu yang melihat kemungkinan hendaklah dia mengubahnya dengan tangannya, sekiranya tidak berupaya untuk mengubahnya, maka gunakanlah dengan lidah dan sekiranya tidak berupaya juga, maka ubahkannya dengan hati. Demikian itu adalah selemah-lemah iman.”
Selain itu, *Al Quran* juga menerangkan kewajipan melaksanakan prinsip ini oleh umat akhir zaman menerusi sepotong ayat *Al Quran* seperti firman-Nya:

*Maksudnya:* “kamu (Wahai umat Muhammad) adalah sebaik-baik umat Yang dilahirkan bagi (faedah) umat manusia, (kerana) kamu menyuruh berbuat Segala perkara Yang baik dan melarang daripada Segala perkara Yang salah (buruk dan keji), serta kamu pula beriman kepada Allah (dengan sebenar-benar iman). dan kalaualah ahli Kitab (Yahudi dan Nasrani) itu beriman (sebagaimana Yang semestinya), tentulah (iman) itu menjadi baik bagi mereka. (Tetapi) di antara mereka ada Yang beriman dan kebanyakan mereka: orang-orang Yang fasik.”

(Surah Al Imran : 110)

### 3.0 BIDANG TUGAS *MUHTASIB* DALAM INSTITUSI *HISBAH*


melantik Said bin al `As sebagai Muhtasib di Makkah. Berdasarkan kepada seluruh definisi dan penjelasan yang diberikan, dataplah disimpulkan bahawa Muhtasib merupakan pegawai penguatkuasa yang bukan hanya berperanan dalam hal-hal ritual tetapi turut bertanggungjawab dalam hal-hal pentadbiran dan sosial yang menjalankan tugas tugas al-amr bil makruf wa nahyu anil munkar.


Walaupun bidang tugas utama Muhtasib begitu luas, artikel ini akan memfokuskan kepada bidang tugas berkaitan menjaga ibadah dan perilaku yang menyalahi hukum agama yang selaras dengan peranan yang dimainkan oleh Pegawai-Pegawai Penguatkuasa Agama (PPA) di bawah JAIN. Secara umumnya, tugas Muhtasib melibatkan tiga perkara di bawah bidang tugas berkaitan menjaga ibadah dan perilaku yang menyalahi hukum agama iaitu mengawasi perkara-perkara berkaitan ibadah khusus, mengawasi perbuatan yang tidak
bermoral dan mengawasi perbuatan memiliki perkara yang dilarang (Ahmad Che Yaacob, 1999).

**Mengawasi perkara-perkara berkaitan ibadah khusus**


**Mengawasi perbuatan yang tidak bermoral**


**Mengawasi perbuatan memiliki perkara yang dilarang**
Muhtasib mempunyai obligasi untuk mencegah mana-mana individu yang memiliki perkara yang dilarang dalam Islam. Sebagai contoh, pemilikan barang dan perkara yang dilarang tersebut termasuklah pemilikan benda-benda yang dilarang seperti arak (khamr), alat muzik yang ditegah, permainan yang berunsur perjudian (maysr) dan sebagainya (Ahmad Che Yaacob, 1999). Bagi kesalahan yang dilakukan oleh orang Islam seperti memiliki arak, Muhtasib diizinkan oleh undang-undang untuk mengambil tindakan dan merampas arak tersebut. Menurut pandangan Abu Hanifah (al-Mawardi, 1966), sekiranya kesalahan dilakukan oleh ahl dhimmah, Muhtasib hanya boleh bertindak memukulnya bagi kesalahan minum di tempat terbuka dan tidak dibenarkan untuk merampas arak tersebut.

4.0 BAHAGIAN PENGUATKUASAAN DAN PENCEGAHAN JENAYAH SYARIAH DI MALAYSIA

JAIN telah ditubuhkan di setiap negeri sebagai sebuah agensi yang bertangunggjawab terhadap hal-hal yang berkaitan agama. Hal-hal tersebut seperti yang termaktub di dalam Perlembagaan Persekutuan di dalam Jadual Sembilan, Senarai II-Senarai Negeri, Perenggan 1 adalah seperti berikut:

“...hukum Syarak yang berhubungan dengan pewarisan, berwasiat dan tidak berwasiat, pertunungan, perkahwinan, perceraian, mas kahwin, na'kah, pengangkatan, kesahtaraan, penjagaan, alang, pecah milik dan amanah bukan khairat; Wakaf dan takrif serta pengawalseliaan amanah khairat dan agama, pelantikan pemegang amanah dan pemerbadanan orang berkenaan dengan derma kekal agama dan khairat, institusi, amanah, khairat dan institusi khairat Islam yang beroperasi keseluruhannya di dalam Negeri; adat Melayu; Zakat, Fitrah dan Baitulmal atau hasil agama Islam yang seumpamanya; masjid atau mana-mana tempat sembahyang awam untuk orang Islam, pewujudan dan penghukuman kesalahan yang dilakukan oleh orang yang menganut agama Islam terhadap perintah agama itu, kecuali berkenaan dengan perkara yang termasuk dalam Senarai Persekutuan; keanggotaan, susunan dan tatacara mahkamah Syariah, yang hendaklah mempunyai bidang kuasa hanya ke atas
orang yang menganut agama Islam dan hanya berkenaan dengan mana-mana perkara yang termasuk dalam perenggan ini...”

Berdasarkan kepada perenggan ini dapatlah difahami bahawa segala peraturan dan undang-undang yang berkaitan hukum syarak dari segi undang-undang diri dan keluarga bagi orang yang menganut agama Islam yang tidak termasuk di dalam Senarai Persekutuan akan ditadbir dan diurus oleh JAIN. Secara keseluruhannya, terdapat 14 buah JAIN di Malaysia yang bertanggungjawab terhadap perkara berkaitan agama Islam dan dapat dilihat melalui Jadual 1 di bawah:

<table>
<thead>
<tr>
<th>Negeri</th>
<th>Jabatan Agama Islam Negeri</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perlis</td>
<td>Jabatan Hal Ehwal Agama Islam Perlis (JAIPS)</td>
</tr>
<tr>
<td>Kedah</td>
<td>Jabatan Hal Ehwal Agama Islam Negeri Kedah (JAIK)</td>
</tr>
<tr>
<td>Perak</td>
<td>Jabatan Agama Islam Perak (JAIPk)</td>
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<tr>
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</tr>
<tr>
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<td>Jabatan Agama Islam Selangor (JAIS)</td>
</tr>
<tr>
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<td>Jabatan Agama Islam Wilayah Persekutuan (JAWI)</td>
</tr>
<tr>
<td>Negeri Sembilan</td>
<td>Jabatan Hal Ehwal Agama Islam Negeri Sembilan (JHEAINS)</td>
</tr>
<tr>
<td>Melaka</td>
<td>Jabatan Agama Islam Melaka (JAIM)</td>
</tr>
<tr>
<td>Johor</td>
<td>Jabatan Agama Islam Johor (JAINJ)</td>
</tr>
<tr>
<td>Pahang</td>
<td>Jabatan Agama Islam Pahang (JAIP)</td>
</tr>
<tr>
<td>Terengganu</td>
<td>Jabatan Hal Ehwal Agama Terengganu (JHEAT)</td>
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<tr>
<td>Kelantan</td>
<td>Jabatan Hal Ehwal Agama Islam Negeri Kelantan (JAHEAIK)</td>
</tr>
<tr>
<td>Sabah</td>
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<table>
<thead>
<tr>
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<td>Pulau Pinang</td>
<td>Enakmen Kesalahan Jenayah Syariah (Negeri Pulau Pinang) 1996 (Enakmen 3 Tahun 1996)</td>
</tr>
<tr>
<td>Perak</td>
<td>Enakmen Jenayah (Syariah) 1992, Perak (Enakmen 3 Tahun 1992)</td>
</tr>
<tr>
<td>Selangor</td>
<td>Enakmen Jenayah Syariah (Selangor) 1995 (Enakmen 9 Tahun 1995)</td>
</tr>
<tr>
<td>Wilayah-Wilayah Persekutuan</td>
<td>Akta Kesalahan Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 (Akta 559)</td>
</tr>
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<td>Negeri Sembilan</td>
<td>Enakmen Jenayah Syariah Negeri Sembilan 1992 (Enakmen 4 Tahun 1992)</td>
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<td>Enakmen Kesalahan Syariah (Negeri Melaka) 1991 (Enakmen 6</td>
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<tr>
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</tr>
<tr>
<td>------------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>Johor</td>
<td>Enakmen Kesalahan Jenayah Syariah 1997 (Johor) (Enakmen 4 Tahun 1997)</td>
</tr>
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<td>Pahang</td>
<td>Enakmen Kesalahan Jenayah Syariah 2013 (Enakmen 8 Tahun 1982)</td>
</tr>
<tr>
<td>Terengganu</td>
<td>Enakmen 7 Tahun 2001 Enakmen Kesalahan Jenayah Syariah (Takzir) (Terengganu) 2001</td>
</tr>
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<td>Kelantan</td>
<td>Enakmen Kanun Jenayah Syariah 1985 (Enakmen 2 Tahun 1985)</td>
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<td>Sarawak</td>
<td>Ordinan Kesalahan Jenayah Syariah 2001 (Sarawak) (Ordinan 46 Tahun 2001)</td>
</tr>
<tr>
<td>Sabah</td>
<td>Enakmen Kesalahan Jenayah Syariah 1995 (Sabah) (Enakmen 3 Tahun 1995)</td>
</tr>
</tbody>
</table>

| JADUAL 2: SENARAI ENAKMEN KESALAHAN JENAYAH NEGERI-NEGERI |


diaplisiskan oleh Jabatan Kemajuan Islam Malaysia (JAKIM) untuk setiap JAIN bagi memastikan setiap PPA tertakluk kepada beberapa peraturan dan undang-undang.

**Peraturan**

<table>
<thead>
<tr>
<th>Peraturan</th>
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<tr>
<td>Arahman Tetap Pengarah Jabatan Agama Islam Negeri</td>
<td>2007</td>
</tr>
<tr>
<td>Kod Etika Pegawai Penguatkuasa Agama Jabatan Agama Islam Negeri</td>
<td>2008</td>
</tr>
<tr>
<td>Arahman Ketua Pendakwa Syarie</td>
<td>2011</td>
</tr>
</tbody>
</table>

**Jadual 3: Senarai Peraturan Gubalan JAKIM**


**Arahman Tetap Pengarah Jabatan Agama Islam Negeri 2008**

Arahman Tetap ini merupakan penjelasan dan huraian kepada Akta/Enakmen/Ordinan Tatacara Jenayah Syariah yang berkuatkuasa di negeri masing-masing. Ia merupakan satu arahan pentadbiran yang perlu dirujuk dan diikuti oleh semua PPA dalam menjalankan tugas. Arahman ini mengandungi beberapa bahagian yang terdiri daripada bahagian pendahuluan, tatacara penerimaan maklumat, tatacara menjalankan siasatan, tatacara berkaitan penyediaan kertas siasatan, penyediaan laporan kes, pengendalian benda yang disita, bahagian am dan jadual pertama berkaitan cadangan kandungan kertas siasatan.
Kod Etika Pegawai Penguatkuasa Agama Jabatan Agama Islam Negeri 2008

Kod etika ini merupakan satu garis panduan yang digubal dengan tujuan memastikan penguatkuasaan undang-undang Syariah dapat dijalankan secara lebih bereti, berdisiplin dan selari dengan kehendak undang-undang serta menepati kehendak hukum syarak. Selain itu, kod ini diharapkan dapat diseragamkan di peringkat negeri serta dapat mengangkat prinsip *al-amr bil makruf wa nahyu anil munkar* dengan lebih efisyen, telus dan berkesan.

Kod ini mengandungi beberapa bahagian iaitu bahagian nama, pemakaian, tatakelakuan umum, tatakelakuan khusus dan bahagian am. Bahagian yang penting dalam kod ini ialah bahagian tatakelakuan umum dan khusus. Tatakelakuan umum menggariskan tentang keperluan tatkaleklu yang perlu ada bagi setiap PPA sebelum menjalankan tugas dalam kehidupan sehari-hari dan semasa tempoh perkhidmatan sebagai PPA. Manakala tatakelakuan khusus berkaitan tatakelaku yang perlu wujud dalam setiap PPA semasa menjalankan tugas *al-amr bil makruf wa nahyu anil munkar*.

Arahan Ketua Pendakwa Syarie 2011

Arahan ini merupakan satu garis panduan bagi tugas pendakwaan undang-undang syariah yang dibuat untuk semua Pendakwa Syarie seluruh Malaysia. Arahan ini telah diersetuju oleh Mesyuarat Ketua Penguatkuasa Agama dan Ketua Pendakwa Syarie seluruh Malaysia dan Persidangan Ketua-Ketua Jabatan/Majlis Agama Islam Negeri seluruh Malaysia. Kandungan arahan ini merangkumi 8 bahagian iaitu bahagian permulaan, penyediaan buku daftar dan buku rekod, penerimaan dan penyemakan kertas siasatan, prinsip pendakwaan, penyediaan pertuduhan, prosiding pedakwaan dan perbicaraan, rayuan dan bahagian am. Secara prinsipnya, arahan ini banyak merujuk kepada Pendakwa Syariedan bukannya PPA. Namun beberapa peruntukan dalam arahan ini perlu diikuti oleh PPA antaranya rekod penghantaran dan penerimaan kertas siasatan dari Bahagian Penguatkuasaan, semakan kertas siasatan dari sudut perintah siasatan dari Ketua Pegawai Penguatkuasa, borang maklumat PPA dan laporan penyasatan PPA.

Peranan menguatkuasakan undang-undang ini akan dimainkan oleh PPA apabila menerima aduan. Aduan tersebut boleh dibuat oleh siapa saja yang mengetahui perbuatan yang tidak bermoral dan bertentangan dengan undang-undang syariah. Aduan yang dibuat
akan dianggap sulit dan tidak didedahkan kepada umum. Cara membuat aduan adalah berdasarkan kepada Carta Alir 1 yang diambil dari Jabatan Agama Islam Wilayah Persekutuan (JAWI) iaitu aduan boleh dibuat secara bertulis dan lisan. Pengadu boleh datang sendiri ke Bahagian Penguatkuasaan dan mengisi borang aduan. Selain itu, pengadu juga boleh membuat aduan menerusi telefon, sms, surat, email, faksimili, laporan polis atau seumpamanya dan semua cara aduan tersebut akan diubah dalam bentuk tulisan.

Carta Alir 1: Cara membuat aduan bagi perbuatan tidak bermoral


Setelah menerima aduan, Bahagian Penguatkuasaan perlu memastikan bahawa aduan tersebut dibuat secara bertulis oleh PPA samada pengadu datang sendiri ke Bahagian Penguatkuasaan atau melapor secara lisan melalui cara lain seperti di Carta Alir 1. Sekiranya aduan tersebut dibuat secara bertulis oleh pengadu, PPA perlu mendapatkan maklumat diri
pengadu, alamat kejadian, identiti orang yang disyaki (OYDS), identiti orang lain yang berkenaan serta apa-apa maklumat lain yang boleh disokong. Kesemua aduan/maklumat yang diterima sama ada secara lisan atau bertulis ini akan didaftarkan di dalam buku daftar maklumat dan akan diberikan nombor pendaftaran atau rujukan fail.

KESIMPULAN

Secara kesimpulannya, kewujudan Bahagian Penguatkuasaan di bawah JAIN seluruh Malaysia bertanggungjawab dalam melaksanakan bidang tugas menyeru umat Islam kepada kebaikan dan mencegah daripada kemungkaran adalah selaras dengan kewujudan bidang tugas yang dipertanggungjawabkan terhadap institusi Hisbah. Namun begitu, bidang tugas yang dilaksanakan oleh JAIN hanyalah terhad terhadap aspek ritual dan moral sahaja. Sebaliknya, institusi Hisbah secara teorinya mempunyai bidang kuasa yang luas merangkumi aspek sosial, ekonomi dan pentadbiran.

Selain itu, peranan dan fungsi yang dimainkan oleh PPA di bawah JAIN adalah sama dengan fungsi yang dimainkan oleh Muhtasib di bawah institusi Hisbah. Prinsip al-amr bil makruf wa nahyu anil munkar yang dilaksanakan oleh Muhtasib turut menjadi prinsip yang dijunjung dan dimartabatkan oleh PPA. Beberapa kriteria tentang perlaksanaan tugas Muhtasib bagi menepati kehendak hukum syarak yang ditetapkan oleh ulama’ terdahulu turut diimplementasikan oleh PPA.

Walaubagaimanapun, peranan dan fungsi PPA jika dibandingkan dengan Muhtasib hanya dari sudut pencegahan jenayah undang-undang syariah. Hal ini kerana keunikan Malaysia yang mempunyai dwi sistem perundangan membataskan bidang tugas dan kuasa PPA yang hanya berkaitan moral dan ritual yang melibatkan orang Islam sahaja. Peranan-peranan lain bagi bidang tugas Muhtasib telah dilaksanakan oleh agensi-agensi penguatkuasaan yang pelbagai di Malaysia.

**RUJUKAN**

**Buku dan Jurnal:**


Arahan dan Garis Panduan:

Arahan Ketua Pendakwa Syarie 2011

Arahan Tetap Pengarah Jabatan Agama Islam Negeri 2008

Kod Etika Pegawai Penguatkuasa Agama Jabatan Agama Islam Negeri 2008

Internet:

AN ANALYSIS OF THE CONSENSUS AD IDEM PRINCIPLE; THE SHARI’AH AND MALAYSIA CONTRACT LAW PERSPECTIVES


Abstract

Under Section 10(1) of Contracts Act 1950, all agreement must be entered with free consent by person having the capacity to enter an agreement. Such requirement relates to the common law doctrine of *consensus ad idem* (meeting of mind) which requires all parties to the contract understand and accepted the commitments / terms under the agreement. The Contracts Act 1950 also provides for the circumstances which affect consent in contract; namely coercion, undue influence, fraud, misrepresentation and mistake (section 14(a)-(e)).

Under Shariah, consent or *redha* is the main element in contract according to Islam. Contract enforced without the consent of contracting parties is void. However, consent or *redha* is something hidden inside one’s mind unknown to the others. In order to show consent, Islam has made *sighah* (offer and acceptance) as main element to determine the existence of consent in contract. *Sighah* is defined as expression of intention of contracting parties and the kinds of affairs they wish to form (Al-Mausu’ah al-Fiqhiyyah, 28:153).

This paper discuss the element which affect free consent under the Malaysia contract law and compare them with the Shariah principles. The objective of this paper is to identify whether the existing provision and principles of free consent under Malaysia contract law is in compliance with Shariah. Research methodology applied in this paper are the doctrinal and statutory analysis.

* This paper is an output of a research under the Harmonization of Laws project funded by IKIM. all these circumstances, free consent among contracting parties does not exist hence diminishing the validity of a contract.
Introduction

A valid contract is a contract, which displays common intention of parties to form such contract. Known as consensus ad idem, contracting parties must have common intention to create a relationship of offer and acceptance and mutual consent (Mohd Ali, 1999). In this manner, contracting parties must agree on the same matter and sense whereby their consent must be undivided and absolute. The absolute intention will unite contracting parties through mutual consent (consensus ad idem) (Razali, 2010, p. 17). Under the Contracts Act 1950, section 14 provides the circumstances/factors which vitiate free consent hence affecting the validity of contract. These factors are coercion, undue influence, fraud, misrepresentation and mistake. In

Under Shariah, the existence of consent in contract can be traced from the merging between offer (ijab) and acceptance (qabul). Article 181 of the Majallah al-ahkam al-Adliyyah explained that the meeting place of contracting parties must be meant to conclude the contract. According to the National Fatwa Council Malaysia, validity of a contract shall be affected due to the existence of gharar, maisir and riba’.

The doctrine of Consensus ad-idem

In the case of *Household Fire and Carriage Accident Insurance Co Ltd v. Grant* (1879) 4 Ex D 216, Thesiger LJ noted that:-

“Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts.”

In the benchmark case of *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, Bowen LJ said:-
“One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law - I say nothing about the laws of other countries - to make a contract.”

In *Baltimore & Ohio R. Co., v. United States* 261 67 L.Ed. 816 (1923) the US Supreme Court submitted that the founding basis of an agreement lies on a meeting of minds between contracting parties:-

“an agreement ... founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.”

**Consent under the Shariah Perspectives**

Under Shariah, consent or *redha* is very important because it reflects the rights and responsibilities that have to be performed by both contracting parties. The principle that an agreement must be based on mutual consent has been expressively stated in Surah An-nisa’ verse 29:

“O YOU who have attained to faith! Do not devour one another’s possessions wrongfully - not even by way of trade based on mutual agreement- and do not destroy one another: for, behold, God is indeed a dispenser of grace unto you.”

The consent of contracting parties may be expressed through some types of *sighah* such as words, signs, actions and in writing. In general, the Muslim jurists agreed that *sighah* of contract should be expressed verbally. Muslim jurists opined that *sighah* of contract through clear signs which is understandable is valid according to the Shariah. Imam Al-Khatib Al-Syarbini stated that *sighah* of contract through signs made by the mute is equal to verbal *sighah* in times of emergency (al-Syarbini, 2:17). Nevertheless, the jurists were
divided on *sighah* through signs for people who are able to contract verbally. According to majority of jurists hold that *sighah* expressed by signs, is considered invalid for contracting parties whom are not mute. The Maliki jurists took a different approach to recognise *sighah* by signs regardless of whether contracting parties are mute or else (al-Mausaüh, 1994. 30: 211).

On the other hand, Hanafi and Hambali jurists accepted the validity of *sighah* made through action (al-Mu’tthah, al-Taa’thi atau al-Murawadhah; al-Kasani, 5:134 & Fath al-Qadir, 5: 177). Agreement made through action with no verbal or signs. For example, a buyer gives money to the seller and the seller provides the goods. These actions are done without buyer or seller saying anything to each other nor showing any signs. According to custom (‘*urf*), agreement made through actions is considered adequate to prove that contracting parties have consented to the deal (al-Zuhailiyy, wahbah, 1885. 4: 99). However, the Shafie jurists refused to recognise *sighah* made through actions because consent is hidden and cannot be showed expressively unless through words. *Sighah* by actions could give rise to alternate meanings hence may render its objective unachieved (al-Syarbini, 2:3 & al-Syiraziyy, 1: 257). Nevertheless, since it has become a popular custom today, it could be accepted as a valid method to determine the consent of parties to perform the contract (al-Kibbi, Sa’duddin, 2002: 57).

*Sighah* in writing is the most popular method to prove the existence of consent in contracts today. Although *sighah* could be made verbally, the intention to contract could be strengthened when *sighah* is made in writing. This could be supported by the Qur’an in Surah Al-Baqarah verse 282:-

“O YOU who have attained to faith! Whenever you give or take credit [269] for a stated term, set it down in writing. And let a scribe write it down equitably between you; and no scribe shall refuse to write as God has taught him.”
The existence of consent in contract can be traced from the merging between offer (ijab) and acceptance (qabul). Article 181 of the Majallah al-ahkam al-Adliyyah explained that the meeting place of contracting parties must be meant to conclude the contract. The existence of a meeting place or majlis can be determined clearly if the contract is made inter presente where all contracting parties meet physically at the same time (Mansoori, 2008). However, issue on legality of contract arose when contracting parties conclude a contract inter absente where both of them were absent physically at the majlis. This issue has been discussed at length by Siti Salwani Razali where she submitted that contract made inter absente does not invalidate the contract (Razali, 2010).

Articles 103 – 104 of the Majallah al-ahkam al-Adliyyah provide that a contract can be concluded through combination of valid offer and acceptance. Coulson explained that combination of offer and acceptance could be validated if majlis al-aqd exists. In a majlis al-aqd, contracting parties meet and discuss with the objective to find an agreement among them. Majlis al-aqd is said to begin when parties meet and ends when they disperse physically (Coulson, 1984, ms. 40). In another definition, majlis al-aqd is an interval where parties meet to conclude contract without any interruption from parties unrelated to the contract. (Alzaagy, 2007). According to Al-Zarqa’, majlis al-aqd is a situation where two parties negotiate to perform contract. Offer is considered invalid if the majlis is adjourned before acceptance. To ensure the acceptance is valid according to Shariah, a new offer should be made in a new majlis (al-Zarqa’, Mustafa, 1998: 432).

However, Wahbah Az-Zuhayli opined that majlis al-aqd does not require physical presence of both contracting parties at the same place and time. Contracting parties are allowed to be at different places so long as there is a medium that could connect them. This would cover communication through online and letters as examples of modern that do not require the presence of both contracting parties during formation of contract. The same opinion is shared by Sheikh Islam Ahmad Ibn Taymiyyah where physical presence during majlis is unnecessary if contracting parties can reach a consensus through any medium of communication (Razali, 2010, p. 23).
Analysis of factors vitiating consent under contract law and Shariah

Under the Contracts Act 1950, factors which affect free consent are coercion, undue influence, fraud, misrepresentation and mistake.

(i) Coercion

Section 15 of the Contracts Act 1950 provides coercion as one of the factors vitiating consent among contracting parties. Coercion happens in two situations. First, when a party to the contract commit or attempting to threaten to commit any act forbidden by the Penal Code. Section 19 provides that any contracts concluded under coercion is voidable. Since coercion under Section 15 merely recognised the above two situations, it is submitted that there are many other types of coercion left uncovered. For example, the act of threatening someone may be carried out through physical assault. Assault is a crime under Section 351 of the Penal Code and any contract influenced by assault may invalidate the consent of contracting parties. However, if such coercion is not specifically classified as a crime under the Penal Code, then such act will not vitiate consent between contracting parties. For example, tortious assault is a made without the intention to cause injury hence is not a crime\(^2\). Consent from tortious action cannot be considered as coercion that vitiates consent.

Cases such as Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors\(^3\), Chin Nam Bee Development Sdn Bhd v Tai Kim Choo\(^4\), Perlis Plantations Bhd v Mohammad Abdullah Ang\(^5\), Mohd Fariq Subramanian v Naza Motor Trading Sdn Bhd\(^6\), are clear examples where the courts have narrowed down the concept of coercion to the two situations mentioned in Section 15 of the Contracts Act 1950. Cases such as Perlis Plantation and Mohd Fariq concerned economic duress where contracting parties have to accept contractual terms deprived of mutual consent due to pressing situations. On both of these cases, the courts have explicitly noted that provision in Section 15 is limited only to those two situations.

\(^2\) Cheong May Fong, Contract Law in Malaysia, (2012), Sweet & Maxwell Asia, p 219.
\(^3\) [1996] 4 MLJ 331
\(^4\) [1988] 2 MLJ 177
\(^5\) [1988] 1 CLJ 670
\(^6\) [1998] 6 MLJ 193
There are several juristic opinions from the Shariah perspective on coercion or *ikrah*. According to *Mu’jam Lughah al-Fuqaha’*, *ikrah* could be defined as the act of forcing someone to do or abstain from doing something against his own will (Qal’ajiyy, Muhammad Rawas, 1988: 85). *Ikrah* has also been defined as asking someone to perform something against his favour and against his free will directly (al-Nasafi, 2: 307). Article 948 of Majallah al-ahkam al-Adliyyah defines *ikrah* as to force someone to perform something without his free will (Ali Haidar, 9: 10). On the other hand, Mustafa al-Zarqa defined *ikrah* as giving undue pressure to someone through hurt, or threat to do or abstain from doing something (al-Zarqa’, Mustafa, 1998: 452).

Wahbah Az-Zuhayli has recorded several definitions of coercion according to the Muslim scholars. For example, coercion is said to happen when someone forces the other to do something beyond his own will, to which such actions shall not be performed even if he is given a different option. Al-Sarakhsi opined that coercion is an action towards someone where his consent and freedom to choose have been denied (Al-Zuhayli, 2003, p. 315). Based on the above definitions, *ikrah* can happen through words or actions, whether to cause actual injury or anything that may lead to such injury.

Scholars of Hanafis School differentiated coercion into two types, namely, total coercion (*mulji*) and partial coercion (*naqis*). Total coercion causes death or serious bodily injury to its victim and vitiates his consent to contract. On the other hand, partial coercion does not threatens life or causes serious bodily injury such as imprisonment and battery. *Ikrah* also causes its victim’s consent to be invalidated however does not deter his right to choose in cases where he may be patient towards suffering from such coercion. (Al-Kasani, 9: 4479, al-Samarqandiyy, 3: 273 & al-Taftazaniyy, 2: 196). However, majority of Muslim scholars do not differentiate between total and partial coercion when both have the same effect, either leading to murder, amputation of limbs, imprisonment, beating etc. According to *Al-Taj wa al-Iklil*, the borderline of coercion crosses when an act of coercion causes detriment whether through assault, hurt and others (al-Mawaq, 4: 45). Imam Al-Syafie opined
that coercion is any actions that could vitiate someone’s consent and right to option (al-Taftazanyy, 2: 196).

(ii) Undue influence

Section 16 of the Contracts Act 1950 provides for undue influence as one of the factors vitiating consent in a contract. Undue influence happens when there exists a dominant relationship between contracting parties, which provides opportunity for one party to use such position to obtain unfair advantage over the other. Section 16 (2) defines dominant relationship as:

a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other;

b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress;

c) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Section 20 of the Contracts Act 1950 provides that any agreement made under undue influence is voidable at the option of the party whose consent was so caused. However, in cases where undue influence was raised, the court insisted that all of the elements in Section 20 of the Contracts Act 1950 should be proven. This had caused cases in which some parties cannot prove the existence of the dominant relationship or the unfair advantage that vitiates consent, such as the case of Polygram Records Sdn Bhd v. The Search [1994] 3 MLJ 127. The existence of this dominant position is so important, which made the Malaysian courts to refer to common law to decide what relationships are considered as fiduciary or not. Fiduciary has been defined by Mohd. Radzali as a relationship between A and B bounded by the law to execute their responsibilities in good faith for the benefit of B. For example, the relationship between trustee and beneficiary. The doctrine in equity does not allow anyone to
have fiduciary relations (except otherwise stated) to gain personal advantage in which
contradicts his duty and personal interest.⁷

One case of the UK that could provide some guideline on fiduciary relationship was *Barclays Bank plc v O'Brien & Anor* [1993] 4 All ER 417, where Lord Browne Wilkinson differentiated fiduciary relationship (categorised as 2A) and others based on trusts and confidence (categorised as 2B). *Barclays Bank plc* has been accepted in Malaysia through *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 26 which involves organiser of an association. Although the organiser was not specifically categorised as having fiduciary relationship, however, was part of a class of persons that could easily influence the others and may have taken the chance for personal gain. However, in cases such as *Southern Bank Bhd v. Abdul Raof bin Rakinan* [2000] 4 MLJ 71 where relationship between husband and wife cannot be considered as having fiduciary relationship. Further, in *Polygram Records Sdn Bhd v. The Search* the band manager and singer was not considered as having fiduciary relationship with each other.

**Shariah principles**

The prohibition of undue influence has clear rulings in Islam. Al-Qur’an through Surah An-nisa’ verses 29 and 39 has laid down the prohibition to eat or own property through undue influence:

“O YOU who have attained to faith! Do not devour one another’s possessions wrongfully - not even by way of trade based on mutual agreement- and do not destroy one another: for, behold, God is indeed a dispenser of grace unto you.” (Al-Qur’an 4:29)

“And what would they have to fear if they would but believe in God and the Last Day, and spend [in His way] out of what God has granted them as sustenance - since God has indeed full knowledge of them?” (Al-Quran 4:39)

⁷ Mohd. Radzali Masrum, Maksim dan Ungkapan Undang-undang, Dewan Bahasa & Pustaka, (2001); ms, 127,
A contract entered into by contracting parties is considered valid if made based on mutual consent and free will from both sides. If a contract is performed but tainted by the existence of undue influence, then the validity of such contract may be questioned. Quranic verses from the above have clearly shown that freedom of choice is a very important ingredient for contracting parties in formation of contract. Muslim jurists were unanimous to provide redha or freedom to choose (hak al-khiyar) as essential element in contract formation. Sanhuri argued that two important elements in contract are freedom to choose (hak al-khiyar) and consent (redha) (Nabil Saleh, 1990:108). This statement derived from the sayings of Allah SWT in Surah An-Nisa verse 29 as stated above. Redha means to do an act with the feeling of ease, purity and good faith. Majority of scholars said that redha is an intention to do something without any force (Ibn Majah, 2: 737 & Mausu’ah, 30: 220).

According to Al-Zarqa’, undue influence is categorised as aib or something that may tarnish the principle of redha or freedom of choice (hak al-Khiyar). Any element that may influence the original intention and free will of the contracting parties is considered as defects (aib) hence could directly affects the validity of the contract concluded (al-Zarqa’: 449). According to Az-Zuhaily, defects in consent (uyub ar-ridha) is something, which was derived from unwilling or incomplete intention to contract (Zuhailiyi, 4: 212). This includes defects in will (uyub ar-ridha) such as fraud (tagrir/tadlis), mistake (Ghalat), coercion (ikrah) and undue influence. Some jurists discussed undue influence under the category of fraud or Al-Ghabn. Al-Ghabn means that there is no balance between offeror and offeree (Al-Asy’ari Hasan, 2015)”. Al-Ghabn shall be discussed in detailed in the next part of this paper.

This general principle has been stated in Article 97 of Majallah al-ahkam al-Adliyyah that provides any property taken shall be returned to its owner regardless of being stolen, undue influence or mistake. All Muslim jurists were unanimous in this position that it shall be an obligation to return any property (whether it is still in good shape or in possession of the influencer) to its owner (Mian & Akter, 2013).
(iii) Fraud and misrepresentation

Section 17 of the Contracts Act 1950 provides for fraud as a factor that vitiate consent in contract. Fraud happens when one party (or its agent) commits one of the following acts:

a) The suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
b) The active concealment of a fact by one having knowledge or belief of the fact;
c) A promise made without any intention of performing it;
d) Any other act fitted to deceive; and
e) Any such act or omission as the law specially declares to be fraudulent.

Section 17 in its Explanation further provides that silence of a party from disclosure of certain facts does not render the act as fraud. A clear example is given in Illustration (a) where A sold an unsound horse in an auction. A does not disclose the fact that the horse is unsound and such is not considered in law as fraud. In the case of Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor [1980] 1 MLJ 185, owner of a vehicle rented it to another person without informing of its manufacturing year and that it has been in an accident. The Federal Court decided that no active duty on behalf of the seller to inform all information pertaining to the vehicle to the buyer. The seller’s silence about defects in a product is not considered as fraud under Section 17 unless he is under the duty to reveal the truth about such product. Illustration (b) provides where Buyer B is the son to Seller A. in this situation, the father-son relationship imposes the duty on Seller A to reveal every facts about the goods to Buyer B.

Another factor that confines the scope of fraud in Section 17 was the exception stated in Section 19:

“If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.”
This exception puts the duty on the buyer or the offeree to seek for the truth and not to simply depend on the information given by the seller. This concept is known at common law as caveat emptor and popularly described as ‘let the buyer beware’. The rule of caveat emptor contravenes the Shariah because the seller whom was lying escaped from any responsibility derived from his actions and the buyer was not aware of such fraud. The seller owes the duty to tell the truth about the goods sold and not for the buyer to seek for it.

**Shariah principles**

Wahbah Az-Zuhaili had emplaced this topic under “Ghabn ma’a al-Taghrir”. ‘Ghabn’ literally means al-Naqs (reduction) or the difference in sales price with actual market price. Reduction in this context refers to the price paid is not equivalent to the value of goods received or too high above the market value. Taghrir refers to fraud by words or action with the intention to induce someone into contract (al-Zarqa’: 463 al-Zuhailiy, 4: 221 & al-Mausu’ah al-Fiqhiyyah, 20: 148). Ghabn may be divided into two categories namely ghabn yasiir (minor fraud) and ghabn fahisy (excessive fraud). Minor fraud happens when the reduction or excessive elements in a contract is not more than 10% from its real value. For example, one buys goods at RM 100.00 where the actual value is only RM 90.00. Minor fraud does not necessarily causes the contract to be void since it is very difficult to be controlled since it happens regularly in daily activities. It is customary in the society that most people simply ignore if there was minor fraud in contracts. However, Hanafi scholars opined that there are few exceptions, which may render necessary to avoid the contract even for minor fraud. Some include contracts made when someone is near to death (marad al-maut) or transaction using properties of the orphans.

On the other hand, ghabn fahisy or excessive fraud receives variety of interpretations from Muslim scholars. Some opined that excessive fraud involves unreasonable price and others thought that it involves different goods than what was agreed. Scholars argued that to measure how excessive a fraud in contract is, (1) the sale price is more than one half, (2) for
livestock goods is more than 1/10th and (3) for immovable property 1/5 from its market value (al-Zuhailiy, 4: 221 & al-Maus’ah al-Fiqhiyyah, 31: 139).

Excessive fraud gives adverse effect to the principle of redha or consent in contract. However, the question is whether excessive fraud in contract allows contracting parties to avoid from the contract. As stated by Hanafi scholars, excessive fraud in contract does not simply allow contracting parties to annul the contract unless the goods received was not as expected to the buyer or the extent of fraud was so clear. For example, developer stated that the house on sale is of two storey but what was discovered later was only single storey. If such happens only then the contract may be rescinded (al-Durr al-Mukhtar, 4: 166). According to scholars from Hambali School, excessive fraud in contract allows the contract to be voidable regardless of whether the fraud was clear or otherwise (Ibn Qudamah 4: 212).

On the other hand, Hanafi and Shafie scholars opined that excessive fraud leads to invalidity of a contract. Article 165 of Majallah al-ahkam al-Adliyyah explains that excessive fraud happens when, (1) in the context of goods – if the fraud is more than one tenth and (2) in the context of livestock – if the fraud is more than one fifth or higher amount. Article 357 of Majallah al-ahkam al-Adliyyah explained that if one party in contract finds the other has defrauded in an excessive manner, the victim may rescind such contract. Maliki and Hambali scholars adopted the same opinion where contract influenced by excessive fraud may be voidable especially when the victim is less experienced in such transaction (Khadduri & Liebesny, 2008, p. 193).

Hambali scholars divided excessive fraud into three situations:-

1) Talaqa al-Rukban: when one blocks traders whom are carrying goods to be sold at cities to buy them at lower price. If he does not do so, the traders will discover that their goods should be sold at higher price. This is forbidden or haram and contracting parties have the right to option (khiyar) to avoid the contract based on a hadith of Rasullullah s.a.w. and Sahih Bukhari, which means: “You should not stop traders before they reach the market”. This opinion is also supported by scholars from Shafie School (Ibn Qudamah 4: 212, Syarbini, 2: 36 & Muhazzab, 1: 292).
2) *Al-Najsyu*: A raised the price in an auction with no intention of buying to confuse B to buy at higher price. According to one of Shafie and Hambalis scholars, B is entitled to an option to rescind the contract (*khiyar*) if he was not aware that A has no intention to buy but only to deceive the others (Ibn Abd al-Bar al-Qurthubi, 2: 739, Al-Mawardi, 5: 343, al-Syabini, 2: 37 dan al-Hijawi 2: 91). On the other hand, Shafie and Hanafi scholars opined that such person does not have the right to option (*khiyar*) and the contract remains valid (Ibn Qudamah 4: 212, Ibn Nujaim, 6: 107, Syarbi, 2: 37 & Muhazzab, 1: 291).

3) *Al-Mustarsil*: A is ignorant about the value of an asset or goods, buys solely based on his trust (*amanah*) to B. After purchase, A found that he was being defrauded excessively, thus, he has the right to option (*khiyar*) to render the contract voidable (Ibn Qudamah 4: 212).

(iv) **Mistake**

Mistake as a common law rule was explained by Lord Atkin in *Bell v. Lever Bros Ltd* [1932] AC 161 as follows: “if mistake operates at all, it operates so as to negate or in some cases to nullify consent.” Therefore, it is clear that when a contract is formed under mistake, consent of the contracting parties is vitiated. Section 21 of the Contracts Act 1950 provides “where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.” Section 23 explained that contract concluded under unilateral mistake is not voidable. In this regard, the contract is still valid although one party has made a mistake. Liquat opined that unilateral contract could not be annulled simply for mistake of fact on one party. Such is because of the principle of *caveat emptor* applied in common law has been absorbed by the Contracts Act 1950 (Niazi, 1991, p. 106).

The difference made in Contracts Act 1950 on unilateral and bilateral mistake shows the importance to ensure which sides have been mistaken. In this regard, Sinnadurai opined that the common law concepts derived from *Cundy v Lindsay* (1878) 3 AC 459, HL and *Leeis v Averay* [1972] 1 QB 198, CA may be adopted in this study where unilateral mistake may
render the contract void. According to this opinion, only unilateral mistake concerning identity may render the contract void. Other kinds of mistake that vitiates consent is not tolerable if caused by one party.

**Shariah principles**

Scholars from Maliki School argued that unilateral mistake allows the contract to be voidable. However, majority of scholars have contrasting opinion where unilateral contract should be void ab initio. Nevertheless, the Shariah allows such contract to be voidable by the mistaken party. If the mistaken party agrees to continue with the contract, then he loses the right to avoid the contract in future. This includes situation where the mistaken party does not make any decision to annul the contract after the expiry of a reasonable time. Contracting parties who have concluded contract under mistake, unfair, forced or cheated shall be given remedy against the effects of such contract. Muslim jurists opined that consent derived from the above manners were vitiated and invalid according to Islam. If the victims know that they will be cheated or defrauded, surely they shall not agree to sign the contract. Therefore, the Shariah provides the mistaken party for the right to set aside the contract where its consent was vitiated (Rayner, 1991, p. 178).

**Conclusion**

It is observed that the Contracts Act 1950 and its principles are generally in line with the Shariah requirements. However, several sections concerning mutual consent such as *consensus ad idem*, coercion, fraud, misrepresentation, undue influence and mistake require necessary improvement for the benefit of both contracting parties. This is because mutual consent is the ‘*illah* of a contract without which the contract will not be perfect and binding. Mutual consent is very important to guarantee that parties have true intention to be bound according to the Shariah. The same applies to contingency and indemnity contracts. Both of these contracts require deeper discussions to determine whether they need to be removed from the Contracts Act 1950 and placed under a specific legislation without affecting modern financial transactions in practice now.
References


Community mediation in Malaysia is a programme created by the Department of National Unity and Integration ("DNUI") in providing an alternative dispute resolution method to the citizens at the community level, as to enable them to resolve disputes amicably. Formal mediation requires the mediators to have a standard practice. Therefore, an institution that is offering mediation services to the people is encouraged to provide proper training and accreditation to the mediators. Accreditation usually occurs in the context of organisational schemes designed to promote quality, standards and accountability among practitioners. Accreditation can be advantageous as it will set a benchmark standard, inspires public confidence and it is consistent with the movement towards the introduction of the reliable public standard. The objective of this paper is to study the practice in Singapore and Kerala, India to be compared with the practice in Malaysia. The authors adopted library based and empirical legal research i.e., a qualitative method in collecting data. From the data collected, it is found that in Singapore, the community mediators are accredited by the Singapore Community Mediation Centre ("SCMC") and in Kerala, India the community mediators are appointed and accredited by IIAM ("Indian Institute of Arbitration and Mediation"). However, in Malaysia, the community mediators are trained by the Institut Kajian dan Latihan Integrasi Nasional ("IKLIN") (National Integration Research and Training Institute), DNUI but is yet to be accredited by a specific body that acquires a national or intentional standard. Therefore, it is suggested for the DNUI to adopt a standard that would allow the community mediators in Malaysia to be accredited and accepted at the national and international level.

**Keywords:** accreditation, community mediator, mediation, training.

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1. Introduction

Department of National Unity and Integration ("DNUI") under the prime Minister office created community mediation programme since 2008. The mediators were selected by the DNUI from the Ruku Tetangga (Peaceful Neighbourhood) committee members and its employees. The selection was made by the DNUI officers at the district level. Currently, there are more than 1000 community mediators in Malaysia. The community mediators were train by the expert in the area appointed by Institut Kajian dan Latihan Integrasi Nasional ("IKLIN") (National Integration Research and Training Institute), DNUI. This paper discusses training and accreditation of mediators in general, the practice adopted by Indian Institute of Arbitration and Mediation ("IIAM"), Singapore Community Mediation Centre ("SCMC") and the current practice in Malaysia. The comparison is made between the three practices as to enable the authors to suggest the best practice to be adopted by Malaysia.

The authors conducted this research by adopting library based and empirical legal research methods but are limited to qualitative legal research in collecting data. Most literatures define empirical research as both qualitative and quantitative research. Undertaking qualitative research alone does not exclude this research from being categorised as an empirical legal research. It is not necessary to undertake both methodologies to be classified as empirical legal research. In collecting data, the authors not only conducted interviews, made personal observations and analyses data, but also attended mediation courses.

The qualitative research method is adopted to enable the authors to focus and observe the current practice of community mediation in Malaysia and to conduct an in-depth study of such practices by the community mediators trained by DNUI and to collect information on the mediators training and accreditation in Singapore and Kerala, India. The authors divided the qualitative research method into personal observation and interviews. The library-based method is adopted to obtain further information on training and accreditation in Singapore and Kerala, India. In collecting data, the authors not only conducted interviews, made personal observations and analysed data, but also attended mediation courses and conducted training to community mediators by invitation from IKLIN.

From the data collected, it is found that in Singapore, the community mediators are trained and accredited by Singapore Community Mediation Centre (“SCMC”) that adopt the standard provided by Singapore Mediation Centre, which mediation practice recognized internationally. As for Indian Institute of Arbitration and Mediation (“IIAM”), the community mediators are trained by the centre that adopts the international standard provided by the International Mediation Institute (“IMI”), the Hague, Netherlands.

It is further found that in Malaysia, the DNUI has yet to establish a body that may accredit the community mediators. The IKLIN as a training body for the DNUI is handling all sort of training for the Department and has yet to have an in-house expert to accredit the mediators. The training given by the IKLIN appointed trainers since 2010 until 2016 is the basic training and there is no specific standard set by IKLIN as a benchmark. The training conducted by the trainer from 2008 to 2013/2014 was an extensive training which has 20 steps which is perceived as a “peacebuilding” programme. Since 2014, the training given to the community mediators concentrated to mediation process only. It focuses on professional mediation process (which adopted the 40 hours mediators training with some modification) and some basic skills for mediators. Despite the changes in the training module and style, the community mediators have yet to be accredited. Therefore, Malaysia still need to have a body to accredit the community mediators. It is suggested that Malaysia creates a national standard for community mediation training or to adopt an international standard to standardise the training and thereafter accredit the community mediators. An accreditation body is urgently needed by the IKLIN, DNUI since community mediation in Malaysia involved a society build by a multi-races, religion, ethnicities and culture.

2. COMMUNITY MEDIATORS’ TRAINING AND ACCREDITATION

2.1 TRAINING AND ACCREDITATION

Training is important for mediators to obtain information on the theory of mediation, some practical skills and ethical awareness; and to learn about the emotional sensitivity of the parties in conducting mediation. The mediators have to improve their levels of competence and ethical behaviour for the benefit of the disputants as the users of their services and for their own reputation. One of the most important elements contributing to successful
mediation is the mediator’s ability to control over mediation process. Studies indicate that the success of mediation largely depends on the skill, training, and experience of the mediator.\textsuperscript{4} The responsibility to train the mediators lies on the shoulder of the so-called ‘accreditation’ organisation or institution that trains the mediators by adopting a certain standard which recognised at national and/or international level.

The term accreditation implies that an occupational group or public body recognises that an individual has successfully completed a prescribed course of education or training and meets certain levels of performance.\textsuperscript{5} At its most basic level accreditation involves the formal recognition of individuals, organisations or programs in a particular profession, occupation or pursuit, in terms of specified objective standards relating to qualifications, competence and performance. Accreditation usually occurs in the context of organisational schemes designed to promote quality, standards and accountability among practitioners. It could apply to individual practitioners, to organisations which provide particular services, to specific service-providing programs, or to employers engaging practitioners in the area.\textsuperscript{6}

In this context, the accreditation body shall be the organisation or institution that provides training to the mediator and monitor compliance of the accredited mediator. The accreditation body will have the control over accredited mediators and may revoke their licence if they fail to follow the procedures laid by the said body. Lau and Mohamed (2010) explained that,

\begin{quote}
“Accreditation or certification involves nothing more than an individual taking one or more training programmes with a reputable or known training body, which subsequently, on the individual taking an accreditation assessment process, is so accredited.”\textsuperscript{7}
\end{quote}

An accreditation body is important in defining standards for practice, covering processes and procedures as well as end results, providing a sound basis for evaluation and external accreditation. Thus, accreditation means that clients, users, contracting agencies and

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\textsuperscript{4} Bullock and Gallagher 1997 : 885
\textsuperscript{5} Boulle and Hwee 2000: 258
\textsuperscript{6} National Mediation Conference
\textsuperscript{7} Lau and Mohamed 2010 : 510
\end{flushleft}
mediators can be confident they are dealing with a quality service. Furthermore, accreditation can be advantageous as it will set a benchmark standard, inspires public confidence and it is consistent with the movement towards the introduction of reliable public standards. Indirectly, accreditation will improve mediator’s knowledge, skills and ethical standards, promote quality of mediation practice, serve and protect the needs of consumers of mediation services and provide accountability where they are not met, enable mediators to gain external recognition of their skills, and broaden the credibility and public acceptance of mediation.

However, it must be understood that the standardisation training and accreditation of mediators is not moving towards uniformity of practice, but rather to assure that the practitioner will be evaluated and managed by the organisation.

2.2. TRAINING AND ACCREDITATION OF COMMUNITY MEDIATORS BY IIAM

The Indian Institute of Arbitration & Mediation (IIAM) is situated in Cochin, Kerala, a city where all the religious places of worship such as mosque, churches, temples and synagogues can be found. IIAM was formed by a group of professionals and businessmen in 2001 and registered under the TC Literary Scientific and Charitable Societies Registration Act, 1955. IIAM is a centre that provides facilities to the people to resolve their problems outside court by applying ADR (alternative dispute resolution) methods such as mediation, conciliation, negotiation and arbitration either at national or international level. The panel of the certified arbitrators and mediators maintained by IIAM are known for their expertise in the fields. IIAM provides training for mediators and arbitrators and the courses offered are approved by the International Mediation Institute (“IMI”) at the Hague as a Qualifying Assessment Programme (QAP) for IMI certification for international mediators. IIAM is the only institution that was granted such approval in India.

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9 About Us, Indian Institute of Arbitration and Mediation.
10 Welcome to IIAM, Indian Institute of Arbitration and Mediation.
The approach or model of mediation adopted by IIAM in practising community mediation is facilitative, where the mediator does not direct the parties towards settlement or evaluates the matters, but to facilitate communication between the parties. The training provided by IIAM equipped the mediators to become skilful mediators and effective negotiators. IIAM emphasises on dispute prevention and management so as to ensure that there will be no repetition of the same disputes in future.\textsuperscript{11} However, if the parties request the community mediator to adopt the evaluative approach, the mediator shall; first, re-confirm the parties on their request, second, conduct the preliminary and common session by adopting facilitative approach; and only adopt an evaluative approach in caucus or private session.\textsuperscript{12}

At the initial stage of developing community mediation programme, IIAM categorised the commercial mediator into four categories, namely Grade A, B, C and D. The community mediators are graded as “Grade D” mediators. This is a special grade that only volunteers who agree to be community mediators are trained under this programme. The community mediators of IIAM CMS are accredited mediators. They have to undergo IIAM Community Mediator Orientation Program to be certified as mediators Grade D.\textsuperscript{13} Currently, IIAM has upgraded the system and all community mediators are trained as “Grade C” mediators.\textsuperscript{14}

IIAM trainers are the experienced mediators who provide free courses for community mediators. The participants are exposed to the real disputes by mock mediations or role plays, group discussions, presentations and case studies based on real situations. The training included an interactive presentation on knowledge of negotiation, mediation rules, mediation ethics and code and good presentation of the matter. The trainers only train the mediators and not evaluate them. Mediators are evaluated by the assessors who are not involved at all in the training process to maintain the standard and guidelines provided by IMI.\textsuperscript{15}

\textsuperscript{11} Qualifying Assessment Programs Accreditation & IMI Certification for Mediators.
\textsuperscript{12} Anil Xavier, Interview by Author, Kuala Lumpur, 5 April, 2014.
\textsuperscript{13} Mediation Training Programs, Indian Institute of Arbitration and Mediation.
\textsuperscript{14} Anil Xavier, Interview by Author, Kuala Lumpur, 5 April, 2014.
\textsuperscript{15} Qualifying Assessment Programs… n.6
The high standard of training entitles the mediators to be recognised as professional mediators and allow them to mediate all kinds of cases. Even though the community mediators are at the bottom of the IIAM grading system, they are equipped with sufficient knowledge and skills that enable them to be acknowledged and recognised by international institutions.\(^{16}\)

### 2.3 TRAINING AND ACCREDITATION OF COMMUNITY MEDIATORS BY SCMC

The establishment of the current Community Mediation in Singapore programme began in 1996 when Professor S. Jayakumar, Minister for Law and Foreign Affairs instructed his inter-agency committee to explore the processes of alternative dispute resolutions and find a way to further promote mediation in Singapore. In July 1997, the committee submitted a report recommending mediation as a non-adversarial method of dispute resolution to be promoted in resolving social and community disputes. Mediation was chosen because of the flexibility and confidentiality of its processes.\(^{17}\) In Singapore, one of the purposes of introducing community mediation is to introduce a method where the disputants could arrive at a mutual agreement in resolving their disputes as well as preserving the existing relationships\(^{18}\) so as to avoid the occurrence of future social problems. In the initial phase, the government focuses on the physical infrastructure of the centre, the administrative processes, followed by referral arrangements and volunteer mediator in order to provide an effective service to the public.\(^{19}\)

Community mediators in Singapore are trained and accredited by the Community Mediation Centre (“CMC”) and appointed officially by the Ministry of Laws. The mediators’ training and the effort taken by the Community Mediation Unit (“CMU”), as well as the accreditation of the mediators is studied herein to learn the method adopted by the CMC that may be applicable for community mediation in Malaysia.

\(^{16}\) Anil Xavier, Interview by Author, Kuala Lumpur, 5 April, 2014.


\(^{18}\) S. Jayakumar, n66 at 3.

The community mediators of CMCs were trained by an eminent expert in mediation, Professor Lim Lan Yuan who also assisted the Community Mediation Unit (CMU) in setting up of the CMCs infrastructure. He has been appointed as the consultant to CMU and is well-known in many countries for his experiences.\textsuperscript{20}

The mediators of CMC have to undergo a two-day Basic Mediation Workshop. The mediation training provided to the mediators may be divided into two sections. The first section is a theoretical part where the mediators are equipped with the basic knowledge of mediation, such as the mediation’s philosophy, objectives and process. The mediators are also equipped with communication techniques and counselling skills. The second section is a practical section where the mediators must join a series of mediation sessions as co-mediators partnering with experienced or senior mediators to expose them to the real mediation sessions and a chance to have hands-on experience.\textsuperscript{21} The mediators will be officially appointed by the Minister once they are recommended by the senior mediator as well as the CMC’s Director.\textsuperscript{22} The appointment of new volunteers as mediators is based on CMC’s operational needs.\textsuperscript{23}

Upon being appointed, the mediators are given chances to network and share their experiences at roundtable sessions facilitated by the CMU’s consultant. In this session, the mediators take turns to share their experience with others.\textsuperscript{24} The community mediators are required to improve their mediation skills by attending programmes provided by the CMU such as advanced training in mediation, thematic workshops and roundtable sessions. The programmes give them an opportunity to learn from others’ experiences. The mediators will be granted with the title of “Master Mediator” once they have achieved the requisite level of expertise and experience in mediation.\textsuperscript{25} On 16 March 2013, the CMU in creating an opportunity for the panel of mediators to network with each other, had organised a retreat where the mediators were given the chance to appreciate and understand one another.

\textsuperscript{20} Ibid.
\textsuperscript{24} Community Mediation Centre Annual Report 2004-2005 : 32.
The Alternative Dispute Resolution (ADR) Division under the Ministry of Law, the Ministry of Home Affairs’ Policy and Operations Division and CMU organised a five-day joint study trip to Australia and visited a few Alternative Dispute Resolution institutions in 2004.\textsuperscript{26} The study trip exposed the CMU to their practice and the structure of the organisations. From the experience gained, the CMU continued to develop the accreditation programmes and mediation training as to ensure the CMC mediators are well-equipped with relevant skills in order to maintain a high level of professionalism of the mediators.\textsuperscript{27}

In 2004, the CMU introduced a new topic to the mediators which is relevant to mediation practice, such as drafting settlement agreement to develop their writing skills and on how to deal with difficult disputant.\textsuperscript{28} The training on these two topics was conducted continuously from 2004 to 2006.\textsuperscript{29} CMC provided advanced training programmes to the mediator to enable them to upgrade their mediation skills. The module or the training is annually revised by the CMU to ensure that the training provided by CMC further enhance the skill and expertise of the mediator.\textsuperscript{30}

In 2010, the CMU provided internal training and external training under the Continuing Professional Development programme to the mediators. The approaches adopted by the CMU as part of internal training are clinics, master classes and workshops. For instance, the CMU offered workshop such as “Improving Skills in Mediation in a Court Environment”, “Situational Management in Mediation” and “Sharpening Mediation Skills”. As for external training, the CMU offered the mediators to participate in conferences, courses and workshops. For instance, the CMU designed Advanced Drafting part 1 and part 2 courses to ensure that the mediators are equipped with appropriate knowledge and skill in drafting a binding settlement agreement and to avoid errors of drafting.\textsuperscript{31}

\textsuperscript{26} Community Mediation Centre Annual Report 2004-2005 : 31.
\textsuperscript{27} Community Mediation Centre Annual Report 2005-2006 : 32. \textit{See also} Community Mediation Centre Annual Report 2006-2007 : 34
\textsuperscript{28} Community Mediation Centre Annual Report 2005-2006 : 32.
\textsuperscript{29} Community Mediation Centre Annual Report 2006-2007 : 34.
\textsuperscript{30} Community Mediation Centre Annual Report 2007-2008 : 27.
\textsuperscript{31} Community Mediation Centre Annual Report 2010-2011 : 21-22.
The CMU collaborated with the Singapore Mediation Centre (“SMC”) to establish a programme, namely, Mediation Clinic, where SMC conducted training to the mediators to provide them with in-depth skills in mediation. Upon completion of the training, the volunteers had given a positive feedback. They were satisfied that they had a chance to gain more knowledge on various areas of mediation. Hence, it encouraged the CMU to continue developing and improving the training provided to the mediators.32

In 2013, the CMU has organised two workshops i.e., “Use of Counselling Skills in Mediation” and “How to Cope with Dilemmas”. The former was organised with the intention to provide the mediators with counselling skills and the latter to assist the mediators in facing dilemmas such as in encountering an unreasonable party.33

CMU has developed a Mediator Management Framework (MMF) to provide opportunities for the mediators to develop their skill in the mediation field professionally. It is designed to be launch by the CMU, collaborating with universities that offer certificate or degree programmes in mediation-related fields in providing workshops and training programmes for the mediators. The CMU also co-sponsors any mediators who are interested in pursuing their study in the universities.34 On the CMC realisation for the need to improve the effectiveness of the mediators with the increasing numbers of cases handled by the centre, the MMF was formalised. It was also formalised to establish the CMC as a centre of excellence in resolving community disputes. The framework has enabled the mediators to participate in the Continuing Professional Development (CPD) programmes. The MMF is now the basis for recruiting, training and developing the panel of mediators by CMC. The formulation of MMF was crucial to strengthen the knowledge and skill of the mediators. Under the MMF programme, commencing from 1 August 2012, the duration of the term is changed from 2 to 3 years.35

The CMC has initiated an accreditation scheme in recognising the competency of the mediators. The volunteer or newly appointed community mediator would be categorised in the first level. Upon fulfilling some criteria as required by the centre such as achieving an

33 Community Mediation Centre Annual Report 2012-2013 : 15.
34 The Mediators, July/August, 2012 : 4.
essential level of experience and expertise, the mediator is recognised as a master mediator, which would automatically elevate them to the second level. The master mediator who has seriously discharged his duties has the opportunity to be appointed as a Justice of the Peace.\textsuperscript{36} The title of senior master mediator is granted to a master mediator who has rendered his/her services as a volunteer of the CMC for no less than 5 years to 10 years.\textsuperscript{37} Further, the mediator must obtain good feedback from his peers and clients, and must be dedicated in performing their task at the CMC as to enable them to be appointed as senior master mediator. In 2009, the CMCs panel comprised of 66 mediators, 69 master mediators and 1 senior master mediator.\textsuperscript{38}

Furthermore, the mediators’ feedback or peer evaluation will be taken into consideration as one of the criteria in re-accrediting and appointment of mediators. Besides peer evaluation, the mediators are evaluated from their participation in the CMCs activities, mediation sessions conducted and success rate of the mediation sessions.\textsuperscript{39} In 2012, CMU has outlined the criteria for the mediators to fulfil, in order for them to be placed at the appropriate level. The tier system is intended to enable the CMU to recognise the efforts and contributions of the existing volunteers and future volunteers.\textsuperscript{40}

\section*{2.4 \textbf{TRAINING AND ACCREDITATION OF COMMUNITY MEDIATORS IN MALAYSIA}}

The community mediation programme in Malaysia is new and need to be improved from time to time. As mentioned earlier herein, the community mediators in Malaysia have yet to be accredited by any institution and the trainers are the expert of the area but are not attached to IKLIN. Due to the reason that this programme is very new in Malaysia and there is a very limited expert in the area, the DNUI has yet to have a specific standard module in conducting training to the mediators. The mediators are yet to have a formal assessment or to be provided with standard rules or laws that will govern their practice. From 2008 to 2013/2014, the mediators were trained with 20 steps of mediation process which is

\begin{footnotesize}
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\item \textsuperscript{36} Community Mediation Centre Annual Report 2007-2008 : 27.
\item \textsuperscript{37} Community Mediation Centre Annual Report 2009-2010 : 8.
\item \textsuperscript{38} Community Mediation Centre Annual Report 2009-2010 : 11.
\item \textsuperscript{39} The Mediators, June 2004 : 3.
\item \textsuperscript{40} The Mediators, July/August 2012 : 4.
\end{itemize}
\end{footnotesize}
considered as to equip them with skills to resolve dispute at community level or as third person who helps disputants to resolve their problems. The training is perceived as a successful “peacebuilding” programme. The training involved 16 days that is divided into four phases. Basically, each phase consists of 4 days training.

In 2014, IKLIN invited the authors to provide training to the community mediation. From the authors’ observation, the DNUI is moving towards professionalism of community mediators. Since 2014 – 2016, the community mediators were trained with 40 hours professional standard training module with some modification to ensure the community mediators in Malaysia would be able to comprehend and digest the module. Further, the modification was made by the trainers/authors because the training period given was only 4 days. The training was divided into three parts; the first part involved explanation on philosophy, process and boundaries on community mediation including mediators’ ethics; in the second part the participants were provided with mediation skills such as listening and reframing, and the third part was allocated for role play sessions. 6 hours was allocated for the role play sessions.

The community mediators in Malaysia has yet to be accredited by any institution since the training provided IKLIN through a third party are not following any national or international standard or a specific standard provided by IKLIN itself. Therefore, IKLIN need to appoint an accredited institution to train the mediator or to have a standard module that allows it to accredit the mediators.

3. CONCLUSION

Any institution may offer training for community mediators but not all institutions may accredit the mediators. The institution that accredited mediators must have a standard guideline and recognised either at national or international level. Currently, there are two recognised institutions that train and accredit mediators i.e., Malaysian Mediation Centre (“MMC”) and Kuala Lumpur Regional Centre for Arbitration (“KLRCA”). Thus, it is suggested that the current training of community mediators in Malaysia to be revised. The programme is recommended to be enhanced by giving accreditation to the community
mediators by adopting a standard that would allow the community mediators to be accredited by any of the national or international institutions such as MMC, KLRCA or IMI.

It is further suggested that IKLIN to appoint the current trainers and mediation expert from national and international institution to form a training board for community mediation that will provide a standard guideline in providing training to community mediators and thereafter accredit them. Community mediators in Malaysia need to be accredit to justify their position as a mediator, the neutral and impartial third party who assists the disputants by facilitating communication between them as to enable them to come out with an agreed resolution. Further, the accreditation body will be responsible to ensure that the mediators are competent to provide their services to the community and follow the standard of rules that are provided to them. In addition, the accreditation body will have the responsibilities to ensure the mediators undergoing a continuous training from time to time. Thus, accreditation of community mediators in Malaysia would benefit both the DNUI i.e., to have a competent mediators and the mediators that is to have a governing body that will ensure the programme is improve from time to time.

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DEALING WITH FACTS IN JUDICIAL PROCESS: A REFLECTION OF IJTIHADIC PRACTICE

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Abstract:

The importance of understanding the factual reality (fahm al-waqi’) has been widely recognized by Muslim jurists in their discussion relating to Islamic legal theory. It has been regarded as an important element for the practice of ijtihad and accepted as a valid justification for renewal of ijtihad. In light of the above, yet in a different context, the paper discusses the judicial concept of al-da’wa and the significance of fahm al-waqi’ or understanding the fact of legal disputes (al-da’awa) in Islamic judicial process. It examines the position of fahm al-waqi’ in judicial process as well as the process that should be taken by the judges in dealing with the fact of the legal disputes. The study proves that, as in the process of formulating legal rulings, understanding the fact of the cases assumes a very critical position in the judicial process, the ignorance of which will lead to injustice in decision making. Further, the paper argues that the process of understanding the fact of the case constitutes a form of ijtihad i.e. al-ijtihad fi al-waqi’, and that it must be undertaken by all judges regardless of their status whether they are mujtahid or muqallid.

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1. Introduction

The fact of a claim (al-da‘wa) is indeed one of the essential ingredients that needs to be attended to by a trial judge during a judicial proceeding. A judge cannot decide a case unless the fact of the case is sufficiently understood and proven. Being that in mind, the current study discusses the concept of the claim or (al-da‘wa) and the process that the judges must undertake to deal with the fact of the case in a judicial proceeding. The discussion on these issues pertaining to the fact of a claim is very important not only due to the reason that the fact is a compulsory element in a judicial process, but that the process of dealing with the fact is in itself influential in judgment-making of the trial judge. The overall discussion of the study will provide insight as to the proper process of dealing with the fact of the case, which eventually will help the judge to decide the legal disputes. The study argues that the process of understanding the fact of legal cases constitutes an effort of ijtihad in nature.

2. Judicial Concept of Al-Da‘Wa: A Reflection of Fact

The Arabic term of al-da‘wa which is literally to mean a claim or a charge has been afforded with many definitions by Muslim scholars. Perhaps the most thorough discussion on the definition of al-da‘wa has been advanced by Muhammad Na‘im Yasin in his book Nazariyah al-Da‘wa baina al-Shari‘ah al-Islamiyyah wa Qanun al-Murafa‘at al-Madaniyah wa al-Tijariyyah. After deliberating the various definitions of al-da‘wa offered by different groups of scholars, he came out with his own definition. He defines al-da‘wa as ‘the accepted words or anything else taking the place of words in a judicial proceeding, which is intended to mean that a person is claiming or securing a right for himself or for his principal’. This definition has been accepted by some scholars as representing the most comprehensive definition of al-da‘wa reflecting distinctively the true nature of al-da‘wa in its practical

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reality.¹¹ The definition has clarified some important points governing the requirements of a claim or a charge, they are;

1. That a claim or a charge must be made in words or expressed in writing or by understandable signs.
2. That a charge or a claim must be made in a judicial proceeding.
3. That only the accepted claims or charges fulfilling certain conditions shall be entertained by the courts.¹²

From the definition, it is clear that the purpose of making a claim or a charge is to demand or to secure or to protect a right or interest against another. It can be brought up by the person entitled to the right or by his representative to the court as the dispute settlement agency established for that purpose by the state. However the claim also inevitably must fulfil certain requirements before it can be accepted by the court as a valid claim.

Defining al-da’wa as an ‘accepted words or anything else taking place of words’, certainly indicates that a claim or a charge rests on a factual account of what happened between the parties. For usually a claim or a charge is preceded by an account of facts leading to the claim or the charge. There is no claim or charge devoid of facts. A claim or a charge normally starts when two or more individuals interact with one another or when an individual infringes the community’s right.¹³ Thus bringing up a claim or a charge for court’s decision in actual sense, is a process of bringing up a certain set of facts for the consideration of the court as to the right or interest of the parties to the action.

That al-da‘wa is a matter of fact can also be ascertained from the saying of the Prophet (s.a.w) as narrated by Ummu Salamah that the Prophet (s.a.w) had said:

“You bring to me for (judgment) your disputes, some of you perhaps being more eloquent in their plea than others, so I give judgment on their behalf according to what I hear from them. (bear in mind, in my judgment) if I slice off anything for him from the right of his brother, he should not accept that, for I slice off for him a portion from the Hell.”

The words of the Prophet (s.a.w.) that he decided cases based on what he heard from the parties shows that the Prophet decided cases based on what he heard of the facts and the proof of al-da‘wa which had been presented by the parties before him. This is because the presentation of fact of al-da‘wa and its proof have been made mandatory by the Prophet (s.a.w.) in another hadith reported by Ibn ‘Abbas which says to the effect that;

“ if the people were given according to their claims, they would claim the lives of persons and their properties, but the oath must be taken by the defendant.”

The above proves that the essence of al-da‘wa is but an account of factual set of circumstances or situations which leads up to an action in court against another person forming basis to initiate any claim for a right or interest recognized by the law. Accordingly al-da‘wa is essentially a matter of fact.


Understanding the case of dispute is mandatory in a judicial process and it is regarded as the most important process to be exercised by the judge. The trial judge must have correct and accurate understanding of the cases brought before him otherwise he would err in his

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16 *Sahih Muslim-Kitab al-'Aqdiyyah*, no. 1711.v. iii, p.149.
judgment. In this regard Ibn Qayyim al-Jawziyyah observed that if the judge errs in understanding the dispute, its subject matter and facts, he will definitely err in his judgment.\textsuperscript{17} Thus \textit{ijtihad} in the judicial process should not be understood to be limited to the knowledge regarding the applicable legal rules alone aloof from the consideration and understanding of the facts of the case.

In light of the above, there are situations where the applicable laws are well clear however the legal cases require intensive and considerable effort of the judges in order to determine the applicability of the law to the legal cases. Consider, the example given by Lon L. Fuller of the application of a very straight forward rule providing that “\textit{No person shall sleep in the city park}” in two different sets of fact. The first where a guy was found sitting upright on a park bench at noon, with his chin was resting on his chest, his eyes were closed and the guy was snoring audibly. In the second, a disheveled tramp was found lying on the same bench at midnight with a pillow beneath his head, and a newspaper was spread over his body as a blanket. The tramp, however, had insomnia. Both were arrested and brought for trial before a court of law. As the judge trying the cases, what would be your decision in both situations? Would you convict the guy and acquit the tramp or vice versa or that you would convict both or acquit both. Whatever your decision, does it base on the language of the rule itself or due to the different fact of the cases.\textsuperscript{18}

The observation by Ibn Qayyim that the judge will surely err in his judgment if he fails to understand and appreciate the facts of the case and the illustration given by Lon L. Fuller above prove the significance of fact-\textit{ijtihad (ijtihad fi al-waqi’) } in every judicial adjudication process. Hence, ascertainment of the rightful party in a civil dispute or the verdict of guilt against an accused in a criminal proceeding substantially depends on, apart from the provision of law, on the accurate and thorough reflection and analysis of the trial judge of fact of the case.\textsuperscript{19}


\textsuperscript{18} Lon L. Fuller, “Positivism, and Fidelity to Law: A Reply to Professor Hart”, \textit{Harv. L. Rev.} v. 71, (1958), 630, 662-664. See also Steven J. Burton, 19.

\textsuperscript{19} Mahmud Muhammad Nasir Barakat, p. 443.
In the constitutional letter of al-qada’, ‘Umar al-Khattab had instructed Abu Musa al-‘Ash’ari, that he must truly understand the facts of the dispute before delivering his legal judgment, the letter reads;

فبفٓى ارا أدنً انٍك

“Hence, you must understand when the case is presented to you…”20.

Commenting on the above instruction, Ibn Qayyim al-Jawziyyah observed that there are two kinds of understanding that a judge must have in order to come to a correct judgment. One of them is the correct and profound understanding of the factual circumstances of case and the ability to uncover the real fact of what occurred from the signs and the evidence of circumstances. Another one is the understanding of the rules governing the factual situation of the case, that is the understanding of God’s ruling in His Book or from His Messenger (s.aw.) for the factual situation.21 Obviously the first kind of understanding is the understanding of the facts and circumstances of the case that will help the judge to come at the just and correct decision.22 According to Ibn Qayyim al-Jawziyyah, those who concentrate his effort on those two understanding will surely will be entitled to two or one reward.23

The great emphasize on the importance of having a deep and through understanding on the fact of very case is also justifiable on the ground that each case or dispute has its own set of peculiar and unique facts. Steven J. Burton, a professor of law, University of Iowa, in his description of the uniqueness of every case brought for the determination of court has written the following words;

“Treating a case as a short story of an incident emphasizes that every case is unique in all of its particulars. A case involves two or more parties, both of whom are unlikely ever to repeat the very action that led to the dispute between them. We can describe the events in one case in terms general enough to encompass other disputes between other parties in other times and places. We can also describe them in terms specific enough to encompass only the

21 Ibid., p. 77.
23 Ibn al-Qayyim, I`lam….,p. 77.
dispute that occurred between these parties at one time and place. However we describe cases, each occurs once.”

In any judicial proceeding, what normally happens is that the fact of the case will be presented by the parties to the trial judge personally, who has the opportunity to hear the fact of the case directly from the parties and as well as from their witnesses. He also has the chance to observe the manoeuvre of the witnesses and to ask questions in order to clarify on certain particular matters that are unclear to him. All these are to make sure that the judge is clear as to the facts surrounding the case. In such a situation and after being clear of the facts of the case, the judge is expected to decide the case based on his understanding of the facts and his analyses of the evidence in support. What follows is that, he should not, in such circumstances, allow other persons, who are not privy to and ignorant of the facts of the dispute to dictate him in his decision of the case or to blindly follow others’ opinion in his judgment. Such a conduct amounts to injustice as others are not in full understanding or ignorant of the facts of the case.

Probably on this understanding, Sheikh Mahmud Syaltut in classifying Sunnah of the Prophet into Sunnah tasyri`iyah `ammah (general) and khassah (specific), stresses that legal decisions of the Prophet are categorized as specific sunnah tasyri`iyah which are not strictly binding on the Muslim. He argues that the actions of the Prophet in the exercise of his judicial functions were utterly based on his ijtihad taking account the peculiar facts and circumstances of the cases. This is a trite principle for it was narrated to the effect that the Prophet decided cases based on the presentation of facts and evidence by the parties before him personally.

24 Steven J. Burton, p. 12.
25 Sunnah tasyri`yah `ammah means the Prophetic legal rulings upon which all muslims are bound to follow and it includes all the teachings and rulings of the Prophet in his capacity as the messenger of Allah whereas Sunnah tasyri`yah khassah is the Prophetic rulings which are not strictly binding on the muslims especially when the rulings came from the Prophet in his capacity as the head of state or as a judge- Mahmud Shaltut, al-Islam: `Aqidat wa Shari`at, (Qahirah: Dar al-Shuruq,2001), p. 500-501. For further details on the above issues, please refer to Nasiruddin bin Hj. Ahmad, “Analisis Asas Pembahagian Sunnah Kepada Tasyri`iyah dan Ghayr Tasyri`iyah”, (Master Dissertation, University of Malaya, 2005).
26 Mahmud Shaltut p. 500.
Obviously, in any judicial dispute, fact of the case constitutes a very vital element in that the understanding of it will lead to the right ascertainment of the governing law and hence a correct judgment. In this conjunction, it is worthwhile to mention the words of Ibn Qayyim al-Jawziyyah who says that;

‘…the knowledgeable (‘alim) (of the mufti or qadi) is one who arrives, by his knowledge of the factual circumstances of the case (al-waqi’) and his erudition (al-tafaqquh) of its ruling, to the knowledge of the ruling of Allah and His Messenger (s.a.w.)...’

Thus, blind imitation to the opinions of others or slavish dependence on the previously decided cases has no place in Islamic adjudicating process simply because every case has its circumstances and concomitants. Letting other person to decide the case or to follow blindly the opinion of others without making own analysis on the applicability of the facts to the governing law in deciding legal case is not a justice for the simple reason the others do not hear the case personally thus are in ignorance as to the facts of the case. Thus, the trial judge needs to determine according to his ijtihad on the fact of the case whether the proven fact of the case constitutes a proper occasion for the application of the law to the case. In that sense, the fact of the case becomes the determining factor for the applicability of the rule to the specific occasion of the case. This is in fact the intended meaning of the ijtihad as to the fact of the case (al-ijtihad fi al-waqi’) to be exercised mandatorily by every trial judge regardless he is a mujtahid or muqallid.

4. Judicial Process in Dealing with Fact of Al-Da‘Wa

We have duly pointed out in the preceding discussion that legal da‘wa or dispute is a matter of fact which is unique in each every case. Due to that, it is justified to regard every case as novel case whereby the judges are demanded to exercise their ijtihad as to the circumstances of the case (ijtihad fi al-waqi’) in order to truly comprehend the case. Most importantly, reflection over the fact and occasions of the case will help the judges to ascertain

28 Ibn al-Qayyim, I’lam...,p. 77.
the correct governing rules for the cases and also the establishment of the required elements
for the application of the law to the fact of the cases. On that note, the following processes
that have been devised by the Muslim scholars must be observed by the judges (as well as the
mufti) in the course of their dealing with the fact of legal cases.

5. Overview Stage (Marhalat al-Tasawwur)

Imam al-Shatibi defines al-tasawwur as the knowledge on a particular subject of all
its aspects necessary to the understanding of the subject as it is.³¹ Thus al-tasawwur stage
represents the stage where the trial judge will have to direct and strain his mind to the subject
matter of dispute and its facts in order to achieve the overall knowledge and understanding of
the case.³² This stage is considered as the starting of the journey of the judges` mind in the
judicial process and regarded as the most crucial stage. The overview stage stands important
in the judicial process for any mistake or misdirection of the trial judge on the subject matter
and facts of the legal dispute will lead him to wrong ascertainment of the applicable law to
the dispute, thus leading to wrong judgment. Thus is it a fatality in the judicial process if the
judge hurriedly comes to a judgment without first correctly and profoundly understood the
subject matter and the facts of the dispute.³³

In the overview process there are two important spectrums that the trial judge must
concentrate on in order to acquire correct understanding of the dispute. The first one is
regarding the subject matter of the dispute itself and the second one is regarding the facts
surrounding the occurrence of the dispute or in a more simple word, the story of the incident
leading to the dispute.³⁴ To regulate for the attainment of better and through knowledge and
understanding of the subject matter of disputes especially those which are novel in nature, the
following methods have been recommended by Muslim scholars;

³¹ In its Arabic words (العلم بالموضوع على ما هو عليه و انا يقترب فيه إلى العلم بما لا يعرف تلك الموضوع الا فيه) - Al-Shatibi, Abu Ishaq Ibrahim, al-Muwafaqat fi Usul al-Ahkam, Ed. Muhammad Hasanayn Makhluf, (Qahirah: al-Matba‘ah al-Salafiyyah, 1341H), v.4, p.412.
³² Imam al-Shatibi defines al-Tasawwur as the understanding of the subject as it is (العلم بالموضوع على ما هو عليه) - Abu Ishaq al-Shatibi, al-Muwafaqat..., p 412.
³⁴ Ibid., Steven J. Button, p. 11.
1. Consultation of the Experts (Mushawarat Ahl al-Khibrat)

We must accept the fact that the knowledge of the judges is not all encompassing. They are not knowledgeable in all matters. There are also disputes where the subjects of which are totally new and unprecedented where the judges need to consult those people who are specialized in the specific fields. In this regard, Imam al-Shatibi pointed out that to acquire understanding of the subject of the disputes it might be situations where the mujtahid (judges) need to consult the doctors (regarding types of injuries and cause of death), the valuers (in relation to market prices and defects in goods), the surveyors (in relation to land areas) and other specialists regardless whether they are believers or non-believers. It is in this respect also that the Islamic judicial system has provided reference to expert opinions (ra‘y al-khabir) during the trial process. The Malaysian states have also incorporated expert opinion into their evidence legislations as part of circumstantial evidence (qarinat). For example, section 33 of Syariah Court Evidence (Federal Territories) Act 1997 provides;

33(1) When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions or relating to determination of nasab, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions or relating to determination of nasab, are qarinah.

33(2) Such persons are called experts

2. Making reference to authoritative and reliable sources of information on the subject matter of the dispute

By this method, the judges are expected to collect as much information as possible to enhance their understanding of the subject matter of dispute. This can be done by making reference to the reliable books as well as other reliable and official sources of information available from the online data providers. It has been argued that due to extensive and far-reaching legal activity of the past jurists, most of legal matters have been dealt with by them.

35 This is in line with the Quranic verse 43 of chapter al-Nahl.
37 Mahmud Saedon A. Othman, An Introduction..., p. 132-134.
This in effect leaves very little cases that are utterly new with no bearing at all from the preceding cases. Thus by reading those sources the judges would be able to know the past as well as the latest researches which would provide the judges with the historical and the contemporary development of the subject matter at hand. Muhammad bin Husain al-Jizani in his illustration of overview exercise of Misyar marriage (nikah al-misyar) has outlined a practical guideline of some mandatory components that must be collected for the understanding of the matter. Among the components are:

i. The reasons for its practice
ii. The nature and elements of Misyar marriage
iii. Its historical origin and later development of the practice
iv. The extent of prevalence of the practice
v. The extent of its urgency and importance
vi. The benefits and harm of the practice
vii. The previous research on the practice

Thus by following the above guideline in the overview process in relation to subject matter of a dispute the trial judges will have all-embracing information on the subject matter especially in connection with the elements of the subject matter because there are, in most legal matters, specific discussions on the specific element that warrant the attention of the trial judges.

3. **Reading and analyzing the previous judgment involving the same subject matter**

It might be situations where there are legal judgments previously decided involving the same subject matter. In such situations, it is recommended for the judges to refer to those judgments that will help them to better understand the nature of the subject matter, the proofs (al-adillat), the argument of the parties and the reasoning (al-ta’lilat) of the judges. This kind of reference resembles with the practice of the mufti to refer the earlier fatwas in the process of issuing new fatwa. This kind of specific reading is merely for the purpose of facilitating

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39 Muhammad bin Husain al-Jizani, p. 45-46.
40 Wail bin ‗Abd Allah bin Sulaiman al-Huwairini, p. 284.
the judges to broaden their overview and understanding of the subject matter of the cases before them by analyzing the arguments and the reasoning of the decided cases. It is not intended that they are to be bound by those previous decisions, because we have noted before that every case has its own unique facts and circumstances.

4. **Hearing to the parties of the dispute (al-Istima‘ ila al-Tarafain)**

Islam has made it mandatory for the judges to hear the claim of the plaintiff and the defence of the defendant in a judicial dispute before making any decision. By this process, the matter of the dispute and the incident leading to the dispute as well as the explanation of both parties of their version and perspective regarding the dispute would be ascertained by the judges. By hearing both versions of the plaintiff and the defendant, it will be easier for judge to understand comprehensively the matter of dispute and its incidents. It was narrated that ‘Ali bin Abi Talib had been appointed to the judgeship, whereas he was still young and had no experience in judicial process. The Prophet (s.a.w) said:

“When two men bring a case before you do not decide in favour of the first till you hear what the other has to say, then you will know how to judge”, then ‘Ali said “thereafter, I kept judging in accordance with that”. 41

Relying on the above hadith, imam al-Shawkani argues that it is forbidden for the judges to decide a case of dispute without first hearing the explanation and argument from each party. The judgment decided unilaterally must also be declared void unless where the defendant willfully refuses (tamarrada) to come to court despite of being served with the summons relating to court proceeding. 42

5. **Considering the evidence of the parties**

A judicial dispute cannot be decided based merely on the claim of the parties alone. Even though all believers are expected in principle to be truthful in their claim, but when it comes to judicial process of dispute settlement Islam has prescribed certain regulations regarding evidence requirement. The reason for that conception has been succinctly explained

by the Prophet (s.a.w) that if the claims of the people were to be accepted on their face value or upon a mere presentation of the claims, then they would claim everything even the lives of the other people. The hadith which was reported by Ibn ‘Abbas mentions;

“if the people were given according to their claims, they would claim the lives of persons and their properties, but the oath must be taken by the defendant”  

By looking at the methods resorted to in the *tasawwur* process one could clearly notice that *ijtihad* is part and parcel of judicial process for in the judicial process, the fact of dispute must be understood, examined and analyzed and these works resemble to substantial extent with the efforts required in the practice of *ijtihad*.

6. The Stage of Deferring the Subject Matter of Dispute to its Governing law (*al-Takyif al-qanuni*)

It has been argued anywhere before that legal cases are complex and indefinite in variety whereas textual provisions of law are simple and limited in number hence do not address specifically every single legal case. Due to that, it is the task of the judge to comprehensively and accurately analyze the legal case before him in order to defer the case to its governing law. The process of deferring the legal case to its governing law is called *takyif al-qanuni*, in which the matter of dispute and its fact that have been identified in the overview stage will be subjected to its relevant governing law and principles.  

Thus *takyif al-qanuni*, is the process that aims at identifying the law that governs the specific legal dispute in accordance of which the legal case will be adjudicated. For example, in a civil case where a plaintiff claims damages against the defendant, the judge has to decide the nature of the plaintiff’s cause of action whether it is based on contractual obligation or due to negligence of the defendant. If the judge in the overview stage found that the damages claimed is on the basis of contractual obligation then the governing law will be the law of contract whereas if it is found that the damages claimed is on the basis of negligence of the defendant then the case will be decided based on the law of tort and its principles. Likewise, in the criminal cases, the process of *takyif al-qanuni* warrants the judge (as well as the

43 Sahih Muslim, no. 1711, p. 149.
prosecutor at the charge stage) to examine the nature of the offence and to analyze every single element of the criminal acts alleged to have been committed by the accused for purpose of subsuming the alleged criminal act under its proper governing criminal offence constituted or established by the law.

Based on the nature of this process as explained above, there are two prerequisites that must be available for the exercise of takyif al-qanuni. The two prerequisites are;

i. The correct understanding of the judge of the legal problem which is obtainable through the overview process

ii. The knowledge the judge of the law and its principles

In the process of subsuming the subject of the legal dispute under its proper governing law, the judge should not however, overwhelmingly depend on the understanding and supposition of the parties to the dispute. It might happen that the parties in a contractual dispute describe a particular contract as a sale contract whereby in essence it is a lease contract or the parties might fail to distinguish between the seemingly similar terms of gift (hadiah), hibah, sadaqah or wasiat and use them interchangeably in their pleadings.

In the case of Ainun bt Arifin v. Maria bt Arifin & Ors, the plaintiff alleged that during the lifetime of her deceased mother she had made good to the value of the shares to a piece of land belonging to her deceased mother by her monetary contribution to the mother to perform pilgrimage. The mother also had expressly mentioned her intention to give her shares in the land to the plaintiff and her adopted daughter with each entitled an equal share. Unfortunately the land had not been transferred to the plaintiff and the adopted daughter till the death of the deceased. The above fact had been admitted by the all the defendant except the second defendant, who argued that the money given to the mother should not be raised up for not only the plaintiff who had contributed to the mother to perform pilgrimage. On the above fact, the plaintiff claimed that the portion of shares belonging to the deceased in the land should be transferred to her and the adopted mother without specifically mentioned the applicable law governing the issue in the case.

45 [2012] 3 ShLR 22.
The judge in the case had rightly pointed out that the primary issue in the case was; what is the type of right which becomes the subject matter of the claim by the plaintiff under the Islamic law? In the opinion of the judge the claim of the plaintiff in the case could fall under the category of hadiah, hibah, sadaqah or wasiyyat. This had prompted the judge to make detailed analysis on these types of rights which are outwardly relevant to the facts of the claim in order to determine the correct law governing the claim in the case. Eventually, the judge decided that the plaintiff`s claim according to Islamic law was a claim for a mere gift (hadiah), it was neither a hibah, sadaqah nor a wasiyyat. Since the claim of the plaintiff was a claim for a gift, the judge then, applied the law and principle relating to gift as the governing law to decide the case. Accordingly the judge decided that the plaintiff had proved her case and that all conditions of gift had been fulfilled even though the transfer of the deceased`s shares in the land had not been effected since there is no issue of ʿijab and qabul (offer and acceptance) and qabd (possession) in the matter of mere gift (hadiah). It is intriguing to note that, the judge in the case had in reality, exercised takyif al-qanuni in order to categorize the subject of the claim under its proper governing law under Hukum Shara’.

Further illustration on the exercise of takyif al-qanuni can also be made to the case of Wan Shahriman Wan Suleiman & Anor v. Siti Norhayati Mohd Daud, in which the Shariah High court of Kuala Lumpur had to decide unprecedentedly the status of ex-gratia payment which was made to a deceased person when he was already died. The issue was whether the ex-gratia payment formed part of the deceased`s estate or it constituted a pure and simple gift by the government to the deceased thus did not need to be distributed to the heirs of the deceased.

In his course of deciding the status of the ex-gratia payment the judge had made a very careful reflection over the essence and objective of the ex-gratia payment being made to the deceased before subjecting the ex-gratia payment under the concept of al-tarikah (al-tirkat). In the process, the judge also had distinguished the ex-gratia payment from the derivative pension or gratuity under the provision of the Pension Act 1980 as well as from the savings in the EPF and SOCSO. Thus based on his analysis of the nature and objective of the

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46 [2010] 1 CLJ (Sya) 85.
47 The judge inter alia had referred to the “dictionary of law” and “Kamus Undang-Undang Bahasa Inggeris-Bahasa Melayu” published by Fajar Bakti for the definition of the ex-gratia.
payment the judge decided that the status of the payment based on the law of al-tarikah (al-tirkat).

We have noted before that the process of takyif al-qanuni is significant and must be exercised diligently not only in relation to civil cases for the process also assumes as much as the equivalent significance in the criminal cases. It has been noted in the case of Public Prosecutor v. Margarita B Cruz\(^{48}\), that KC Vohrah J, which is in turn clearly indicates the judicial exercise takyif al-qanuni, when the Justice observed as follows;

“it behooves all magistrates and presidents to scrutinize the charges, to read the provision of the statute under which the charge is framed, to understand the constituent ingredients of the charge, to know the nature of the punishment and appreciate the gravity of the charge. If the charge is defective and badly framed, the magistrate should point out the defects and request the prosecuting officer to amend the charge as the accused should truly understand the nature of the charge he is asked to plead to”.

The judicial observation by KC Vohrah J quoted above manifestly indicates the task of the trial judge to clearly understand and identify the mandatory elements of the offence preferred by the prosecuting officer. This is for the reason, *inter alia*, that the judge will be able to match and compare the fact of the alleged criminal act of the accused with the elements constituting the offence under the charge. In this regard, the case of Pendakwa Syarie v. Wan Mohd Faizdehar bin Wan Abdullah\(^{49}\), proves to be a good illustration regarding the exercise of takyif al-qanuni by the trial judge. The accused in the case were charged with the offence of committing an act preparatory to sexual intercourse out of wedlock pursuant to section 29 of the Syariah Criminal Offences (Takzir) (Terengganu) 2001. The accused pleaded guilty to the offence as per the charge. Irrespective of the plea of guilt by the accused, the trial judge opted to examine the constituents of the offence and the proven facts of the case in order to ascertain whether the act of the accused constituted an offence under the section they were charged. On his analysis, the judge concluded that the words *an act preparatory to sexual intercourse out of wedlock*’ appear in the section refer to an act forming preliminary act towards the commission of sexual intercourse outside of

\(^{48}\) [1998] 1 MLJ 539 at 539.

\(^{49}\) [2012] 3 ShLR 75.
marriage, without the existence of a valid marriage in accordance with Islamic law between the accused. From the above interpretation, the judge concluded that there are two elements necessary to constitute the offence under section 29. They are;

i. That the accused are not legally wedded under the Islamic Law.

ii. That the act of the accused amounts to a preparatory act towards the commission of illegal sexual intercourse.

To prove the presence of these two elements in the act of the accused, the judge then made analysis on the admitted fact of the case in order to make sure that the accused had been charged with the correct criminal offence.

From the above explication, it is clearly established that the process of takyif al-qanuni is very important for it is through this process that the correct governing law will be correctly ascertained and applied to a given case. If the trial judge defers the case to the wrong governing law, then it would be fatal to the right of the parties to the action simply because the wrong law is applied to the fact of the case. The processes of dealing with fact of the case warrant a great deal of juristic effort from the trial judge of the type that the ijthad requires from mujtahid.

7. Conclusion

The fact that constitutes an important element in a legal case (al-da’wa) deserves special attention of the trial judge. Apart of the governing law, the fact presented and duly admitted during the court’s proceeding forms the basis for the counsel’ submission and the legal judgment of the court. As such, the fact of a case needs to be ascertained and understood by the judge and its proof must be established during the proceeding. Apparently the processes highlighted here are, upon examination, reflective to the kind of efforts that are required in the exercise of al-ijthad al-tatbiqi whereby the facts and surroundings of the case must be fully understood by the mujtahid. As far as judicial proceeding is concerned, these processes must be undertaken by all judges regardless of their status, mujtahids or muqallids.

The terminological essence of the offence was formulated by the trial judge mostly based on the meaning of every word appears in the phrase ‘perbuatan sebagai persediaan untuk melakukan persetubuhan luar nikah’, translated into English ‘an act preparatory to sexual intercourse out of wedlock’ taken from Malay dictionary, Kamus Dewan Bahasa dan Pustaka. Ibid., p. 84.
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Ainun bt Arifin v. Maria bt Arifin & Ors [2012] 3 ShLR 22.


ABSTRACT

Film rating is designed to categorise films with regard to its suitability for audiences in term of issues such as sex, violence, substance abuse, profanity or other types of mature content. Ratings typically carry age recommendations. This could be regarded as a form of censorship. Nowadays, the film rating system is being adopted by numerous countries including Malaysia and Bangladesh. Malaysia provides three ratings, namely U, P13, 18 and Bangladesh provides two types of film rating namely U and A. The main purpose of this paper is to discuss the legal framework of film rating and current challenges in implementing it. A qualitative research’s method was adopted by gleaning information statutes, case law, articles and books. The research also conducted semi-structured interviews with film directors and members of the Board of Censorship. The research found that there are some contradicting views regarding film rating between the censors and the film industry players. These findings will be considered in the making recommendation at the end of the research.

Keywords: Film Censorship, Film Rating, Film producers, Malaysia and Bangladesh
1. Introduction

For some people, film rating is a form of censorship where restrictions are imposed on the population on what films a person could view. In some instances the rating of films may result in a failure of a film producer to recoup his investment in the film. However, some view rating system as a guideline for individuals or parents or guardians to decide which films should they or person under their care view.

Many countries adopt film rating system using names such as film classification, film certification and film categories. In Britain, film rating was introduced by the British Board of Film Classification in 1912. Formerly, there were no agreed rating standard and local council imposed their own restrictions and conditions. Today’s voluntary movie rating system is aimed at giving parents the information they need to decide whether a film is appropriate for their family.

In America, the rating system emerged in 1968, when the Motion Picture Association of America (MPAA) replaced the earlier moral censorship guidelines, known as the Hays Code, with a new parent-focused rating system. The Hays Code provides an exhaustive list of moral to determine the “moral” of the film. However, the current movie rating system is established to give leeway for film producers to decide on their own in making films and at the same time to educate parents and helping them determine which films should be viewed by their family members. Films are given a rating of G, PG, PG-13, R and NC-17 which guide the content of the movie. The brief guidance for the ratings respectively refers to general audiences, all ages admitted; parental guidance suggested, some material may not be suitable for children; parents strongly cautioned, some material may be inappropriate for children under 13; restricted, children under 17 require accompanying parent or adult guardian; no one 17 and under admitted.

These ratings provide assistance to individuals and parents in making viewing decisions. The rating agencies are at great pains emphasis that they are not evaluating the quality of the films, but rather helping individuals and particular parents in making viewing decisions. These rating systems to a certain extent are also adopted in Malaysian and Bangladesh.
2. Legal Framework of Film Rating

In contrast to systems in some other countries, films censorship in Malaysia and Bangladesh are statutorily regulated and govern by film censorship boards. If any owner of a film wants to exhibit any film, he has to come through the film censorship boards. That means the film owner has to request approval from the censorship board. Film censorship boards may approve or reject any film to exhibit, to censor any part of the film, and to classify the film in accordance to suitability of age groups for viewing.

3. Film Censorship Laws in Malaysia

Film Censorship Act 2002 regulates film censorship in Malaysia. It came into force on 1st April 2002 and repealed the Film (Censorship) Act 1952. The Act establishes the Board of Censors, Appeal Committee; provides the control of film and film publicity materials; and the power relating to enforcement, seizure and arrest.

Such a wide power could also be seen in the power allocated to the Home Minister. If the Minister satisfied that the exhibition, display, distribution, possession, circulation or sale of any film or film publicity material would be contrary to public interest, he may prohibit the exhibition, display distribution, circulation or sale of that film by order published in the Gazette. For instance, the film The Last Communist (in Malay - Lelaki Komunis Terakhir) was banned in 2006. Amir Muhammad – the director – crafted a novel method in documenting the life of Chin Peng who was a prominent and high in the hierarchy of the Malaysian Communist Party leading – according to him - a revolution against the Japanese and British imperials. This film was first approved by the Film Censorship Board but it was banned by the Ministry of Home Affair under section 26 of the Film Censorship Act 2002 which gives the Minister a discretionary power.

At the same time, if the Minister satisfied that the exhibition, display, distribution, possession, circulation or sale of any film or film publicity material would not be contrary to public interest or to the interest of the country, he may exempt any film or film publicity material from any provisions of this Act or regulations made under the Act.
4. Guidelines

Film producers in particular had criticised the working of the Censorship Board as being not business friendly because, among others, of the uncertainty and inconsistency in their decisions. To address these criticisms, the guideline known as the Garis Panduan Lembaga Penapis Filem or Film Censorship Guideline 1993 was issued in the Malay language by the Prime Minister’s Department and approved by the Cabinet on 17th November 1993. It was amended in 2010 and known as the Garis Panduan Penapisan Filem or Film Censorship Guidelines.

It could be discerned from the guideline that the need for censorship is made because of the recognition of the impact of films over the society particularly the youth and the children. The Board recognises the need for films to be allowed to be widely distributed to viewers and adults should be given the freedom to choose any content that they may wish to view as long as it is permissible and not potentially detrimental.

In determining the requirement for censorship over a film, the Board considers the theme of the film; the message conveyed by the producer; the lesson that can be gained from it; the influence of any age group; glorification of any clan, race, religion, nation or belief. A more subjective consideration and probably ill-suited for a nation that practise parliamentary democracy is for the Board to consider whether the film is consistent with the aspirations of the government and the nation.

Consideration by the Board of the security and public order, religion, social norms, decorum and morality seems to be reasonable but with the caveat that the implementation also should be reasonable because the general and vague nature of security and public order for instance.

The language used in films is also a major consideration and the Board would not tolerate cursing for instance. The guideline provides lists of objectionable cursing words in Malay, Chinese, English, Tamil, Hindi, Bengali and Punjabi.

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3 Saw Tiong Guan, Film censorship in the Asia-Pacific Region: Malaysia, Hong Kong and Australia Compared, Routledge, 2013 at 37.
4 Ibid
Another important issue film rating has been discussed in this guideline. According to this guideline, there are three types of film. They are-

<table>
<thead>
<tr>
<th>Rating Symbol</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image1" alt="Rating Symbol" /></td>
<td>There is no age restriction in this category. This Category is suitable for viewing by all levels of people.</td>
</tr>
<tr>
<td><img src="image2" alt="Rating Symbol" /></td>
<td>There is an age restriction in this category. This category is suitable for viewing by those 13 years and above. Viewers aged below 13 require the guidance of their parents. The film has some scenes of violence or horror.</td>
</tr>
<tr>
<td><img src="image3" alt="Rating Symbol" /></td>
<td>There is also an age restriction in this category. This category is suitable for viewing by those aged 18 years and above. The film has some scenes of violence, horror and sex, but that are not excessive.</td>
</tr>
</tbody>
</table>

5. Views Regarding the Working of the Censorship Board

As explained earlier, the Film Censorship Board apart from approving the distribution of films may also request deletion of scenes and sounds. It also provides rating for it which will determine the pool of audience for the films. For instance, if a film is rated 18 after numerous cutting of objectionable scenes, the pool of potential audience is reduced. This in turn will affect the reach of the films and economic return from the screening. In one of the interviews conducted where a film director was asked about the future of film censorship in Malaysia, he opined that we should be moving towards relying more on self-censorship. He considered that this is the only option available since the internet has provided the ability of viewers to by-pass the scrutiny of the Censorship Board. According to him the reality that we
have multi culture societies where numerous cultures are available should be reflected also in the availability of options to view different types of films in cinema.\(^5\)

Other film directors echo the same view. For the other two film directors, for films that are given rated as 18, the Censorship Board should be more relaxed in cutting the scene because the audience is adults who should be able to think independently.\(^6\)

The views of the film directors are in sharp contrast to the views of members of the Board. The members emphasise on the need to protect school-going children and to consider the local condition. For instance, for “U” rating, it means unrestricted and not harmful even for primary school children. For PG13 it means that only those at 13 years or above – namely the secondary school children or above – could safely view it.

6. Film Censorship Laws in Bangladesh

Similar to Malaysia, Bangladesh employs a statutorily established Board to govern films censorship through the Film Censorship Act 1963 which was amended by the President’s Order No. 41/1972. The Act requires for anyone who wants to exhibit film to take certificate from the film censorship board. The board has the power to approve or to reject the distribution of films. Appeals from the decision of the Board could be made to the Government and the decision of the Government shall be final.

Apart from the Act, the Bangladesh Censorship of Films Rules 1977 was passed in exercise of the powers conferred by section 10 of the Censorship of Films Act 1963. The Rule provides detail of the working of the Board.

The Rule provides principles to be considered in determining applications to distribute films. The principles are: (a) the film must not portrays or not likely to decrease the moral standard of the viewer by extenuating vice or crime or by depreciating social values; (b) the film story or incident or dialogue must not offend or likely to offend sentiments of any section of the public; (c) the story or dialogue must not be harmful for children under 12 years old; (d) any element which lowering national ideology (includes

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\(^5\) For the purpose of this paper, the interviewee is referred to as MM.
\(^6\) For the purpose of this paper, the interviewees are referred to as AM and AF.
absolute trust and faith almighty Allah, nationalism, democracy, socialism meaning economic and social justice) must not expect in the film.

If the film is suitable for unrestricted public exhibition with or without censorship, a “U” certificate is assigned. If the film is suitable for public exhibition only to adult (person not under eighteen years of age) with or without censorship, “A” certificate shall be assigned. Thus in contrast to Malaysia that has 3 ratings, Bangladesh has only 2 ratings.

7. Views Regarding Film Rating

Although interviewees agreed that film rating is necessary, people in the film industry are not extremely pleased with the current rating system in Bangladesh. For them rating could assist the population in choosing suitable films for their viewing. According to a film director, in the absence of film rating, it would be difficult for viewers to choose films because they wouldn’t know the content of the film.7

Members of the Censorship Board noted that the two ratings of “U” and “A” is inadequate to assist the population in making viewing decisions. A proposal on improving the rating system is its final stage.8

8. Concluding Remarks

Malaysia and Bangladesh share the existence of a majority Muslims population with the Malaysian population being more pronounced in her multi-ethnic, multi-religion and multi-culture. Both countries have put in place a statutory regulatory body in approving distribution, censoring and rating films.

People in the film industry in both countries accepted the need for film rating as guidance for individuals and parents in choosing film viewing. However, their disagreement with the current system is the amount of restrictions still being imposed for the “18” rating. Perhaps more leeway should be given to the content of the film in the “18” rating particularly thematic and socio-political content of the films.

7 For the purpose of this paper, the interviewee is referred to as MR.
8 For the purpose of this paper, the interviewee is referred to as ZH.
For Bangladesh, the limited categories of only “U” and “A” may require expansion of the categories. If we consider the views from Malaysia, children may be categorised between primary school children and secondary school children with different developmental stage. Thus, at least Bangladesh could add another rating of P13.

REFERENCES


HIGHLIGHTS ON THE FLAWS IN LAND ADMINISTRATION IN MALAYSIA: A REVIEW

Salleh, K. 1, Harun, N. 2 & Bidin, A. 3

ABSTRACT

The National Land Code 1965 is the highest law in Peninsular Malaysia in respect of land administration. NLC is not an ordinary statute. It is indeed a codification of the laws covering various important aspects of the land. This writing aims to discuss some important issues in land administration in respect of the rights of stakeholders such as the issue of squatters, temporary occupation on lands and corruption. The methodology used in this study is an analysis of the literature review, documents such as books, articles, newspapers - local newspapers and court cases related. The study reveals that there are evident flaws in the administration of land in the arising legal issues highlighted. This study will also highlight some of the proposed improvements to improve both land administration and land law to protect the rights of parties who has interests on lands.

Keywords: National Land Code 1965, issue of land administration, weaknesses and recommendations.

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1. Introduction

The National Land Code 1965 (NLC) is the main law governing land matters in Peninsular Malaysia. It was first enacted before independence, which was in the '50s. NLC is based on previous law namely Land Code 1926 and was further updated and supplemented with several new parts.

NLC which is currently enforced is based on the Torrens system or Title Registration System. The system is based on the Real Property Act 1857 which was originated from Southern Australia. Torrens system was originally introduced in the Malay Peninsula Land in 1864. The provisions contained therein are mostly similar (in pari materia) with provisions enforced in Australia, except on certain fundamental principles such as 'assurance fund' where this concept is not enshrined in the provisions of the Torrens system in Malaysia. Torrens system is a title based system in which registration guarantees the principle of indefeasibility of proprietary rights of land owners. This system was created to solve the problem of uncertainty, complexity and costs arising out of the previous system which was earlier introduced (Ainul Jaria, et. al, 2008). Therefore, the Torrens system was introduced to create a registration system with the aim of upholding the ownership of land which can not be deprived. In addition, it seeks to form a uniform law relating to land administration throughout the Peninsula as well as to preserve the rights and interests of land owners through the titles which are issued by the government (Ridzuan, 1994).

2. Issues in Land Administration

Among the issues that arise due to weaknesses or loopholes in the laws relating to land administration in Malaysia are as follows:

2.1 Temporary Occupation Lincence of Land (TOL)

Under the NLC, the disposal of government land is divided into two, namely the disposal by way of alienation and the second is disposal other way than alienation. Disposal of the first type is found in section 76 which empowers the State Authority (SA) to grant freehold titles or titles for specific timeframe, while for the second method of disposal, the SA can provide reserve over lands, grant temporary occupation license, permit the extraction
of rock and allow the use of air space over government land and land reserves (Salleh, 1993). Disposal by way of temporary occupation falls under the second method.

TOL is a temporary license or permit granted by SA for specific purpose and time limit. Thus it can be said that TOL is introduced to solve the problem of ‘land hunger’. It is undeniable that the definition and interpretation of TOL under the NLC is not complete but it should be acknowledged that the term is used to reflect the nature of approval to occupy which is purely temporary and is strictly based on the licence applied. It is in short a form of approval to enter a land and work on it (Hunud, 2011). Without such license, a person who occupies the land will be considered as illegal trespassers or squatters (Salleh, 1987). The rights conferred by TOL are not only limited in terms of the purpose or nature, but in terms of time. Lifespan of a TOL ends on December 31 each year unless it is pre-determinated by SA. Therefore, the TOL lands remain as State lands and there is no guarantee that the land will be transferred to the licensee who enjoys the TOL.

In the case of Teh Bee vs. K. Maruthamuthu [1977] 2 MLJ 7, the plaintiff has occupied a parcel of land for 21 years when the SA then decided to give the land to the defendant. The trial judge who heard the case held that:

“The holder under a temporary occupation licence obtains no legal or equitable rights over the land he occupies by virtue of the licence other than to occupy the land temporarily from year to year if he can have his licence renewed annually… but there is no obligation on the part of the authorities to grant a renewal of a temporary occupation licence for any subsequent year”

In the case of Bohari Taib & Ors v PTG Selangor [1991] 1 MLJ 343, the grandparents of the appellant and others were the original inhabitants who lived on the agricultural land in question. The appellants alleged that between 1971 and 1976 other residents and them has made an application to the respective SA to obtain ownership of the land. Letters and affidavits were submitted as evidence that the Selangor State Executive Council had approved the alienation of land to the appellants and other selected residents or inhabitants. On 1 November 1980, a member of the State Executive Council has confirmed the approval and ensured that they were to be given ownership of the land. According to the state government's policy, only those inhabitants who are actually farmers and do not own any
land would be granted with land, and a temporary occupation license has been granted on the basis that the individual titles would be issued if they continuously worked on and cultivated the land. The appellants claimed that after the expiration of their TOL in 1984, they and other farmers who had fulfilled all the conditions imposed by the respondents could acquire rights or legitimate expectations to be issued with title over the land. The respondents instead gave the land to FELCRA to be developed. Under the NLC, when TOL expired (not extended), the occupiers become trespassers. Legally, trespassers can be evicted at any time.

In the case of *Lebbey Sdn Bhd vs. Wooi Chong Leong* [1998] 5 MLJ 368, the plaintiff was the registered proprietor of the land. The land was formerly owned by the Selangor SA which has approved the application of the plaintiff for the alienation of land. At the time of alienation, many houses were built on the land which was occupied by squatters. The plaintiffs wanted to develop the land and issued an evacuation notice urging the residents (‘the defendants’) to vacate the land. The defendants refused to vacate the land and the plaintiff commenced proceedings against them. The defendants contended that: (i) they have earned the right in equity to be compensated (ii) the plaintiff, who took the land with full knowledge of the defendants settling on the land, took the land subject to the equity of the defendants (iii) even if the defendants had entered the state land without authority or license, they have enjoyed peace and occupation without interference by the SA. A district officer has allowed them to rebuild their homes on the land after their previous houses were caught on fire, and the residents’ committee had applied for TOL based on promises by politicians that they would be given such licence. In this case it was decided that the plaintiffs (the registered owner) had rights over the title. The defendants in this case had not only entered the land without authority but had also been living there without permission of the SA. The defendants could not obtain rights in equity against the SA in respect of their occupation of the land. Finally the plaintiffs’ right over the land was affirmed and the residents were expelled from the land.

In the case of *Sentul Murni Sdn Bhd vs. Ahmad Amirudin & Ors* [2000] 4 MLJ 503, the appellant was the registered owner of a piece of land. The appellant filed a claim against the respondent claiming that the respondents were trespassers and the appellant applied for the vacant possession of the land. The respondents denied that they were trespassers and asserted that they were the legitimate owners of the land as a licensee and
under equity and further contended that the appellant knew or should have known about such equity. They further argued that their continuous occupation of the land was made known or authorized by the SA by virtue of a promise pledged by the State Government (through the Minister) that the respondents would be given titles of the land. The area later became part of the Federal Territory and was finally given over to the developer (the appellant).

In the case of P & A Systech Sdn Bhd vs. the State of Kedah Darul Aman [2015] 9 MLJ 37, the plaintiff was permitted by the defendant to carry out the operation of carrying out residual works including the sea sand at the base of the Pulau Songsong sea, Yan, Kedah with the condition that the royalty of the sea sand must be paid to the defendant at the rate of RM2 per meter cubic. The plaintiff also, by way of TOL was given permission by the defendant for the purpose of taking out the sea sand for the area covering 1 kilometer per square at Pulau Songsong. The plaintiff then made a payment to the defendant in the amount of RM200 for the purpose of carrying out works of extracting shells of carrying out residual works, and RM50,000 as the deposit for the taking out of the sand at the base of Pulau Songsong. The defendant later had instructed the plaintiff to stop the suction and/or mining of the sand at the base of the sea. The TOL was also revoked. The plaintiff filed a legal action in court to claim for damages. In this case, although the court acknowledged the plaintiff had a good cause of action, the case was nevertheless dismissed since the filing of action was time-barred.

Therefore, it is high time for the law on temporary occupation of state lands to be reviewed to determine the required amendments. The question of whether TOL should continue to exist or not under NLC does not arise but a more important question arises i.e. how to make it more effective and beneficial to the people as in the cases discussed above.

### 2.2 Squatters

Under the NLC, occupying lands of others and government lands is an offence. In case of squatters on alienated land, it is a form of encroachment and a civil wrong but if squatters occupy government land, it is considered as an act of crime of aggression and could
be fined not more than RM10,000 and jailed for not more than one year if convicted (Salleh, 2003). The question is whether NLC provides any rights for squatters.

The position of SA as the sole and absolute owner of all lands and section 48 of NLC which prohibits illegal land occupation has provoked a socio-economical problem as in the case Sidek & Ors v Perak State Government [1982] 1 MLJ 313, which that facts are as follows. In this case, the appellants who were originated from Kedah, North Perak and Selangor came to Telok Anson and opened up a large area of jungle. They became squatters and later on, other squatters joined them. There was a discussion between them and government officers in which it was alleged that the the officers informed that each settler family would be granted five acres of paddy land. There were also articles mainstream media stating that the State Government was willing to open up about 10,000 acres of lands to be developed by them. In due course some of the squatters were given 3 acre lots but others including the appellants were not successful. The appellants were given notice to stop work and to vacate the area. The appellants filed an action for a declaration that they were entitled in law and in equity to be in possession of the respective lots originally pioneered, opened up and occupied by them. The respondents applied to strike out the appellant's action on the grounds that they were squatters and that it was within the sole discretion of the State Government to alienate land. It was held by the High Court that the appellants did not have cause of action against the respondents as they were squatters, and squatters have no right either in law or in equity;

In the case of Shaari bin Saad vs Pentadbir Tanah Klang & Ors [2009] MLJU 1196, Lot 62 of Mukim Bukit Raja was held in reserve for a rail station area. In 1971, the plaintiff had explored the land and thereon built a house and set up his business. On December 18, 1991, the defendants issued a notice to the plaintiff that to demolish the buildings erected on that land and subsequently ordered the plaintiff to vacate the area. On 15 April 1993, an operation was carried out by the defendants in cooperation with the police to demolish the building. The plaintiff claimed that the demolition action on the ground was against the law, while the defendants claimed that their actions were legal under Sections 425 and 426 A (1) (c) of the NLC. The court found that the plaintiff was a squatter and did not have any rights
either in law or equity. Clearly here, squatters or people who do not own legal titles have no rights either in law or equity.

In the case of 

Messrs Tokoyaki Property Sdn Bhd vs. Sam Kok Sang Tham Sow Seng & Ors [2001] 1 MLJ 585, the plaintiff sought to recover their lands which were then inhabited by the first and second defendants and other inhabitants without the plaintiff’s approval. The first defendant argued that he was entitled to reside on the lot as legal owner or in equity because he had applied for a housing lot on that land, and he was ordered to complete the application form in 1989, while at the same time he had been making payments of assessments to the Taiping Municipal Council since 1984, and he was surprised when he was told that the plaintiff had been alienated for the lot in 1999. The first defendant also argued that he had been supplied with water, electricity and garbage bin. The issue to be discussed was whether the first defendant had the right under law and equity to settle on the lot. The court ruled the supply of water, electricity and garbage bin did not mean that the SA has implicitly gave the first defendant permission to reside or continue to reside on the lot. Illegal squatters have no protection under law or equity to enable them to claim any right to reside or continue to reside or live on the lot but the plaintiff, as the registered owner, has the right to expel the first defendant. A mere construction of a building illegally on the plaintiff’s lot and settling on it in is not sufficient to create any rights or equity against the real owner of the lot. The first defendant also did not have protection under equity due to section 48 of NLC.

In the case of Bukit Lenang Development Sdn Bhd vs Penduduk-Penduduk Yang Menduduki Atas Tanah HS (D) 151079 -Hs(D)151601, Mukim Plentong, Daerah Johor Baru [1999] 6 MLJ 25, the Plaintiff entered into a purchase agreement with Oakfield Enterprise Sdn Bhd ( 'Oakfield') to purchase plots of land. Lots were occupied by people who were not known by the plaintiff. Oakfield told the plaintiff that the strangers had been unlawfully entering the lots and the lots were occupied by them without permission of Oakfield. Oakfield obtained a court order to get rid of the invaders and then a writ of possession had also been obtained. However, attempts to evict the invaders were not successful. Oakfield then applied for an order of committal. The plaintiff made an application for the vacant possession under Order 89 of the Rules of the High Court 1980. It was submitted that
Oakfield never granted a license or consent to the defendants and the defendants were squatters on the lot. The defendants argued that they had paid RM3,000 each to Oakfield as earnest deposit to their lots, respectively. These payments were included together with a proforma of the acquisition entitled 'Application Form and Declaration of Interest'. Issue that arose before the court was whether the defendants were licensees or simply squatters. The court ruled that the construction of the application is that it did not constitute a legally binding contract between the parties concerned but it was only a guideline for the defendants in respect of the sale and purchase of disputed lands. It was merely reflect the desire of the defendants to purchase the land subject to various conditions and the receipt of Oakfield. Therefore, the court found that the defendants were mere squatters and did not have any rights as intruders on lands.

In the case of Immetec Sdn Bhd vs. Yong Tai Hoong & Anor [1995] 1 MLJ 390, the plaintiff was the registered owner of a parcel of land where he was building a flat block. The defendants were squatters on a part of the plaintiff’s land. On June 9, 1991, the plaintiffs made an agreement with the defendants in which the first defendant was allocated with one unit of flat at a price of $ 25,000 and had agreed, among other things, that the defendant would leave the wooden house that once were issued with evacuation by the plaintiff. In March 1994, the defendant had started to keep goods and appliances around the house without the consent of the plaintiff. The area was meant to be constructed with sewage processing plants for the use of the flats. The plaintiff had issued an evacuation notice to the defendant but was refused. Their refusal had obstructed the plaintiff to complete the project as a whole. The plaintiff had applied for, among other things, an order directing the defendants and their families to vacate the house and the land immediately and an injunction to prevent them from invading the land. The court held that although the defendant had been living in the house for 40 years, but it did not undermine the rights of the plaintiff as the registered owner of the land. This is because the defendant did not show any rights in law or equity to continue to occupy the house and the land except as squatters or trespassers alone.

The words of the judge in the case of Sidek is then used repeatedly by the courts in latter cases, such as the cases discussed above, which highlighted that ‘promises by SA’ is not sufficient to alienate land to someone. Ownership of the land is acquired only if the procedures outlined in the NLC are fully complied with (Salleh, 2003). If the legal protection
contained in section 48 and section 425 of the NLC is put aside, is the government's decision considered reasonable? There are suggestions that the State Director has the power to bind the State Government because there is delegation of authority in accordance with the requirements of section 13 of the NLC. If this opinion is well founded and Director of State has the power, injustice had obviously occurred when the State failed to fulfill the promises given to the stakeholders such as the above cases.

In the case of *Mat Bin Che Pa & 54 Yang Lain vs Felcra Berhad* [2015] MLJU 731, Plaintiffs were villagers from the region of Degong, Mukim Sokor, District of Ulu Kusial, Tanah Merah where the Piau 1 and 2 Water Projects were under progress. The plaintiffs claimed that the land were originally explored and developed by the villagers namely by the Plaintiffs, their parents and ancestors. Initially, the plaintiffs had agreed to surrender to the State Government as recommended to be developed. The land was later on handed over to the Defendant. Plaintiffs alleged that the handover of the land to the defendant was a breach of trust between the plaintiffs and the State Government. The Court however found that the plaintiffs had never obtained any title by the State Government on any land that allegedly claimed to have been discovered by them, and even if the plaintiffs have ventured on these lands, their status remained as illegal settlers or trespassers on land owned by the State Government. This case clearly shows that without a valid title on land, Plaintiff had no cause of action and they failed to defend their interests as settlers because their status was considered as intruders in the above case.

2.3 Corruption in Land Administration

Statistics of arrest made by Anti-Corruption Commission from 2015 until January 2016 as per Table 1 below shows the involvement of civil servants, which includes those from the Management and Professional group as well as supporting group, in corruption cases.

*Table 1: Statistic of arrest by Anti-Corruption Commission from 2015 – January 2016*

<table>
<thead>
<tr>
<th>Year</th>
<th>Civil Servants (Top Management, Public (private persons or citizens,</th>
<th>Total</th>
</tr>
</thead>
</table>

982
### Professional and Supporting groups vs. Council members and politicians

<table>
<thead>
<tr>
<th>Year</th>
<th>Professional</th>
<th>Council members</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>323</td>
<td>595</td>
<td>918</td>
</tr>
<tr>
<td>2012</td>
<td>288</td>
<td>413</td>
<td>701</td>
</tr>
<tr>
<td>2013</td>
<td>170</td>
<td>339</td>
<td>509</td>
</tr>
<tr>
<td>2014</td>
<td>224</td>
<td>328</td>
<td>552</td>
</tr>
<tr>
<td>2015</td>
<td>398</td>
<td>443</td>
<td>841</td>
</tr>
<tr>
<td>Jan 2</td>
<td>53</td>
<td>53</td>
<td>106</td>
</tr>
</tbody>
</table>
The above statistic indicates the involvement of civil servants in corruption crimes which is increasing quite sharply in 2015 (174 cases) than in 2014. It further transpires that involvement of civil servants in such crime has reached to a level of concern as this scenario is deeply unhealthy if not immediately overcame.

Cases of corruption involving civil servants in land administrations were frequently reported in local newspapers. Below are some examples of news by the local press on the *modus operandi* of the crime, as follows:

<table>
<thead>
<tr>
<th>No.</th>
<th>Newspaper</th>
<th>Modus Operandi</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><em>Sinar Harian:</em> (“Empat Pegawai PTG ditahan SPRM”, 8 January 2016, p. 2).</td>
<td>Four Enforcement Officers from the Land and Mines Office (PTG) of Pahang were alleged to have received bribes from bauxite miners who operated the mining illegally. Total payment amount received was over RM100,000 and the payments were obtained through the sale of Form 13D issued to lorry drivers to transfer out the bauxite. By keeping the form, bauxite truck drivers involved were spared from enforcement action whenever any operation is carried out.</td>
</tr>
<tr>
<td>2</td>
<td><em>Sinar Harian Online:</em> (“Penolong Pegawai Pejabat Daerah dan Tanah didenda”),</td>
<td>An assistant officer Kinta District and Land Office, Batu Gajah was fined for RM15,000 by the Sessions Court after he pleaded guilty to five counts of corruption between May 2011 and July 2012 involving party who was officially connected to him by works.</td>
</tr>
<tr>
<td>No.</td>
<td>Newspaper</td>
<td>Modus Operandi</td>
</tr>
<tr>
<td>-----</td>
<td>-----------</td>
<td>----------------</td>
</tr>
<tr>
<td>3</td>
<td><em>Sinar Harian</em> Online: (“<em>Dua Penjawat Awam Terima Padah Ambil Rasuah</em>”, 2015)</td>
<td>Two civil servants namely Senior Assistant Officers of Kota Tinggi Land Office were alleged to have received a check worth RM5,000 from a logging company as an inducement to help the company to procure approval of cleansing and removing woods in Mukim Sedili Besar, Kota Tinggi; and Lower General Workers were also indicted on four separate counts of bribe totaling RM64,000 at different times and locations around Kulai Jaya and Kota Tinggi.</td>
</tr>
<tr>
<td>4</td>
<td><em>Sinar Harian</em> Online: (“<em>Penolong Pegawai Tanah Mengaku Salah Rasuah</em>”, 2014).</td>
<td>An Assistant Land Officer in Kinta District and Land Office pleaded guilty to accepting bribes involving money and cheques amounting to RM7,572 from two entrepreneurs of sand companies.</td>
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<td>5</td>
<td><em>Sinar Harian</em> Online: (“<em>Bekas Penolong Penolong Pengarah Pejabat Tanah Dipenjara</em>”, 2014)</td>
<td>Assistant Director of Land Acquisition Unit, Department of Lands and Mine, received bribes amounting to RM5,000 as an inducement to help preventing the lands from being acquired.</td>
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<td><em>Sinar Harian</em> Online : (Tuan Buqhariah, 2014)</td>
<td>Three officers of Gombak Land and District Office, including two of the officers were charged in the Sessions Court for receiving a bribe of RM2,000 from the</td>
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<td>No.</td>
<td>Newspaper</td>
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<td>a site ground supervisor to allow lorries carrying red soils from hill site without valid permit.</td>
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<td>7</td>
<td>Kosmo Online: (Nuzul Sham Shamsuddin, 2013)</td>
<td>Land Assistant Officer (NT17) of the Enforcement Unit of Land and Mines Office had received a cheque as a consideration, which cheque was used to fully settle a loan from Bank Pertanian Malaysia involving a land under charge as security for the given loan.</td>
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<td>8</td>
<td>Berita Harian Online: (“Dua Pegawai Tanah Melaka Didakwa Rasuah”, 2012)</td>
<td>Two including a Director in the Department of Lands and Mines State were charged receiving a RM5,000 bribe to ensure non-acquisition in respect of a land at Lot 2288, Mukim Sungai Udang, Melaka.</td>
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<td>9</td>
<td>SPRM: (S.O. Kanan Pejabat Tanah &amp; Galian (PTG) Pahang di penjara, Denda Kerana Terima Rasuah, 2012)</td>
<td>Senior Placement Officer of Land and Mines Office, Pahang, faced charges of receiving bribes in the form of a cash prize of RM1,500.00 intended to protect the buying stolen rocks activity at a quarry in Batu Panching.</td>
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In the case of *Lee Siew Ken v Director of the Selangor Land and Mines* [2015] MLJU 610, plaintiff had purchased a piece of land from a fake land owner, under which transaction; the plaintiff was able to get his name transferred on the land’s title. Few years later, the actual registered proprietor of the real estate had informed the plaintiff in respect of fraud and demanded for his title over the land to be reinstated. Plaintiff subsequently realised the
purchase of the land which he entered into previously was void and thereafter consented for the title to be reinstated to the actual owner as demanded. The plaintiffs in his suit against the fraudster demanded for full of loss for the void transaction due to violation of law by the defendant. The Court has found that only defendant and/or his officials were authorised to have access to the data bank of information and can print the original issue document of title. The court thus allowed the application for damages by the plaintiff after its finding inter alia that the defendant had released two original titles in respect of the same piece of land the same without complying with the proper process and the defendant had also provided one original title to the fraudster, who had no right or interest to obtain it.

Although this case does not directly highlight the issue of bribery involving officials at the Land Office, it however proves that the abuse of power by officials in the Department of Land and wrong act committed by conspiring with third parties who cheat ('fraudster') on the sale of land had seriously and adversely affect the rights and interests of the real registered landowners and the next buyers. The act of complicity with the 'fraudster' is also a form of corruption and it is often associated with the payment of bribes to induce the officer to commit fraud in terms of processing the issue of document of title illegally.

In the case of Public Prosecutor vs Mohd Noor bin Yusof [2008] 2 MLJ 518, the accused, an officer at District and Land Office of Taiping was charged with corruption where he agreed to accept for himself a bribery of RM1,000 being gift for recommending a contractor’s application for extension of sand permit. In this case, the accused requested for coffee money in consideration of recommendation letter for renewal of the contractor’s permit for sand extraction works. The accused was found guilty under s 11(a) Anti-Corruption Act 1997 and was sentenced for 18 months imprisonment and fine for RM5,000 or six months imprisonment.

Results of analysis in respect of news or articles in the local newspapers as well as reported cases reveal various modus operandi were identified in the course of such crime. It further reflects that confidence, trust and accountability supposedly held by the respective officials were fouled by self-interest when corruption becomes a shortcut to satisfy the needs and benefits of oneself without taking into account the adverse effects that would possibly occur towards others. This leads to an answer as to why corruption often occurred at the land
office. It simply due to the fact that the people involved had the opportunity to do it. According to Zameri and Azmin (interviews on 8 July 2011) there would be opportunity when such people who are involved used such opportunity to work together in order to fulfil each other’s desire. It obviously indicates that corruption basically occurs due to the personal desires. Personal character may sometime become the pushing factor for a person to give or receive bribes. Bureaucracy is also said to be a factor that lead to corruption in land administration sector. Corruption is said to be rampant in the Land Office and it has been allegedly practised to expedite dealings in the land office. Delays in the approval process, casual procedures of control, as well as practice of bribery, all of these factors lead a customer to rather pay bribes in order to enjoy faster service from the land office.

3. Recommendations

The TOL system does not fundamentally conflict with Islamic law when it is issued in respect of a State land which has been developed. On the other hand, if a TOL is issued over a land which is actually a forest, or shrub, or wasteland or uncultivated land, then it is clearly contrary to Islamic law. Disposal of land in Islam takes place through the concept of *ihya al-mawat* or exploring uncultivated land by Muslims. This means those who explore and cultivate a plot of uncultivated land would be entitled to ownership of the land. This clearly shows that Islam recognizes the principle of *ihya al-mawat* as a way of alienation of land. Alienation of land through this principle is made in the form of permanent title or on freehold basis. This principle has actually been carried out and made into a written law in the Malay States before the reception of Torrens system and English system deed. Upon the introduction of Torrens system and the deed system into the Malay states, the principle of *ihya al-mawat* was ignored by certain reasons and the NLC does not directly recognize and does not acknowledge the ownership of land by this method. This results in contradiction of NLC’s provision with the principle of *ihya al-mawat* which was previously implemented as part of the land law in Islam (Ridzuan, 1994). The author believes that the concept of *ihya ‘al-mawat* i.e. where a person can recover and fertilise an uncultivated land and later on entitled to its ownership regardless of whether it was made with the prior consent of the government or not, should be recognised. Therefore, when a person or a group of individuals had been working on a land which was
abandoned, be it with or without permission of the government, they should be considered in priority if the government wishes to issue separate title of ownership over such land.

Further, it is in the author's view that the NLC provisions should be amended to conform to the requirements of the principles of Islam 'ihya al-mawat'. However the principle of 'ihya al-mawat' can not be used to protect squatters occupying State land that has been developed or occupying private land. The occupation of such lands is prohibited by Islam as it is a criminal extortion (encroachment of land belonging to someone else) (Salleh, 1993). In the case of Sidek, the judge had missed an opportunity to describe the application of the Islamic principles of 'ihya al-mawat' in order to overcome problems involving the opening and the occupation of government’s uncultivated lands. Therefore, if similar issues in other arising disputes as in the case of Sidek are to be scrutinised in a court trial in future, it is highly recommended that the parties should attempt to resolve it in accordance with the principle of ihya al-mawat.

Further, a licensee who has successfully been working on a land for several years should be considered to enable him to procure a lease of land for a reasonable time, unless the land he occupied needs to be developed by the SA towards public use and interests in the future. In other words, it is suggested that a change is introduced from TOL to 'Extended Term of Years Lease' (ETOL), i.e. from a license that must be renewed on each year to a reward of grants to those who work or cultivate or venture the land for a lease period of moderate length, such as 30 up to 60 years (rate of one generation of descent).

In terms of penalties in cases of corruption, section 13 (1) of the Prevention of Corruption Act 1960 enforced in Singapore, for example empowers the Court to order the recipient of a bribe to pay a fine equivalent to the amount of feed received by him other than the punishment in the form of fines and / or prison. This shows the recipient of bribe should not enjoy any benefits from the corruption itself. The Malaysian government may consider including similar penalty clause in the MACC Act 2009, i.e. to empower the court to order a convicted offender to pay fine for amount which is equivalent to the amount he previously received, as currently being enforced in Singapore. This is because, if only the person who pays or gives bribe are being penalised and not the both who pays and who receives are caught and penalised or sentenced, it would not eliminate the culture of corruption (Justin, 2012). Therefore, severe punishment should be imposed on the offenders so that it would
serve as lesson to the public in general. It is high time for the law to impose severe punishments over persons who are involved in corruption. This is taking into account the statistics released by MACC in respect of various corruption charges made from the years 2005 to 2012 which reflect the number of cases reported is seriously abundant, namely offence of paying or giving bribery (753 cases), receiving bribery (595 cases), fraudulent claims (241 cases), abuse of power (79 cases) and other cases of 424 cases.

4. Conclusion

NLC which is the supreme law on land administration in the Peninsular Malaysia covers many important aspects of the land that should be amended in order to ensure justice and to strengthen the law of the land in relation to its administration. Cases involving fraud, abuse of power and lack of law enforcement can indirectly affect the image and reputation of the state's land administration. The matter should be given serious attention. In addition, the full commitment is necessary on the part of the enforcement to ensure the implementation of law is fully enforced. From the point of law, the effectiveness can be seen by the willingness and readiness of the people to comply with the law. In addition, from time to time, amendments to be made to provisions of laws and regulations as land matters are necessary as they are not something static or stagnant. Thus, the land administrators must understand their daily work procedures and appreciate the legal provisions in force to reduce errors as to its minimum.
REFERENCE


INTERNATIONAL RELIGIOUS FREEDOM ACT 1998 AND THE ISSUES OF RELIGIOUS FREEDOM IN MUSLIM COUNTRIES

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Abstract

In the late 20th centuries, the increasing international emphasis on the recognition of religious freedom had led the United States drew up the International Religious Freedom Act (1998) in October 1998. The Act aims to improve the ability of United States to advance religious freedom through its foreign affairs. However, after almost 18 years of its establishment, it is important to highlight that IRFA’s report had focused on Muslim-majority countries. In fact, many Muslim countries were classified as “Countries Particular Concern” (CPC) which equivalent to violators of religious freedom. The objective of this article is to study critically the result on the report of IRFA with particular regard to Muslim countries. The paper contends that, U.S. government had given too much attention on Muslim countries rather than other countries. We argue that, though the law has the potential to be a useful tool for United States in protecting religious freedom, the result of IRFA report in meddling affairs of Muslim-majority states is the major flaw. The paper will also examine, at glance, on the concept of religious freedom within the framework of maqasid al-shariah (the objectives of Shariah law).

Key Words: Religious freedom, International Religious Freedom Act (IRFA), Religion and International Relations

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1. Introduction

The issue of religious freedom has become visible in many areas of the world. Cases for religious freedom mostly took place in Muslim majority countries. International Religious Freedom Act (IRFA) implementation towards Muslim countries has been criticized and provides misunderstanding towards U.S. government. Generally, most of the studies accused United States had focused on the situation in Muslim countries and in fact those countries have been recognized as violators of religious freedom, Countries of Particular Concern (CPC). Islamic law and the primary of international law are conflicts that contribute to the issues of IRFA in combating religious freedom. This study thus argues that despite IRFA provides adequate protection for religious freedom, it does not adequately specify particular rights with religious freedom in Muslim countries.

2. IRFA: A General Background

The issue of religious persecution continued to mount and captured attention members of the Congress. In 1998, IRFA was passed unanimously by U.S. government and it requires the United States to extend the concern for religious freedom through its foreign relations (Danchin, 2002). The establishment of IRFA creates the Office on International Religious Freedom, a Commission and a special adviser on International Religious Freedom.

The Office of International Religious Freedom within the State Department and is headed by an Ambassador at Large for International Religious Freedom who is appointed by President. The State Department’s duty is to highlight the status of religious freedom around the world, together with foreign officials and besides, to publish its International Religious Freedom Report for every year.

The main part of IRFA are laid down in Subchapter III of the Act. Under the Act, it directs the President to response to the violation and not only that, the President must oppose and promote the right to freedom of religion. Actions taken are based on annual report which release on September of each year by State Department and findings of the Commission (Sadat, 2003). The annual reports describe the status of religious freedom for almost 195 countries over the world except for the United States. The Secretary of State is responsible to manage the countries that involved with Countries of Particular Concern (CPC). The reports describe measures needed in order to address violations of religious freedom and the
consequences to the reporting are not included (Hanford, 2008). In addition to that, the report is a resource for diplomacy, policy, assistance, recommendations and other resource allocations and a basis for decision in determining countries that have engaged in “particular severe violations”. The U.S. government will independently handle the countries in the violation and the report used as a tool of U.S. human rights policy (Farr, 2001).

The objective of the annual report is to advance U.S. human right policy in promoting and protecting religious freedom. The abiding commitment to the international standard of religious freedom must be adhered by U.S government as to further the interest of the U.S. The annual report on the current status and development of religious freedom around the world has been recognized as “the most comprehensive account of religious ever compiled” (Smith, 2001). In addition, the IRFA report is one of the most widely read documents of American diplomacy and has become the gold standard on international religious freedom (Hertzke, 2008).

Generally, the main purpose of IRFA is “to condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental freedom of religion.” (International Religious Freedom Act of 1998). The passage of IRFA might be argued with some justifications and criticisms, but however it is unfair to evaluate the success or failure of U.S. religious freedom policy form mere worldwide reported statistics (Farr, 2012).

IRFA also created an independent watchdog agency, known as U.S. Commission on International Religious Freedom (USCIRF), to monitor IRFA’s implementation. The USCIRF consists of nine unpaid commissioners to oversee the implementation of the Act. USCIRF also produces their own report and it will serve as a basis for the U.S. government’s cooperation with private groups to promote the observance of the internationally recognized right to religious freedom.

According to U.S. Department of State, the U.S. government is committed to global religious freedom agenda. It states that, the American government seeks to promote religious freedom as a basic human right and sees this endeavor as a source of stability of all countries. As argue by Allen Herzke, the U.S. administration believes that religious repression and
persecution result instability, violence and conflict. Thus, the U.S. believes religious freedom is an important part of democratic system and would assist countries in implementing freedom of religion and conscience. In that process, American government would help and cooperate with religious and human rights NGOs. However, the U.S. government warns that it would identify and take actions to any regimes or countries that persecute their citizens or others on the basis of religious beliefs (U.S. Department of State, 2016).

Hence, the IRFA empowers a legal framework for the U.S. government through the institution of the U.S State Department and the Commission on International Religious Freedom to examine the status of religious persecution of other countries. In addition, it will suggest a proper punishment such as economic sanction to countries that repress religious freedom. However, there are some criticisms leveled against the U.S government over the IRFA, including disagreements on the question of the promotion of religious freedom internationally.

3. Defining the Key Concept of Religious Freedom from International Perspective

Generally, religious freedom has been embedded in various instruments of international law. One of the four major international documents that universalized the principle of religious freedom can be found in Universal Declaration of Human Rights. Under the declaration, it recognizes a broader spectrum of the definition of religious freedom. Article 18 reads:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Based on the declaration, it impliedly says that religious freedom is a potent human right. The right includes together the freedom of conscience and association, the right to own property, to publicly worship, publish, speak, petition government, and raise children according to family desires (Hertzke, 2012). Not only that, the declaration asserts that any religious differences should be respected (Davis, 2002). The longstanding principle of
religious freedom as a fundamental human right deeply affected in human’s life and as the persuasive evidence in religious freedom advocacy. Subsequently, later document that has been introduced was the International Covenant on Civil and Political Right (ICCPR). In Art. 2(1) it states, “without distinction of any kind, such race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This provision prohibits religious discrimination among the society and Art. 18 has artificial provision with Art. 18 of Universal Declaration of Human Rights. It includes the right of parents to direct the religious education of their children. Therefore, it provides a broad definition of religion that encompasses both theistic and non theistic religions.

The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief is also one of the fundamental documents that protect religious freedom. Particularly, the right has been embedded in Art. 1 and 6 of the Declaration. In Art.1, it stipulates, “Everyone shall have the right to freedom of thought, conscience and religion.” This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practices and teaching.”

In 1998, Congress adopted the International Religious Freedom Act (IRFA) in response to growing concerns about the persecution of various religious groups throughout the world.

4. Countries of Particular Concern (CPC)

Designation for Countries of Particular Concern (CPC) is for countries engaging with severe violations of religious freedom. The annual report released by State Department describes status of religious freedom in every country around the world. There are 195 countries be evaluated and according to latest report, nine countries were designated as CPC; Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan, Uzbekistan and Turkmenistan (U.S. Department of State, 2014). When a country is designated as CPC by Secretary of State, the President is responsible to use variety of tools, as economic sanction and improve the protection for religious freedom to the states concerned.
The President, either he or she does not have complete discretion if it concerning CPC, “that have engaged particularly severe religious freedom violations”5.

In September 2011, Suzan Johnson Cook who is an Ambassador-at-large for International Religious Freedom states that CPC designations is a starting point in order for the U.S. government to work constructively with foreign governments to improve religious freedom. At the same time, they are working hard to remove the listed countries from CPC. This measure or sanction will be considered according to the circumstances of the country to improve religious freedom in their countries. She further contends that the goal of CPC designation is not only to report abuses but to take the responsibility for the values that all nations agree as members of the United Nations. Despite that, it will encourage the countries to involve in the needed reform and help the international community to scrutiny the persecutors (Cook, 2011). Nonetheless, a prominent ambassador, Robert A. Seiple argues that State Department was not doing well in designating the CPC countries. The result was not surprising due to methodological differences of foreign policy regarding “promotion” and “punishment” (Seiple, 2004).

The result of IRFA is rather ambiguous. Farr (2013) states that, the designation “Countries of Particular Concern” list as ineffective. During Obama administration, it was reported that listed countries has not be issued annually since 2011. In the first place, the commission under Robert George had publicly expressed its concern regarding the issue but the Congress itself did not show moral support when they put little notice of this omission.

Under IRFA, countries remain designated as CPC until removed but any corresponding penalties will expire after two years. When the President determines that “the government of a foreign country has engaged in or tolerated particularly severe violations of religious freedom,” the President designates that country as a “Country of Particular Concern” (CPCs), are more limited and more specifically prescribed than are his options.

5 22 U.S.C. § (c)(1)(A) (providing that the President shall respond to violations of religious freedom by taking the “action or actions that most appropriately respond to the nature and severity of the violations of religious freedom.”)
It is important to note that the effectiveness of designation of CPC is not easy to be measured and it requires a thorough scrutiny of all aspects. Therefore it is not surprising that the designation of CPC received criticisms by the opponent and due to that, rendered it as a major flaw of IRFA. Among other things, it is important to highlight the issue of CPC in order to see the implementation of the law. Since it was established by U.S. government, it is most high likely for the U.S. government for biasness in granting decision in designating those countries, particularly regarding to Muslim countries. U.S fails to notice the issue properly and they need to focus instead of denying the truth.

5. Religious Freedom and The Contents of IRFA

By virtue of IRFA, the U.S. has recognized four principles in promoting and monitoring international religious freedom. Firstly, freedom of religion is a fundamental human right and is a source of stability for all nations. Secondly, the U.S. government and its agencies will assist any newly democratic countries to implement freedom of religion. Thirdly, it will support any religious groups as well as human rights NGOs in their mission to promote religious freedom. Fourthly, the U.S government and its agencies will identify and take a specific measure to punish any regimes or countries that severely violate freedom of religious and persecute their citizens or others because of their religious belief (U.S. Department of State, 2016).

The introduction of the Act with overwhelming majority votes by Congress in the House and Senate became a new landmark in the foreign policy making and diplomatic practice of American government. The Act created a new dimension in U.S. foreign relations and its engagement with other nations when it provided an obligation for the President’s office and Department of State to consider seriously any claims based on abuse of religious freedom. Moreover, it also created a set of requirements to which the U.S. government can be held accountable by public interest groups with concerns related to the religious rights of specific groups, or in specific countries. In addition, by virtue of the Act, the U.S. started to consider any issues related to international religious freedom as its important concern of its foreign affairs.
Since the introduction of IRFA, the importance of religious freedom to the U.S. national interest has consistently been highlighted in various State Department official statements. Among others, it states that the American government seeks to promote religious freedom as a basic human right and sees this endeavor as a source of stability for all countries. In addition, it believes that religious freedom is an important part of any democratic system and will assist countries in implementing freedom of religion and conscience. In November 2006, the State Department announced that the U.S. government was committed to implementing IRFA worldwide and declared that it addresses three main issues: to oppose religious persecution, to release religious prisoners and to promote religious freedom as a priority in its action (Pew Research Center, 2006). In September 2006, former Secretary of State Condoleezza Rice gave her remarks on the U.S. Department of State’s 9th Annual Report on International Religious Freedom. She said:

“Religious liberty is deeply rooted in our principles and history, and it is our belief in this universal human right that leads us into the world support all who want to secure this right in this lives and in their countries. Freedom of religion is also integral to our efforts to combat the ideology of hatred and religious intolerance that fuels global terrorism ... With this year’s Report on International Religious Freedom, the State Department is helping to advance President Bush’s vision of a world that is growing in freedom and peace ... the United States will continue working to promote religious freedom, to nurture tolerance and to build a more peaceful world for people of all faiths.”

(Rice, 2006)

6. Religious Freedom in Muslim countries

Religious freedom has always mattered to Muslim countries. In fact, in any study shows those religious freedoms in Muslim countries have higher level of violation of religious freedom and conflict. This argument is supported by Grim & Finke (2010) since Muslims are trying to revive and upholding the true rule of Islamic law. The movement caused by their forces to challenge government’s rule and restriction and “realm of submission” to God, which known as Dar’ al Islam. One of the most important element in the concept is it regulates the society by Islamic faith and practices through the implementation
of Sharia law. Besides, escalating the issue in pursuit of Islam is great importance to understand the conflict.

In the Muslim world, oppression of Christians and other non-Muslims are increasing every day. The offenders were related to Muslim countries including Saudi Arabia, Sudan, Pakistan dan Egypt (Nickles, 1998). It is important to note that freedom of religion is a good thing. However, the freedom should not include matters of religion because religion is sacred and cannot be questioned. There is also a belief that religious freedom is always handled with sensitivity (Uddin, 2011). John Ambassador, U.S. ambassador for religious freedom believed that there is no room for religious freedom in a country where Islam as state religion of the country and he particularly refer to Saudi Arabia. He further explains that in Muslim majority countries, the law will be based on Holy Koran and the Prophet’s Sunna and at the same time every constitution of the country must be respected (Hanford, 2004). They believe Muslims are ruled by their own Islamic law which is based on Islamic sources. The perception of non-Muslims pertaining to Islam somehow distracted with baseless accusation. The media, the electronic sources sometimes posted the wrong perceptions on the true teaching of Islam.

According to Pew Research Center (2012), Muslim represents 1.6 billion, 23% of population of all people over the world. Islam has been regarded as second largest religion in the world. Indonesia is the largest predominantly Muslim countries (13%), followed by India (11%), Pakistan (11%), Bangladesh (8%), Nigeria (5%), Egypt (5%), Iran (5%), Turkey (5%), Algeria (2%) and Morocco (2%). A closer look at listed countries on Countries of Particular Concern (CPC) at International Religious Freedom report 2014, Burma, Sudan, Saudi Arabia and Iran are the Muslim-majority countries.

Grim & Finke (2010) generally highlights religious freedom is violated in most Muslim-majority countries. Kuru (2011) in reviewing the book believes that the authors of the book have put pressure on religious persecution that happened in Muslim-majority countries when they dedicate specific chapter in the book with regards to the issue. It creates the assumption that Muslim countries are “exceptionally repressive and their societies uniquely tolerant.” However, surprisingly the data provided in the book showed different result that almost sixty-two percent have level of persecution rather than twenty-eight percent of Christian-majority countries and sixty percent of other countries.
It was contended that Iran is one of the world’s worst religious persecution (Marshall, Gilbert, & Shea, 2013). Iran’s population consists of 99% of Muslims and its constitution states that Islam is the official religion. According to the latest International Religious Freedom report, Iran was re-designated as CPC country (U.S. Department of State, 2014). In addition to that, the two largest Muslim-majority democracies, Indonesia and Turkey, have made significant strides in advancing political and civil rights overall, but far less in advancing religious freedom. Embracing religious liberty in full will be exceedingly difficult in any Muslim society as it may prove impossible for the Muslim Brothers (Farr, 2011). In Saudi Arabia, religious freedom is not protected under the law. It has been designated as CPC since 2004 since for having engaged in or tolerated particularly severe violations of religious freedom. While in Pakistan, 95% of the population consists of Muslims. The Criminal Code in Sudan criminalizes both the offence of apostasy and acts that will lead to apostasy. In the latest case of Ms. Meriam Yahya Ibrahim Ishag in Sudan, the case received global condemnation when she was spared a death sentence for apostasy. She is a Sudanese woman and according to her family, her father is a Muslim and according to Sudan’s Islamic law, Meriam is a Muslim. She argues that she was brought up by Christian family and never practiced Islam (BBC News, 2014). Initially the court sentenced death penalty to her but due to international pressure, court overturned the sentence (U.S. Department of State, 2014). When a person was sentenced to death because of apostasy, many regarded death penalty is harsh and they want to escape from the penalties. Many believes that death penalty of apostasy is cruel and against human right. Misconception of the concept of religious freedom in Islam has led global community to condemn teachings of Islam.

On the other hand, many Muslims have lost confidence in the international system as a neutral problem solver after the experiences of the post-Cold War era and the persistence of the geopolitics of exclusion, double standards and intervention. Ultimately, however, the answer to the question of how best to promote and protect human rights and human dignity lies within the purview of internal domains. The choices made by the leaders and peoples of the Muslim world will play a key role in shaping the politics and the practice of human rights in their societies.
However, Esposito (2011) argues that most Muslims do not want Shariah as the source of law; nor do they want a theocracy (a clergy-governed state). Significant majorities in many countries say religious leaders should play no direct role in drafting a country's constitution, writing national legislation, drafting new laws, determining foreign policy and international relations, or deciding how women should dress in public or what should be televised or published in newspapers. Thus many Muslims want neither a Western secular nor a theocratic state but rather one that combines religious values with broader political participation, political freedoms, and rule of law.

In sum, most of IRFA’s report had focused on Muslim-majority countries. The result after the implementation of IRFA was suspicious. In addition, IRFA’s goal was suspicious because U.S. only focuses on Muslim countries rather than other countries. Saudi Arabia is considered one of the most oppressive Islamic states on earth (McCormick, 1998). Laila Maryati, who is the only commissioner of the nine-member US Commission on International Religious Freedom believes that the Act is biased against Islam.

7. **IRFA and Islam**

At early stage, IRFA received opposition from some Muslims leaders and organizations. James J. Zog argues that this feeling was due to “the concern that the bills were not part of a serious effort to provide balanced protection to the rights of religious minorities” (Zog, 2000). Rather, Muslims saw clear signs of ideological bias in the rhetoric of the legislation’s advocate (the conservative Christians movement).” Intriguingly, Laila al-Marayati, the sole Muslim commissioner of the nine-member US Commission on International Religious Freedom (USCIRF) was also criticizing IRFA and claims the legislation is biased against Islam. In 2002, she issued her dissenting view to the report of 2001 USCIRF report that did not highlight situation in Israel and the Occupied Territories in Palestine in the light of IRFA provision. She claims that Israel’s denial of Jerusalem holy sites to Palestinian Muslims and Christian was against the provision of IRFA. She furthermore argues that Israeli claims that its action was taken under ‘security concerns’ judgment does not justify restriction of religious worship for Palestinians. She made a complaint against Elliot Abrams, the chairman of the Commission during that period who
refused to go to Jerusalem as he was of the opinion that there are no problems with religious freedom in Israel that would warrant the attention of the Commission. Due to this, Laila al-Marayati an American Palestinian argues that Abrams “did not apply a uniform standard by which to judge religious freedom violations of any given country, relying instead on personal perceptions and preferences” (Marayati, 2002).

On the other hand, the Commission that led by Elliot Abrams in his testimony before the House International Relations Committee, acknowledged the dissenting view expressed by Laila al-Marayati. However, the Commission reported that the situation in the Occupied Territories as “… a complex matter requiring additional work. The Commissioner did not feel they were ready to make a formal report or recommendations (before the House)” (Marayati, Saperstein, & Shea, U.S. State Department, 2001).

Meanwhile, Lawrence J. Goodrich, USCIRF director of Communication, when asked by Washington Report responded to the issue and said “The Commission is well aware that Israel has restricted access to religious sites off and on for many years. Its statement does not imply an endorsement of current or previous restrictions. Far from seeking to legitimize those restrictions, the Commission called for ‘restoration of access to religious sites when legitimate security concerns are met.’. Given that the Commission’s expertise is in religious freedom rather than security matters, we took no position as to those security concerns…We believe it important for the Commission to focus on religious-freedom issues and avoid carefully the error inserting itself into the Middle East peace process” (Pat & Twair, 2001). Nina Shea, in her personal remark about the dissenting view of Laila on 2001 Commission report, says that “I think she (Laila) has a political agenda. Her religious belief has been politicized and was motivated by her Palestinian feeling.” (Shea, personal communication, 2001).

However, issue of religious freedom in Israel and Occupied Territory was also been highlighted by non Muslim. In 2006, Chris Smith, chairman of the House Subcommittee on Africa, Global Human Rights and International Operations presented his testimonial on the situation of Palestinian Christians after the building of separation wall by Israeli government. He recommended to the Commission on International Religious Freedom to report the negative impact of the wall to Palestinians. However, there was no action taken by the Commission until now on the issue (Smith, 2006).
8. **Islamic View of Religious Freedom**

In Islam, a human is God’s creature. The relation between human being and God is to be defined through human responsibilities. The Secular West depicted Islam as a religion that seems to clash with the modern era pertaining to human rights. An issue arise whether Islam as an antithesis to the doctrine of human rights. The Westernized liberal advocates and Muslims have debated and exchange their arguments in championing human rights and also the sanctity of their religion (Ahmad, 2015).

Accordingly, human rights mean rights that have been given by God as the creator of human beings as creatures. It is not the result or the fruit of mind but was determined in the Holy Quran and also Prophet’s recommended acts. There are a lot of matters relating to human rights that have been mentioned in Quran, there are almost 40 verses circulate the matters on compulsion and coercion.

The Quran is very clear on the right to religious freedom and the Islamic concept of religious freedom is simple. The general rule of absence of compulsion in religion in Surah al Baqarah reads,

Let there be is no compulsion in religion. Truth has been made clear form error.

Whoever reject false worship and believes in Allah has grasped the most trustworthy handhold that never breaks. And Allah hears and knows all things. (Al-Quran, 2:256)

According to the Quran, no one can be compelled to embrace the religion of Islam. Every Muslim has their duty to prove Islam as sacred and clear from falsehood. Whoever non-Muslims should be left free either to believe or not to believe. In fact, no harm or threat in anyway if the person does not want to accept Islam. Allah will reward the person who accepts Islam and if a person becomes an apostate, he or she will receive punishment from Allah.

Based on the perspective of Sharia law, a Muslim cannot change his or her religion. In contrast to Muslims, non Muslims are free to follow and profess any religion they prefer to. The Islamic concept of religious freedom is laid down in the first pillar of Islam “Declaration of Faith” (Shahadah) (Khan, 2003). A Muslim is obliged to testify to the Unity of Allah and
one”s commitment to the cause of Islam. Shahadah which means witness in Arabic is the most essential part of a Muslim whereby he declares, “There is no God but Allah and Muhammad is the Messenger of Allah.”

It is vital to Muslim to not only remain as a Muslim constantly but to proclaim that he will always be a Muslim. Hence, the issue of religious freedom from Shariah law is totally not applicable to Muslim. It is applicable to non Muslim to accept Islam but there is no way for a Muslim to change his religion. Be that as it may, being a surrendered Muslim, a Muslim has a right to invite non Muslims to Islam. But it cannot be done forcefully and even though they offer him to follow their own religion instead.

It is prohibited for a Muslim to force any non Muslim to accept Islam because in professing the religion, it is a matter of choice and confidence for them to live in their own lives. There is no advantages can be derived if it can be done forcefully and it will only harm others” feeling and sensitivities. Islam respects other religions to be practiced as long as it guaranteed peacefulness among society throughout the world.

Shah (2005) highlights the example of freedom of religion comes from the Quran and the way of the Prophet Muhammad followed. When the Prophet Muhammad failed to convince delegates of non-Muslim tribes to accept Islam, Allah commanded him to tell them that, “to you be your religion, and to me my religion” (Al-Quran, 109:6). This explains that people have their choices whether to embrace or left the religion and Allah has the reward and punishment for those who believe and those who not.

One of the ultimate objectives of Shariah law is to protect the religion of Islam. There are 3 essential types of maqasid al-shariah namely that are al-maqasid al-dhoruriyyah (the essential objectives), al-maqasid al-hajiyyah (the complementary objectives) and al-maqasid al-tahsiniyyah (the embellishment objectives). This categorization is unambiguously embraced and acknowledged by the muslim jurists and becomes the principal point for them in discussing maqasid al-shariah. The essential objectives mean the aims which are to be attained for the religious and material well-being of individual where otherwise the life will be in disordered and destructive in this world and thereafter. Whereas the complementary objectives mean the aims to remove adversity and severity on life in which such adversity and severity are not to the degree of placing the life in chaotic and destructive mode. The last
type means the aim to beautify and refine the customs and conducts of the people. The said protection of religion comes under are *al-maqaṣid al-dhoruriyyah*.

Shariah law itself has put forward several mechanisms in protecting the religion of islam. In *maqaṣid al-shariah* discussion, those mechanism are regarded as *al-wasail ila al-maqaṣid* (ways to achieve objectives). One of themechanisms is capital punishment for who converts out and denounces Islam. The Muslim scholars has unanimously agreed on this based on the prophetic saying where the Prophet Muhaamad said, “who changes the religion, kill him”. However the punishment may be set aside if the culprit revert back his decision to convert out of Islam.

9. **Conclusion**

This study concludes that it is obvious that U.S. International Religious Freedom report had focused on Muslim-majority countries rather than other countries. However, the U.S. government had denied the fact since the first report was released. Instead, they had blamed Muslims countries as repressive and the worst violators of religious freedom. The effort by U.S. to improve religious freedom around the world is commendable. However, the clashes of Islamic law and the primary of international law showed that the result of IRFA report in meddling affairs in Muslim-majority countries is the major flaw. In addition, the designation of those Muslim countries as CPC was mainly based on biasness and influenced by U.S. national interest.
BIBLIOGRAPHIES


KANAK-KANAK TIDAK TERKAWAL
DI MAHKAMAH BAGI KANAK-KANAK DI MALAYSIA

Syed Nong Mohamad, S.N.A. 1 & Mohd Yusoff, J. Z. 2

ABSTRAK


Kata kunci: kanak-kanak luar kawalan, bidangkuasa, undang-undang kanak-kanak di Malaysia

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1. Pengenalan

Satu petikan akhbar Malaysia melaporkan: “A Welfare Department official disclosed that magistrates were ordering children beyond control to serve the maximum three years period in a home when granting applications from parents…in most cases, magistrates didn’t consider the welfare officer’s report recommending counseling as a better solution. The parents say they don’t want their child and the magistrate acquiesces…Why does this happen when Article 40(2)(vii)(b) of the Convention on the Rights of the Child (CRC) states that children should not be subject of any judicial proceedings where possible?…most magistrates were not conversant with the CRC…Suhakam is very apprehensive of fresh law graduates sitting as magistrates. It is quite dangerous in that there could be a miscarriage of justice. When the family is the problem, how does sending a child beyond control to such a place resolve the problem?... Magistrates sending children beyond control to orphanages or shelters for abandoned children” (Koshy, 2008).

kesalah, latarbelakang dan persekitaran kanak-kanak, namun apakah prinsip-prinsip dan kriteria-kriteria yang dipertimbangkan dalam mengeluarkan perintah tidak dijelaskan sama ada oleh undang-undang atau keputusan mahkamah, dan keadaan ini menghasilkan pelbagai interpretasi dan aplikasi. Tambahnya lagi, prinsip-prinsip CRC mengenai penempatan di institusi sebagai langkah penyelesaian terakhir tidak dipatuhi secara konsisten.


2. Maksud tingkah laku tidak terkawal

Tingkah laku tidak terkawal umumnya bererti tingkah laku yang tidak dapat dikawal atau dikendalikan, liar, degil, nakal, ingkar arahan, memberontak, cepat marah, agresif, mudah bergaduh, keras kepala, tidak dapat dipulihkan, anti sosial dan melanggar peraturan (‘Definition of Out of Control in English’, n.d.). Theoharis (n.d.) menjelaskan bahawa kanak-kanak dianggap luar kawalan apabila mereka berulangkali mengingkari arahan ibu bapa atau penjaganya yang mengakibatkan masalah besar kepada dirinya, penjaganya atau persekitaran yang didiaminya. Walau bagaimanapun, tidak semua pengingkaran ini membawa maksud


3. **Senario kes tidak terkawal**

berbanding kanak-kanak lelaki 32.76% sebagaimana yang ditunjukkan dalam Jadual di bawah (Jabatan Kebajikan Masyarakat Malaysia, n.d.-a):

<table>
<thead>
<tr>
<th>TAHUN</th>
<th>LELAKI</th>
<th>PEREMPUAN</th>
<th>BILANGAN KES</th>
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<td>713</td>
</tr>
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<td>2011</td>
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<td>407</td>
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<tr>
<td>2012</td>
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<tr>
<td>2013</td>
<td>213</td>
<td>422</td>
<td>635</td>
</tr>
<tr>
<td>2014</td>
<td>201</td>
<td>445</td>
<td>646</td>
</tr>
<tr>
<td>JUMLAH</td>
<td>1,344</td>
<td>2,759</td>
<td>4,103</td>
</tr>
</tbody>
</table>

4. Prinsip parens patriae

CRC. Artikel 5 memperuntukkan bahawa kerajaan hendaklah menghormati tanggungjawab, hak dan tugas ibu bapa untuk menyediakan arah tuju dan panduan yang sewajarnya kepada anak-anak mereka (Cleland & Tisdall, 2005) namun artikel 3 memindahkan tanggungjawab penjagaan kanak-kanak ke atas pihak kerajaan sekiranya ibu bapa atau penjaga gagal berbuat demikian bagi tujuan menjaga kepentingan kanak-kanak (UNICEF, 2009).


Penubuhan mahkamah kanak-kanak mempamerkan peranan kerajaan dalam mengambil alih tanggungjawab ibu bapa bagi memastikan kawalan dan disiplin yang diperlukan kanak-kanak dapat diberikan sepertimana ibu bapa sebenar (Naffine, 1992). Ia menggambarkan prinsip *parens patriae* di mana kerajaan bertindak sebagai ibu bapa apabila ibu bapa tidak dapat menjalankan tanggungjawab terhadap anak mereka (Kim, 2010). Oleh itu, bidangkuasa mahkamah kanak-kanak di bawah *parens patriae* adalah terhad di mana tidak semua jenis kes kanak-kanak bermasalah boleh dikendalikannya. Ia hanya boleh mengendalikan kes sekiranya ibu bapa gagal dalam tanggungjawab mereka untuk mengawasi atau mengawal anak-anak mereka. Tanggungjawab mendidik dan menelamatkan kanak-

5. **Pemakaian parens patriae di Malaysia**


zaman penjajahan yang dibina atas kepercayaan bahawa pemerintah merupakan “ibu bapa” kepada kanak-kanak yang lahir di negara tersebut (R. Nalasamy & Abu Bakar Ah, 2013).

Pemakaian *parens patriae* khususnya dalam kes kanak-kanak tidak terkawal di Malaysia dapat dilihat melalui penggubalan seksyen 46 AKK di mana MBKK mempunyai bidangkuasa untuk mendengar permohonan luar kawalan yang dibuat oleh ibu bapa atau penjaga dan mengeluarkan perintah sama ada penempatan di institusi atau pengawasan. MBKK akan menentukan sama ada perintah luar kawalan boleh dibuat setelah menimbang laporan akhlak dan berpuas hati bahawa ia suaimfaat kepada kanak-kanak yang terlibat dan ibu bapa faham tentang akibat perintah serta mengizinkannya dibuat. Laporan akhlak yang disediakan oleh pegawai akhlak JKM perlu menyokong permohonan ibu bapa bahawa mereka tidak lagi dapat mengawal tingkah laku anak-anak mereka sebelum perintah boleh dikeluarkan. Walau bagaimanapun, apakah jenis tingkah laku tidak terkawal dan bagaimanakah kawalan yang sepatutnya dilakukan oleh ibu bapa tidak dijelaskan. Keadaan ini memberikan mahkamah budibicara yang luas dalam menentukan situasi kegagalan ibu bapa untuk mengawal anak mereka dan seterusnya mengeluarkan perintah sama ada menempatkan kanak-kanak di salah satu institusi iaitu sekolah diluluskan, tempat pelindungan, asrama akhlak atau institusi pemulihan persendirian, atau meletakkan mereka di bawah pengawasan pegawai akhlak. Secara tidak langsung, prinsip *parens patriae* digunapakai dengan meluas memandangkan tiada kiteria-kriteria atau syarat-syarat tertentu bagi menghadkan bidangkuasa MBKK dalam pengendalian kes kanak-kanak tidak terkawal.

**6. Kesimpulan**

Kanak-kanak tidak terkawal merupakan sebahagian daripada sistem keadilan kanak-kanak Malaysia yang turut mengendalikan kes kanak-kanak yang melakukan jenayah, selain mangsa-mangsa pengabaian, penderaan dan seksual di mana penglibatan kanak-kanak tidak terkawal bermula sebaik sahaja kes mereka mula dirujuk ke mahkamah (Rashid, 2009). Prinsip *common law* masih digunapakai melalui penggubalan bidangkuasa MBKK ke atas kanak-kanak tidak terkawal di bawah AKK. Namun kekaburan peruntukan dalam mengenalpasti tingkah laku luar kawalan ibu bapa perlu diberikan perhatian memandangkan ia boleh membawa kepada penyalahgunaan atau intervensi yang berlebihan daripada pihak kerajaan. Masalah kanak-kanak tidak terkawal merupakan masalah dalaman keluarga yang melibatkan hubungan ibu bapa dan anak perlu diselesaikan oleh ahli keluarga sendiri sebelum sebarang campur tangan pihak luar boleh dilakukan. Intervensi mahkamah hendaklah
menjadi jalan penyelesaian terakhir setelah semua ikhtiar yang dibuat oleh ibu bapa menemui jalan buntu.

Rujukan


http://books.google.com/books?hl=en&lr=&id=TS7mFx9WunQC&oi=fnd&pg=PA2&dq=administration+of+juvenile+justice++%22definition+of+a+child%22&ots=0cwdSmZEOT&sig=DcdYybS9OWawjSSv78XRFDvgc0


KELEMAHAN DALAM PENTADBIRAN TANAH DI MALAYSIA: SATU SOROTAN

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ABSTRAK


Kata Kunci: KTN 1965, isu dalam pentadbiran tanah, kelemahan dan cadangan.

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1. Pengenalan

Kanun Tanah Negara 1965 (KTN) merupakan undang-undang utama yang mengawal perundangan tanah di seluruh Semenanjung Malaysia. Ia mula digubal sebelum merdeka iaitu di tahun 50an. KTN berasaskan kepada undang-undang terdahulu yang sedia ada (Land Code 1926) dan dikemas kini dan ditambah dengan beberapa bahagian baru.

2. **Isu-Isu Dalam Pentadbiran Tanah**

Antara isu-isu kelemahan yang terdapat dalam undang-undang tanah Malaysia berkenaan dengan pentadbiran tanah adalah seperti berikut:

2.1 **lesen pendudukan sementara (LPS)**

Di bawah KTN, pelupusan tanah kerajaan terbahagi kepada dua iaitu pelupusan dengan cara pemberian milik dan kedua ialah pelupusan selain dari pemberian milik. Pelupusan tanah jenis pertama terdapat dalam seksyen 76 yang memberi kuasa kepada Pihak Berkuasa Negeri (PBN) memberi milik tanah kekal atau satu jangka masa yang ditetapkan, manakala pelupusan tanah jenis kedua, PBN boleh merizabkan tanah, memberi lesen pendudukan sementara, membenarkan pengeluaran batu-batan dan membenarkan penggunaan ruang udara di atas tanah kerajaan dan tanah rizab (Salleh, 1993). Pelupusan tanah tumpangan sementara termasuk dalam kategori kedua.

LPS merupakan satu lesen atau keizinan yang bersifat sementara, yang diberikan oleh PBN untuk satu maksud yang tertentu dan terhad. Oleh itu boleh dikatakan bahawa LPS diperkenalkan untuk menyelesaikan masalah ‘land hunger’. Memang tidak dinafikan bahawa definisi dan interpretasi LPS di bawah KTN adalah tidak lengkap tetapi perlu diakui bahawa terma tersebut adalah untuk menggambarkan bahawa menduduki atau mendiami tanah tersebut adalah bersifat sementara dan dengan permit lesen yang dipohon. Ia merupakan satu kebenaran untuk masuk dan melakukan sesuatu di atas tanah milik PBN (Hunud, 2011). Tanpa lesen tersebut, seseorang yang menduduki tanah itu akan dianggap sebagai penceroboh atau setinggan haram (Salleh, 1987). Hak-hak yang diberi oleh LPS bukan hanya terhad dari segi maksud atau sifat, tetapi juga terhad dari segi masa. Tempoh tamat LPS berakhir di akhir 31 Disember setiap tahun melainkan ia ditamatkan terlebih awal oleh PBN. Oleh itu, tanah LPS tetap tanah kerajaan dan tiada jaminan tanah itu akan menjadi miliknya selalma mana seseorang itu menikmati LPS tersebut.

Dalam kes Teh Bee Iwn K. Maruthamuthu [1977] 2 MLJ 7, di mana plaintif telah menduduki sebidang tanah selama 21 tahun apabila PBN (kerajaan Negeri Sembilan) memutuskan untuk memberi milik tanah tersebut kepada pihak defendan. Hakim perbicaraan yang mendengar kes tersebut menyatakan bahawa:
“The holder under a temporary occupation licence obtains no legal or equitable rights over the land he occupies by virtue of the licence other than to occupy the land temporarily from year if he can have his licence renewed annually… but there is no obligation on the part of the authorities to grant a renewal of a temporary occupation licence for any subsequent year”


Dalam kes Lebbey Sdn Bhd lwn Chong Wooi Leong [1998] 5 MLJ 368, Plaintiff adalah tuan punya berdaftar sebidang tanah. Tanah tersebut dahulunya dimiliki oleh PBN Selangor yang telah meluluskan permohonan plaintiff untuk pemberimilikan tanah tersebut. Pada masa pemberimilikan, banyak rumah didirikan atas tanah tersebut yang diduduki

Wilayah Persekutuan dan akhirnya kawasan tersebut diberi milik kepada syarikat pemaju (perayu).


Oleh itu, sudah sampai masanya undang-undang mengenai pendudukan sementara tanah kerajaan dikaji semula untuk menentukan pindaan-pindaan yang perlu. Persoalan sama ada perlu wujud atau tidak LPS di bawah KTN tidak timbul tetapi persoalan yang lebih penting ialah bagaimana menjadikan LPS satu sistem yang lebih berkesan dan mendatangkan manfaat kepada rakyat seperti dalam kes-kes yang telah dibincangkan di atas.

2.2 Masalah Setinggan (squatter)

Di bawah KTN, menduduki tanah beri milik (tanah milik orang lain) dan tanah kerajaan adalah merupakan satu kesalahan. Perbezaan di antara setinggan yang menduduki tanah beri milik, ia merupakan satu pencerobohan dan suatu kesalahan sivil tetapi jika setinggan menduduki tanah kerajaan perbuatan itu merupakan satu pencerobohan jenayah dan jika sabit kesalahan ia boleh dikenakan hukuman denda tidak melebihi RM10,000 dan
penjara tidak melebihi satu tahun (Salleh, 2003). Persoalannya adakah setinggan tiada hak langsung di sisi KTN?


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sesuatu hak untuk menetap atau terus menetap atau mendiami lot tersebut tetapi plaintif, sebagai pemilik berdaftar, mempunyai hak untuk mengusir defendan pertama. Hanya dengan mendirikan sebuah bangunan secara haram di atas lot plaintif dan menetap di situ tidak mencukupi untuk mewujudkan apa-apa hak atau ekuiti menentang pemilik sebenar lot tersebut yang dilindungi oleh hak milik. Defendan pertama juga tiada perlindungan di bawah ekuiti disebabkan seksyen 48 KTN 1965.


Kata-kata hakim dalam kes Sidek inilah yang kemudian digunakan berulang kali oleh mahkamah dalam kes-kes terkemudian, seperti kes-kes yang dibincangkan di atas, apabila menyatakan ‘janji-janji’ sahaja (walau diberikan oleh sesiapapun) tidak mencukupi.

2.3 Rasuah dalam Pentadbiran Tanah

Statistik Tangkapan Suruhan Pencegahan Rasuah 2015 sehingga Januari 2016 seperti jadual 1 di bawah menunjukkan penglibatan penjawat awam sama ada daripada kumpulan Pengurusan dan Professional (P& P) mahu pun kumpulan sokongan dalam gejala rasuah.

<table>
<thead>
<tr>
<th>Tahun</th>
<th>Penjawat Awam (Pengurusan Tertinggi, Pengurusan Profesional dan sokongan)</th>
<th>Awam (swasta, orang awam, Ahli Majlis dan ahli Politik)</th>
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<tr>
<td>2011</td>
<td>323</td>
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<td>918</td>
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<td>443</td>
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</tr>
<tr>
<td>Jan 2016</td>
<td>53</td>
<td>53</td>
<td>106</td>
</tr>
</tbody>
</table>

Jadual 1: Penglibatan Penjawat Awam Dalam Gejala Rasuah

(Sumber: [www.sprm.gov.my](http://www.sprm.gov.my))

Kes-kes berkaitan rasuah yang dilaporkan di dada-dada akhbar tempatan mengenai isu membabitkan penjawat awam yang terlibat dalam jenayah rasuah dalam pentadbiran tanah turut dilaporkan. Di bawah disertakan beberapa contoh berita oleh akhbar tempatan mengenai *modus operandi* dalam jenayah rasuah adalah seperti berikut:

<table>
<thead>
<tr>
<th>No.</th>
<th>Akhbar</th>
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</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Sinar Harian: (Empat Pegawai PTG ditahan SPRM, 8 Januari 2016, hlm. 2)</td>
<td>Empat Pegawai Penguatkuasaan Pejabat Tanah dan Galian (PTG) Pahang didakwa menerima rasuah daripada pelombong yang mengendalikan bauksit secara haram. Jumlah suapan yang terlibat berjumlah lebih RM100,000 yang diperoleh melalui penjualan Borang 13D yang dikeluarkan kepada pemandu lori yang mengangkut bauksit. Dengan menyimpan borang tersebut, pemandu lori bauksit yang terlibat diberi jaminan perlindungan daripada tindakan penguatkuasaan apabila operasi dijalankan.</td>
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<td>3</td>
<td>Sinar Harian</td>
<td>Dua penjawat awam, Penolong Pegawai Kanan</td>
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<td>No</td>
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<td>1</td>
<td>Online: (Dua Penjawat Awam Terima Padah Ambil Rasuah, 2015)</td>
<td>Pejabat Tanah daerah Kota Tinggi didakwa menerima cek bernilai RM5,000 daripada syarikat pembalakan sebagai dorongan membantu syarikat berkenaan mendapatkan kelulusan permohonan membersih dan mengeluarkan kayu di Mukim Sedili Besar, Kota Tinggi dan Pekerja Rendah Am didakwa atas empat pertuduhan menerima rasuah berjumlah RM64,000 secara berasingan di masa dan lokasi berbeza sekitar Kulaijaya dan Kota Tinggi.</td>
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<td>3</td>
<td>Sinar Harian Online: (Bekas Penolong Pengarah Unit Pengambilan Tanah, Jabatan Ketua Pengarah Tanah dan Galian Melaka, menerima suapan berjumlah RM5,000 sebagai dorongan membantu mengelak tanah daripada diambil semula.</td>
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<td>4</td>
<td>Sinar Harian Online: (Tuan Buqhairah, 2014)</td>
<td>Tiga kakitangan Pejabat Tanah dan Daerah Gombak termasuk dua daripadanya pegawai didakwa di Mahkamah Sesyen atas tuduhan menerima suapan RM 2000 daripada penyelia tapak tanah supaya tidak menahan lori-lori yang membawa tanah merah keluar dari tapak bukit yang mempunyai permit sah.</td>
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<td>7</td>
<td>Kosmo Online : (Nuzul Sham Shamsuddin, 2013)</td>
<td>Penolong Pegawai Tanah (NT17) di Unit Penguatkuasaan Pejabat Tanah dan Galian telah menerima cek untuk menjelaskan sepenuhnya pinjaman Bank Pertanian Malaysia sebagai balasan membabitkan tanah yang dijadikan cagaran pinjaman.</td>
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<td>8</td>
<td>Berita Harian Online: (Dua Pegawai Tanah Melaka Didakwa Rasuah, 2012)</td>
<td>Dua termasuk seorang Pengarah di Jabatan Ketua Pengarah Tanah dan Galian Persekutuan Negeri didakwa menerima rasuah RM5,000 supaya tidak mengambil tindakan pengambilan balik tanah di Lot 2288, Mukim Sungai Udang, Melaka.</td>
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diishtiharkan ke atas nama tuan punya tanah yang sebenar. Plaintiff turut menuntut daripada kerugian penuh yang boleh dihadapi oleh Plaintiff atas tindakan salah atau pelanggaran undang-undang oleh Defendan. Mahkamah telah mendapati bahawa hanya pegawai Defendan telah diberi kuasa untuk mendapatkan akses ke dalam bank data maklumat boleh mencetak milikan yang asal, dan seterusnya membenarkan permohonan gantirugi oleh Plantif setelah mendapati antara lainnya bahawa, Defendan telah mengeluarkan Defendan telah mengeluarkan 2 milikan yang asal bagi sebidang tanah yang sama tanpa mematuhi proses yang sepatutnya dan Defendan telah memberikan 1 milikan asal untuk penipu, yang tidak mempunyai hak atau kepentingan untuk memiliki tajuk.

Walaupun kes ini tidak secara terus membincangkan isu rasuah yang melibatkan pegawai di Pejabat Tanah, ia walau bagaimana pun membuktikan bahawa penyalahgunaan kuasa oleh pegawai di Pejabat Tanah dan perbuatan salah bersubahat dengan pihak ketiga yang menipu (‘fraudster’) dalam penjualan tanah membawa kesan yang amat serius terhadap pemilik tanah yang sebenar dan pembeli yang berikutnya. Perbuatan subahat dengan ‘fraudster’ lazimnya dikaitkan dengan pembayaran suapan bagi mendorong pegawai berkenaan melakukan penipuan dari segi pemprosesan dokumen milikan tanah.

Tanah bagi mempercepatkan urusan, bahkan ia sudah menjadi amalan biasa di kalangan mereka yang kerap berurusan di jabatan itu. Kelewatan proses kelulusan permohonan dan prosedur kawalan longgar di pejabat tanah dan amalan menyogok wang ini berlaku apabila ada pelanggan yang sedia membayar sogokan bagi mempercepatkan urusan. Di samping itu juga, longgarnya tatacara dan peraturan kerja atau kelemahan dalam sistem pelaksanaan kerja itu sendiri boleh menyebabkan sesuatu jabatan itu sentiasa terdedah kepada perlakuan-perlakuan seperti jenayah rasuah, penyelewengan dan penyalahgunaan kuasa oleh pegawai dan kakitangan.

3. Cadangan Penyelesaian

3.1 Mengiktiraf Prinsip Ihya Al-Mawat

seseorang yang dapat memulih dan menyuburkan tanah mawat adalah menjadi miliknya tidak kira sama ada ilya itu dibuat dengan keizinan pihak pemerintah ataupun tidak, patut diterima. Oleh itu, apabila seseorang atau sekumpulan individu telah mengusahakan tanah terbiar yang tidak diusahakan oleh sesiapa dengan izin atau tanpa izin kerajaan diberi keutamaan untuk mendapatkan hak ke atas tanah itu.


Selain itu juga, Menurut Salleh (1987), seseorang pemegang lesen yang telah berjaya mengerjakan tanah buat beberapa tahun hendaklah diberi pertimbangan untuk membolehkannya mendapatkan satu pajakan negeri bagi tempoh yang berpatutan, melainkan tanah yang didudukinya itu dikehendaki oleh PBN bagi maksud kepentingan awam di masa akan datang. Dengan erti kata lain, adalah disarankan supaya ditukar daripada LPS menjadi ‘Extended Term of Years Lease’ (ETOL), dari Lesen Pendudukan Sementara (LPS) yang perlu diperbaharui setiap tahun kepada pemberian kepada pengusaha tanah tersebut satu tempoh pajakan yang sederhana lamanya, seperti 30 hingga 60 tahun ( kadar satu generasi keturunan).

Dari segi hukuman dalam kes rasuah, contohnya di Singapura, dalam seksyen 13 (1) Prevention of Corruption Act 1960 terdapat peruntukan memberi kuasa kepada Mahkamah untuk memerintahkan penerima rasuah membayar denda setara dengan jumlah suapan yang diterima olehnya selain daripada hukuman dalam bentuk denda dan/atau penjara. Ini menunjukkan penerima rasuah tidak patut menikmati apa-apa faedah daripada kegiatan

4. Kesimpulan

prosedur kerja dan menghayati peruntukan undang-undang yang berkuat kuasa bagi memastikan kesilapan berlaku di tahap yang paling minima.

**RUJUKAN**


dibentangkan di seminar Pentadbiran dan Perundangan Tanah untuk Pegawai Daerah/Pentadbir Tanah Semenanjung Malaysia, Melaka.


Temu bual dengan Encik Zameri bin Mat Zin, Pengarah SPRM negeri Terengganu dan Azmin Yusoff, Penguasa Kanan, SPRM negeri Terengganu, Tingkat 10, Wisma Persekutuan, Jalan Sultan Ismail, Peti Surat 6000, 20720 Kuala Terengganu, Terengganu, 8 Mei 2011.

MEDIATION SERVICES AT THE FAMILY COURTS OF SINGAPORE AND AUSTRALIA: LESSONS FOR MALAYSIA

Mohd Arshad, A.H, Che Soh @ Yusoff, R. Mohd Zin, N. & Abdul Hak, N.

Abstract

Family mediation has become an important tool in resolving family disputes. Family courts all over the world have adopted mediation as part and parcel of their structure, or as a mandatory process in dispensing justice. The purpose of this paper is to learn how mediation is integrated into, or upheld by the family courts, particularly because of the need to develop a comprehensive and holistic family court system in Malaysia. In this paper, two family courts are studied i.e., the family courts in Singapore and in Australia. The discussion in this paper begins with a brief introduction on family mediation as practised in the Malaysian courts. This is followed by a discussion on the law and practise of mediation in the family courts of Singapore and Australia. The effectiveness of family mediation in these two countries is also discussed in general. It is found that mediation in family courts have been systematically and successfully implemented. It is also learned that mediation has been able to help the family courts to expedite the cases brought before the courts and clear backlogs. Even though there are certain differences in the way mediation is implemented in the family courts, it is proven that mediation is able to facilitate the parties to achieve a resolution, which is more satisfactory. In this paper, the data are obtained from materials consisting of textbooks, statutes, journal articles, newspapers, seminar and conference papers and unpublished writings. Interviews with the relevant personnel are also conducted. It is hoped that

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the findings of this study will be of help to the relevant authorities like the Malaysia Judiciary Department and Attorney General Department in designing a new regulatory framework in an effort to introduce mediation service at the proposed family court in Malaysia

Keywords: Family mediation, family court, family disputes.

1. Introduction

Family law litigation can be said to be unique in so far as it rarely involves judgements solely concerned with matters of fact but it almost invariably complicated by the intense and intimate emotions of the parties in conflict. The use of the traditional litigation process to resolve family issues in dispute has been much criticised. Where human relationships are strained, the adversarial approach may actually exacerbate rather than reduce conflict. The use of ADR processes, such as counselling, conciliation and mediation may lead to a more satisfactory resolution of disputes. Currently, mediation is regarded as the most widely recognised alternative dispute resolution method especially, in family matters such as marriage breakdown, custody of children, *mut’ah*, *harta sepencarian* and *nafqah*.

It is the aim of this paper to learn how mediation is integrated into, or upheld by the family courts, particularly because of the need to develop a comprehensive and holistic family court system in Malaysia. In this paper, two family courts are studied i.e., the family courts in Singapore and in Australia. A brief introduction on family mediation as practised in the Malaysian courts is deliberated and followed by a discussion on the law and practise of mediation in the family courts of Singapore and Australia. The effectiveness of family mediation in these two countries is also discussed in general.
2. Family Mediation in the Malaysian Courts

In Malaysia, family matters are administered by two different court systems. The Civil Courts govern the non-Muslims and the Syariah Courts for the Muslims. Therefore, different mediation services are provided for the two respective courts. In principle, family mediation is not mandatory for non-Muslims. There is no statutory provision that requires a person who is undergoing family proceedings to go for mediation. Nevertheless, the parties are encouraged to go for mediation on a voluntary basis. An initiative was taken by introducing a formal direction on mediation by issuing Practice Direction No. 5/2010 on 13 August 2010 with the objective to encourage parties in reaching amicable settlement without having to go through or completing a trial (Arifin Zakaria, 2010).

The Practice Direction No. 5/2010 that formally introduced the practice and procedure for court-initiated mediation provides that judges are allowed to encourage parties to settle their disputes at the pre-trial case management stage or at any stage before or after a trial has commenced. It can even be suggested at the appeal level. The Practice Direction suggests two modes of mediation, namely, judge-led mediation and mediation by a mediator agreeable to both parties.

Based on the practice of the Kuala Lumpur Family Court, mediation may be conducted by a family court judge provided that the parties give their consent. During this session, the judge shall put aside all the proceeding notes and observe the etiquettes of mediation. However, it was viewed that mediation is not the main subject matter of the Family Court because in general the Court’s main function is to dispose cases by way of hearing cases. Nevertheless, mediation is seen as a supplementary tool that helps the Court to encourage parties to settle the matter, as it was agreed that family matters should be resolved amicably (Wee Siam, 2012).

On the other hand, for the Muslims, the state provides for the application of sulh through the state enactments. For instance, for the Federal Territories, the provision can be found under section 99 of the Syariah Court Civil Procedure (Federal Territories) Act 1998, which allows the parties to hold sulh at any stage of the proceedings, in accordance with the prescribed rules, or hukum syarak. There is a
specific rule that governs the process of *sulh* known as the Syariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004. Other than the above legislations, there are a number of guidelines referred to by the *sulh* officer (mediator) to handle *sulh* and related matters, such as Mediation Work Manual, circulations and practice directions relating to the conduct of *sulh*.

*Sulh* at the Syariah Court is an integral part of the court process. It is conducted in almost all types of family disputes that include breach of contract to marry, *muta’ah*, maintenance of wife and children, custody and so on, as listed under the Practice Direction No. 1/2010. For these cases, *sulh* are mandatory. The parties are not given any options whether to undergo *sulh* process or not. However, *sulh* is not applicable in cases of divorce and dispute over *nasab* (determination of lineage). Besides the advantage of helping the parties to reach an amicable settlement, *sulh* also helps the parties to settle their case in a very short time, without having to go through all the procedures of a full trial. A case can be settled as fast as five minutes, if the parties came with an agreement pre-concluded between them. However, the maximum time given for a *sulh* officer to settle the case is three months (Zalinah Said, 2012).

It is observed that at the Syariah Court, *sulh* or mediation has become a very effective tool that helps the Court as well as the parties. For the Court, it helps to minimize cases that go for full trial and clear backlogged cases, whereas, for the parties, it provides an opportunity for them to settle their case harmoniously through the help of a mediator who facilitates the process.

Considering the importance of mediation in resolving family disputes, many legal scholars have suggested that mandatory mediation should be introduced in the civil courts as well, because family disputes are more suitable for mediation. Therefore, there is a need for specific legislations to be made to empower judges to order the parties involved to go for mediation (Nora, 2010). Suggestion was also made to introduce compulsory family mediation with certain exceptions, which is based on the Australia’s model of family dispute resolution, subject to certain modifications (Nor Fadzlina and Nora, 2013). Some legal scholars also recommended that mediation should be integrated into the family courts in Malaysia as one of the courts’ components (Nor Aini, 1996; Muhammad Nizam, 2004).
It is viewed that, even though mediation gives a lot of advantages in resolving family disputes, these advantages are not equally obtained by Muslims and non-Muslims in Malaysia because family mediation is only made mandatory for the Muslims, but not the non-Muslims. Therefore, in an effort to promote a more effective mediation in the Malaysian courts, this paper has studied how family courts in Singapore and Australia hold mediation, or work together with mediation service provider.

3. Mediation Services at the Family Courts of Singapore

In Singapore, family matters under the civil system are dealt with by the Family Justice Courts (the FJC) that consist of the Family Division of the High Court, the Family Courts and the Youth Courts. The FJC, which was launched in 2014, brought a number of important changes to the family courts in Singapore. Among the 4
significant ones is that more power is given to the Court to direct the parties involved to attend mediation to resolve disputes for all cases that are brought before the Court. This is stipulated under section 26(9) of the Family Justice Act 2014 that provides for the jurisdiction of Family Courts:

(9) Subject to any other written law, a Family Court may, either on its own motion or on the application of any person, order any party to any proceedings in a Family Court, or any child who is a subject of such proceedings, to undergo such mediation or counselling, or to participate in such family support programme or activity, as the Family Court may direct.

Besides the above provision, s.50 of the Women’s Charter also empowers the Court to refer parties for mediation or harmonious resolution of disputes. The above provisions have strengthened the philosophy behind the creation of Family Courts in Singapore, that is to help family members resolve their dispute amicably; and to provide family services and supports, so that family dispute can be resolve in a holistic manner (Wai Kum, 2007).

The subject matter of mediation covers a wide range of cases such as petition for divorce, nullity of marriage or judicial separation, ancillary applications regarding custody, maintenance of children or wife, division of matrimonial assets, applications under the Guardianship of Infants Act, complaints of failure to provide reasonable maintenance during the subsistence of marriage and the application for the enforcement of maintenance orders (Wai Kum, 2007).

A study visit to the Family Court of Singapore was conducted on the 21st May 2012 with a number of objectives, among others, to learn about how mediation is implemented in the Family Courts. The Family Courts have established three dedicated units to facilitate the parties to go for mediation. These are Family Resolution Chambers, Child Focused Resolution Centre, and Maintenance Mediation Chambers.
The Family Relations Chambers were set up to deal with issues that involve matrimonial relationship problems. It is a dedicated centre that assists the parties and families to seek for a more cooperative and problem-solving approach with the help of mediators. The Child Focused Resolution Centre was set up to facilitate mandatory mediation and counselling for divorcing couples with children. Whereas, the Maintenance Mediation Chambers are dedicated to handle cases of pre-divorce spousal and child maintenance, as well as both pre and post divorce enforcement of mediation. The first two units are headed by judges, which are also known as judge-led mediation for divorce and ancillary matters. The third unit on the other hand, is conducted by dedicated, trained mediators and large pool of volunteer mediators for maintenance only.

Recently, the Singapore Family Mediation Training and Certification Framework was established and has given an accreditation to the first batch of 24 specialist family mediators, which include Family Justice Courts district judges and senior lawyers (Ming En, 2015). This latest development has certainly strengthened the implementation of family mediation in Singapore that will benefit both the Courts and the parties who obtained mediation services.

The Family Court mediation has been proven successful since the very beginning of the establishment of the Family Court in 1995, where 85.1% rate of successful mediation was recorded in that year (Yuan and Leng, 1997). The high-resolution rates continue in the recent years. According to the Family Court Judge, Mas Ayu Norasyikin (2012), 80% of divorce cases and 90% of maintenance cases are settled through mediation. The Family Court make an early intervention by imposing compulsory mediation and counselling for divorce cases with at least one child under the age of eight years old, while for maintenance cases it is usually done before the first mention. In 2014, Singapore imposes mandatory mediation and counselling for divorcing couples with children aged below 21 years old, which is held at the Child Focused Resolution Centre (Ming En, 2015).

Menon (2015) mentions a number of factors that lead to the success of mediation in Singapore. This includes the active role played by the government in encouraging prospective litigants to consider mediation. Besides, the judiciary also helps entrench mediation as a parallel process to traditional court proceedings.
Provisions in the Rules of Court also allow the court to take into account parties’ attempts at mediation or other means of dispute resolution. Another factor is that Singapore gives great emphasis on developing and maintaining an available pool of trained and experienced mediators. In the area of family law, the Family Justice Courts place the less confrontational approaches to mediation and counselling front and centre. Judges of the FJC are given power to order the parties involved to attend mediation and counselling as part of the court process where appropriate.

In Singapore, the Syariah court is another court, which governs the administration of the family law for Muslims. The Syariah court provides mediation, but it is limited to family disputes involving Muslims only. According to the Syariah Court judge, Abdul Jalil (2012), mediation is part of the Syariah court process. It is conducted before the pre-trial conference is held and it also can be done after a proceeding has commenced. It means, mediation can be done at any stage, as early as the case is registered. The Syariah court has full time mediators as well as a few ad-hoc mediators who assist the Court with mediation. In recent years, the Syariah court recorded the rate of 70% cases settled through mediation. This has reduced the number of cases that go for full trial at the Syariah court.

It is found that in Singapore, mediation is an integral part of the Family Courts as well as the Syariah court. It is a very effective case management tool that helps the courts and the litigants to find a harmonious resolution. Trials or adjudication will be the last resort if mediation fails to give any resolution. The Family Courts are equipped with all the facilities that help the smooth running of mediation process such as mediation rooms, and also manned by professional and trained family mediators who work together with the family court judges and officers.

4. **Mediation Services at the Family Courts of Australia**

The family law in Australia is administered by three courts, namely the Family Court of Australia, the Federal Circuit Court and the Family Court of Western Australia. The latter was established as the state court, whereas the first two courts were established at the federal level.
In ensuring justice in family cases, there are various family services available in Australia, which are either provided by the court or outside of the court. Family consultancy and reconciliation are categorized as court-based services (see ss.10A and 13B, Family Law Act 1975), whereas counselling, family dispute resolution and arbitration are categorized as non-court based family services (see ss.10B, 10F and 10L, Family Law Act 1975). There is no specific provision that mentions about mediation under the Family Law Act 1975 (‘the FLA’). However, according to Parkinson (2009), the term ‘family dispute resolution’ used in the FLA refers to the process of mediation, even though it is more broadly defined than mediation. Mediation services, or family dispute resolution (FDR) are provided by the external, non-judicial institutions. Nevertheless, the family court and the external bodies that provide family services are working side by side, to the extent that it has become a statutory requirement to inform people about these services, as stipulated under s.12A of the Family Law Act 1975.

It is reported that the Family Court of Australia has started to provide mediation services since January 1992. An evaluation report was subsequently made with the study sample consisting of 149 mediated cases completed within 18 months. The study concluded that mediation could be effective in resolving a wide variety of disputes provided that it is conducted by trained mediators familiar with family law and problems related to separation (Alexender, 1999). In the early years, mediation services were conducted by the family court counsellors who worked in the Court. The success of this mediation services has prompted the Australian Government to support family mediation services within the community, and eventually introducing mandatory FDR (Nor Fadzlina and Nora, 2013).

It was in 2006 that the FLA was amended to strongly encourage family dispute resolution in parenting cases by making it a mandatory. As a consequence of the Family Law Amendment (Shared Parental Responsibility) Act 2006, parents are required to engage in FDR before applying to court, unless exempted. The object of this requirement, as stated under s.60I (1) of the FLA, is to ensure that all persons who have a dispute about matters relating to children which are stipulated under Part VII of the FLA, shall make a genuine effort to resolve that dispute before any order is applied for.
This has also transformed the encouragement to use mediation into a pre-litigation requirement. One of the significant effects of this requirement is there has been a sharp decline in parenting applications for parenting orders before the Court (Rhoades, 2010), and also the establishment of the Family Relationship Centre, with accredited FDR practitioners who are authorised to issue a certificate indicating whether FDR is appropriate, or whether a genuine effort has been made to resolve the matter (Caruana, 2010).

The establishment of Family Relationship Centres is vital in ensuring mediation services are adequate to cater for the mandatory requirement. Other than mediation, the FRCs also provide information, advice and other services in assisting the parents to reach an agreement. There are 65 centres throughout Australia, which are funded by the Australian Government and staffed by independent, professionally qualified staff offering confidential and impartial services in a welcoming, safe and confidential environment. The centres are run by non-government organizations, but they operate in accordance with guidelines set by the Government. Although run by different service providers in different locations, the FRCs have a common identity to the public (Parkinson, 2009).

FDR or mediation provided at FRCs addresses all issues arising from the separation, but focuses primarily on parenting issues and property settlement in conjunction with parenting issues. FDR is child-focused, aiming to promote the best interest of the children. It involves careful assessment for suitability, screening for issues such as domestic violence and child abuse, and preparations for clients. If there is a concern about the safety of the clients or the mediators, the FDR practitioners may refuse to conduct mediation. Similarly, when there is power imbalance that cannot be handled during the process. It is a requirement that the client be able to negotiate on his or her own behalf. For this purpose, they may have their own support person or a lawyer. Otherwise, mediation can be conducted on a shuttle basis, where the parties are placed in a separate room and the mediators move between the rooms. FRCs are also staffed with family advisors, who help separating couples prepare for mediation by providing coaching support and referral to other services, which might be needed from time to time. Some FRCs offers a unique service by combining
mediation and therapy, where the mediator and counsellor are present in a joint session. This is useful, particularly where mediation gets stuck due to an emotional obstacle, and cannot move until some therapeutic treatment is given (Caruana, 2010).

It is found that the mandatory requirement to use FDR, particularly in sorting out parenting and financial agreement, has given rise to the creation of various mediation models. The process of mediation becomes more flexible and creative. Therefore, the use of ‘family dispute resolution’ is seen as more appropriate to cover all mediation models. These include settlement model, evaluative, facilitative, transformative, narrative mediation, structured mediation, therapeutic mediation and child-inclusive mediation (Martin and Douglas, 2007).

It is observed that mediation as practised in Australia nowadays is a non-court based procedure. Nevertheless, there is a clear provision that stipulated mandatory mediation in certain cases. Because of this requirement, the government has provided facilities that help the litigants to undergo mediation. The Family Law Act 1975 of Australia provides extensive provisions on family dispute resolution mechanisms, which include mediation. It is the obligation of the family courts to ensure that the litigants have been well-informed about the mediation services, obtained such services where it is mandatory for them to do so, or make an order for the litigants to attend mediation sessions. In addition, the existence of family consultant in the family courts helps the Courts in discharging its duty, because the family consultant will advise the Courts as to the appropriate family dispute resolution and other services to which the court can refer the parties to its proceedings (see s.11A).

5. Findings

It is observed that in Malaysia, mediation has been systematically and actively implemented at the Syariah courts. Unfortunately, that is not the case for the civil courts. There are a number of causes that hinder mediation from being actively conducted by the civil courts. The most apparent one is the absence of comprehensive provisions that enables the court to order parties to go for mediation. Secondly, the court lacks mediators who are trained and specialized in family mediation. Mediations
at the civil courts are conducted by judges and registrars. It is found that the present number of judges and court officers in both Civil and Syariah courts are not adequate to conduct mediation, as they are occupied with many other officials’ tasks. Thirdly, in terms of infrastructure, there is no specific room allocated for conducting mediation. Mediation is conducted either at the judge’s chamber or in the office of the registrar or deputy registrar. Finally, lack of publicity on what mediation is and how it helps the litigants to obtain a satisfactory level of dispute settlement. Due to the principle that mediation should be conducted on a voluntary basis, it becomes less popular among the litigants. Only those who can appreciate the benefits of mediation will choose to go for mediation, otherwise, they prefer to fight in the court. Therefore, actions must be taken to improve the present situation, not only for the advantages of the judiciary but also the litigants.

Based on what has been learned from Singapore and Australia, there are a number of similarities and differences that can be drawn. Both jurisdictions have their own legislation that allows the family courts to order the parties to attend mediation, in an aim to promote amicable dispute settlement. Due to the existence of such provision, the family courts has more power to ensure that the parties have resorted to the non-litigious procedure before applying for any proceedings in the courts. This in turn, will safeguard the well-being of family members, especially children, from being involved in adversarial contentious court proceedings. In addition, trainings and accreditation programs are conducted to produce more qualified family mediators. Previously, Singaporean mediators obtained certification and accreditation from Australia, but now Singapore is moving forward by establishing its own training and accreditation centre for family mediators. In the respective jurisdictions, the governments also give their cooperation to encourage the development of mediation services. With the support and cooperation of the executives, legislature and the judiciary, mediation becomes a very effective mechanism for family dispute resolution in those countries.

The difference is on the implementation of mediation, whereby in Singapore, it comes under the category of court-annexed mediation, whereas in Australia, mediation is a non-court based procedure. In Singapore, mediation is integrated into the family court that is as part and parcel of the court process and procedure. By
having such a system, all matters relating to family mediation are centralized into the family courts. There is no need to create a new establishment to accommodate family mediation. Judges, court officers and mediators can work together in a collaborative and facilitative environment. On the other hand, in Australia, mediation is conducted by external Family Relationship Centres that spread throughout Australia. This system is also proven effective. The procedure of mediation is more flexible and the mediators become more creative with the techniques and skills of mediation as it is totally separated from the courts. However, to establish such centres, it is expected that substantial amount of financial allocation will be required. Therefore, at the initial stage, it is suggested that mediation is integrated into the civil court as part of the court process and procedure. The civil courts need to have full time family mediators, just like the Syariah courts. In addition, there must be specific room allocated for mediations. At the same time, sufficient information must be given to the parties to make sure that they really understand what mediation is, and how it benefits them.

6. Conclusion

There is no doubt that mediation is suitable in most of the family disputes. The existence of specific provisions that govern mediation is very important; otherwise it seems difficult or less effective to promote the parties to opt for mediation. Family mediation can either be integrated into the court process and procedure, or conducted outside of the courts. It is the duty of the authorities to examine the advantages and disadvantages of the different systems before a regulatory framework is designed. The study and research on mediation must be done continuously, because there are many lessons that can be learned from the practice and experience of other jurisdictions.
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PRIVATE INDIVIDUAL WAQF: AN ANALYSIS

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Abstract

The common practice of bequest property is to focus on distribution, which leads to non-regenerate assets which is limited to certain legal heirs of that family. Endowment or waqf literature normally talks on practical management in order to be more efficient and transparent. The entrusted body i.e. State Islamic Religious Council is likely incapable to monitor all the operations of endowment assets effectively. This paper tries to explore the issues of private individual waqf and its possibilities to assist State Islamic Religious Council.

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1. Introduction

Waqf literally derives from word waqafa (وقف) means is to stand or to stop. Technically means the allocation of certain properties to be used by the public or certain groups and the donor no longer becomes the owner of such properties because he already returns them to Allah.

Private individual endowment is commonly practiced in our society. It happens unofficially when the donor has excessive property and tries to benefit his asset for public. Normally the donor appoints himself as the trustee because it is easier to manage such property and in accordance with his intention to sustain that property for the sake of public.

2. Waqf Structure in Malaysian Administration

Malaysian Federal Constitution acknowledges Malaysian State’s jurisdiction over waqf properties that can enact laws relating to waqf and its management within the state.1 State laws on administration of Islamic religious affairs have provisions to establish governance mechanism for management of waqf properties in the State. The State Islamic Religion Council (SIRC) in each of the thirteen States and the Federal Territories require every waqf to be registered with the SIRC. A Majlis under the SIRC has authority to register, regulate, monitor and manage consumptive waqf properties within the state. The Majlis have an advisory board and a waqf properties management committee. The advisory board consists of individuals, legal and Shariah experts appointed by the Majlis along with the Mufti, Secretary of the Majlis, State Legal Adviser and State Director of Land as permanent members. Members normally include State Financial Officer, Muslim scholars and practitioners in profession relating to Shariah, property management and financial management.2

The legal issue is perhaps the most difficult issue faced by the waqf manager (nazir) in Malaysia. In most situations, the laws related to waqf administration in the state enactments are not comprehensive. They only cover managerial aspects as well as the brief procedure for making waqf. Selangor was the first state in Malaysia that introduced new enactment in waqf administration that touches on substantive areas and more updated.

1 State List, 9th Schedule of Federal Constitution.
According to the most of the States enactments, the SIRC acts as the trustee of waqf property, either the waqf is general/public or specific. The nature of trustee is to abide by the conditions laid out by the donor. Hence, this does not give the flexibility to the state Islamic council to manage the waqf property. In order to provide flexibility related to the legal framework of waqf property, it is important to educate the public especially the donors to make general waqf instead of specific waqf. General waqf provides the managing institutions ample space to manage and develop the waqf assets.

Lack of uniform rules and practices of waqf property management affect its efficient planning and distribution across states. Nonetheless, waqf in Malaysia, particularly its financial management appeared still much neglected by the relevant authorities and therefore after more than half a century under the trusteeship of the SIRCs, waqf is yet to significantly contribute to deliver social and economic welfare of the community.\(^3\) The need for a central waqf institution is felt by people for efficient management, organization and development of waqf properties in Malaysia. Realizing such a need, the former prime minister, Tun Abdullah Ahmad Badawi announced the establishment of the Department of Waqf, Zakat and Haj (JAWHAR).\(^4\) JAWHAR was expected to make progress on waqf properties in an organized, systematic and effective way. However, JAWHAR has no jurisdiction in practicing its power and rights on the management of waqf properties because the States are the sole trustee of waqf properties in Malaysia.\(^5\) Therefore, JAWHAR mainly play a role of coordinating waqf development of the SIRCs through the National Waqf Institution.

3. Current Progress of Waqf Management

As the sole trustee of waqf properties, SRICs are empowered by law to appoint any individual or committee acting as its representative and also use waqf assets to generate income through yields and rentals. In contrast to past experience, waqf authorities not only develop waqf for establishing religious places, but also build shop lots and commercial


properties on waqf lands. To overcome the problem of getting enough funds for waqf development projects, various financing mechanisms have been used by waqf managers including *hukr, ijaratain, istibdal* and *sukuk musyarakah*. Waqf authorities also introduced the cash waqf concept for fund raising purposes and the proceeds channeled to finance waqf activities. Various types of cash waqf concept such as waqf shares models, takaful waqf model and corporate cash waqf models have been developed by waqf authorities in Malaysia.\(^6\)

In 2008, the Waqf Foundation of Malaysia (Yayasan Wakaf Malaysia) was set up to strengthen waqf developments in the country. Currently, the foundation actively promotes its waqf fund projects and cash waqf scheme (www.ywm.org.my). Corporate waqf share launched in 2006 by Johor Corporation demonstrates the company’s assurance to be one of the leaders in promoting corporate social responsibility via philanthropic waqf practice. Kumpulan Waqf An-Nur, a subsidiary of JCorp has been successfully developed a number of clinics known as An-Nur Waqf Clinic in various places and a hospital in Pasir Gudang (www.jcorp.com.my). The initiative taken by JCorp can be used as a model for other private companies to actively involve in promoting, establishing and developing waqf properties in Malaysia.\(^7\)


JCorp plays a very important role in developing waqf properties in Malaysia particularly in corporate sector. Thus, its contribution in managing waqf property is proven and recognized by many parties.

As a private institution, JCorp is one of the prominent institutions which contributes directly towards this development. Waqf activities anticipated by JCorp is diversified to various activities via Kumpulan Waqf An-Nur Berhad like waqf activity in medical-based institution known as Waqf An-Nur Clinic which was the first waqf hospital launched by

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\(^7\) Ibid.
JCorp in 2006. Until 2007, the expansion of Waqf An-Nur Hospital and Clinics reached not only the state of Johor, but also to Kuching, Sarawak in collaboration with Baitulmal Sarawak. With the implementation of cash waqf in Waqf An-Nur, it has contributed towards the society in its own range.

A unique agenda planned by JCorp for the ummah is through its Corporate Shares of Waqf Corporation. This concept is a key institutional strategy towards making a success of its corporate mission of “Business Jihad”. As a proof, via its corporate waqf agenda as reported in 2007 JCorp pledges to dedicate 25% of the annual dividend payout from the shares transferred into waqaf. Thus, the dividend is useful to organize various activities for Muslims and non-Muslims and arranged for charitable and religious activities that benefit and fulfill the needs of the society as a whole. In 2006, JCorp launched the idea of “Corporate Waqaf” which involved the transfer of 12.35 million unit shares owned by JCorp Kulim (M) Bhd, 18.60 million unit shares in KPJ Healthcare Bhd and 4.32 million unit shares in Johor Land Bhd to Kumpulan Waqaf An-Nur Bhd as trustee.

As for da’wah activities, JCorp with Malaysian Islamic Development Department (Jabatan Kemajuan Islam Malaysia - JAKIM) produces an academic-based programme to instill business mind-setting amongst Malaysian community with Islamic outlook. The programme invites callers and viewers to donate via SMS (Short Messaging System) which is then distributed to the poor and needy in most of JCorp’s programme.

Thus, waqf activities in business, its Waqf An-Nur Clinics and Hospital and other Islamic driven corporate social responsibilities activities have brought JCorp as Muslims corporation that devoted towards Muslims ummah as a whole and directly alleviate poverty amongst Muslims. The focal activity of JCorp via corporate share and medical-based contribution has benefited the ummah.

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9 Ibid.
5. The Significance of Private Initiatives

Based on the experiences of JCorp in Malaysia in the development of waqf fund and properties in their respected areas, it is evident that the initiatives carried out by private entity with corporate and professional backgrounds could help the religious authorities in developing the waqf assets as well as diversifying the sources and application of waqf funds. The involvement of private institutions could diversify the concept of waqf as could be seen by the practices of JCorp and Warees (legal heirs). Previously, waqf concept is only associated with fixed or immovable properties. Furthermore, the private institutions are seen to be more creative and capable in the development of waqf assets.

This initiative could be expended further by Public Trust Corporation (Amanah Raya Berhad) to apply the same approach in order to upgrade the efficiency of waqf management. There are some private companies registered under Public Trust Corporation (PTC) like Wasiyyah Shoppe Sdn. Bhd, As-Salihin Trustee Berhad, Zar Perunding Pusaka to assist the people making wills, gift, division of matrimonial assets, bequest, etc. so the problem of unliquidated properties at PTC could be settled accordingly. These private companies could expend their product to include waqf property and register with SIRC. This approach will help SIRC to update the current data of waqf assets besides upgrading the supervision system on them.

Maybe some researchers will argue that these private companies might impose certain charges, whereas waqf concept is non-commercial base and it should be free from any payment. The same scenario happens in JCorp at the first moment to set up corporate waqf and establish Waqf An-Nur Clinics, thus, the imposition of certain charges is inevitable.

Apart from that, another approach could be applied is private individuals must appoint themselves as trustees for waqf properties. The old approach which is putting waqf asset as secret because of humility should be neglected and declaration of certain properties as waqf should be done officially. The trustees must disclose the waqf asset to their families in order to avoid any argument, and any attempt to intervene over waqf asset will be taken a legal action against them. The process of waqf management will be better if trustees put the waqf asset together with NGOs. The trustee will register waqf asset with SIRC and that NGO will

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assist SIRC to maintain and update the status of waqf asset. The approach is very practical because SIRC becomes a coordinator to monitor all waqf assets at the scattered areas.

6. Conclusion

Private individual waqf would be effective with cooperation of non-commercial bodies, i.e. NGOs’ whose the main activities are charitable base. The issue of strict condition imposed the trustee (the usage of waqf property only for certain purposes) is irrelevant because any change of it, as long as it is in line with the principle of charitable activities, so it is justifiable according to siasah syar’iyyah. The burden of SIRC to administer, manage and develop the waqf land efficiently and productively also could be settled by the assistance of NGOs.

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MISCONDUCT AND DISCIPLINARY ACTION: PROPORTIONALITY OF PUNISHMENT WITH REFERENCE TO INDUSTRIAL COURT AWARDS

Ali Mohamed, A.A. & Sardar Baig, F.B.

1. Introduction

In determining the appropriate punishment for the alleged misconduct, the company is entitled to consider the aggravating circumstances that count against the employee, such as the seriousness of the offense, his position in the company, to what degree did any element of trust exist in this employment relationship. The extenuating circumstances such as self-defense, provocation, coercion, lack of intent and necessity, among others things is also considered. Further, the mitigating circumstances in the favour of the employee that should be considered include the employee’s length of service, his position in the company, his previous work and disciplinary record, does he show any remorse and if so to what degree, is he prepared to make restitution if this is possible, did he readily plead guilty and confess, among other things.\(^1\) Only after careful consideration of the above circumstances would the inquiry panel arrive at a suitable and fair sanction. The company must act reasonably in deciding whether the misconduct warrant dismiss. When a dismissal claim under section 20 of the Industrial Relations Act 1967 (IRA) is referred to the Industrial Court, the Court will have to determine inter alia, whether the dismissal was with just cause or excuse and whether the preferred sanction was proportionate to the gravity of the wrong committed. The principle of proportionality demands that the alleged misconduct of the claimant and the punishment meted out on him must be proportional to his culpability in doing what he did. In other words, there must be proportionality between the severity of the misconduct and discipline or

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\(^1\) See Alex Lawrence Gopal v Malaysia Airlines System Berhad [2014] 2 LNS 011.
dismissal imposed on the claimant. In light of the above, this paper discusses the principle of proportionality of punishment in dismissal cases with reference to the awards of the Industrial Court.

Proportionality of Punishment: A Commentary on Norizan bin Bakar v Panzana Enterprise Sdn Bhd

In *Norizan’s case*, the appellant, an employee of the respondent, was charged with four charges of misconduct, three of which relates to the violation of the company rules. The fourth charge against the appellant was that the appellant had falsely declared in writing in breach of the respondent company’s code of conduct that he was not serving on the Board of Directors of any other company when he was at all material times found to be serving on the Board of Directors of another company. The domestic inquiry panel found the appellant guilty on all of the above charges and the respondent accordingly dismissed the appellant from employment. The Industrial Court found the appellant guilty of the fourth charge. However, the Industrial Court was of the opinion that the appellant's misconduct was only minor, which did not warrant a dismissal. The Industrial Court also ordered 30% liability on the part of the appellant for his misconduct.

In dismissing the respondent's application for judicial review, the High Court held that the there was no jurisdictional error on the part of the Industrial Court which would merit interference by an order of certiorari. The Court of Appeal allowed the respondent's appeal and accordingly set-aside the decision of the High Court. The Court of Appeal stated inter alia, that Industrial Court and the High Court had erred in substituting their own views on the appropriate penalty for the views of the employer. The appellant’s leave to appeal to the Federal Court was allowed on the following two questions of law, namely: ‘(a) Whether the Industrial Court has the jurisdiction to decide that the dismissal of the Appellant was without

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2 In *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1995]2CLJ 748; [1990] 1 MLJ 5, Idris Yusof J held stated that the term 'misconduct' refers to conduct so seriously in breach of the accepted practice that by standards of fairness and justice the employer should not be bound to continue the employment.

3 [2013] 9 CLJ 409.

4 Industrial Court Award No. 154 of 2006.

5 [2012] 7 CLJ 137 (CA).
just cause or excuse by using the doctrine of proportionality of punishment and/or that the punishment of dismissal was too harsh in the circumstances, when handing down an Award under section 20(3) of the Industrial Relations Act 1967; and (b) Further and/or in the alternative, whether the Industrial Court in exercising its functions as stated in the paragraph above can rely to its powers under s 30(5) of the Industrial Relations Act 1967 specifically based on the principle of equity, good conscience and substantial merits of the case.’

In the Federal Court it was contended for the appellant that the Court of Appeal in deciding whether the dismissal of an employee was right in law had erred in placing its reliance on the dissenting judgment of NH Chan, JCA in *Tan Teck Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor,* where the learned judge stated: “When considering the reasonableness of what a reasonable employer would have done, the court (whether it be the High Court, Court of Appeal or, the Industrial Court) must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.” The above dissenting judgment was cited with approval by the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors.* The appellant contended that the minority decision of *Tan Teck Seng* was based on the "reasonable employer" test based on s 57(3) of the Employment Protection (Consolidation) Act 1978 (UK) which was propounded in the *English Case of British Leyland UK Ltd v Swift.* It was contended that said English court’s decision was not consonant with the local industrial law jurisprudence.

**In delivering the judgment of the Federal Court,** Raus Sharif PCA stated that the case of *Tan Teck Seng* and *Ng Hock Cheng* are cases involving the public servants where the disciplinary procedures relating to public servants are regulated by articles 132 and 135 of the Federal Constitution. According to his Lordship there is a mark different between the rights of an employee in a public sector and an employee in the private sector when dealing with unlawful dismissal claims. Unlike a public officer whose challenge of any punishment

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9 Zulkefli Ahmad Makinudin CJ (Malaya), Hashim Yusoff, Abdull Hamid Embong and Zainun Ali FCJJ.
imposed is in the High Court by way of judicial review, the right of private sector employee is regulated by section 20 of the IRA. His Lordship also noted that the principle of proportionality of punishment was inbuilt into the IRA, section 30(5), which requires the Industrial Court to have regards to the principle of equity, good conscience and substantial merit of the case. Further, section 30(6) of the IRA provides that in making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3). Apart from the above, item 5 of the Second Schedule to the IRA states that any relief given shall take into account contributory misconduct of the workman. Based on above provisions, the apex court noted that the Industrial Court is empowered to decide based on the principle of proportionality whether the dismissal punishment was too harsh in the circumstances. The court is empowered to substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

As from the above, it is obvious that while the decision to dismiss an employee on justifiable grounds belongs to the employer, the Court nevertheless has the right to question its fairness based on the abovementioned provisions of the IRA. The employer’s decision to impose appropriate punishment must be proportionate with the alleged misconduct committed. The Industrial Court has the power to decide on the basis of the doctrine of proportionality of punishment whether the dismissal punishment meted out by the employer was too harsh or excessive in the circumstances. There is a band of reasonableness which a reasonable employer is expected to consider between the magnitude of the fault and the appropriate punishment or penalty imposed before arriving at a decision to dismiss the employee. In light of the above, to determine whether the punishment meted out by the employer against the accused employee for the alleged misconduct was harsh or excessive in the circumstances, it would be appropriate to discuss this with reference selected acts of misconduct decided by the Industrial Court as below.
(i) Deceiving or defrauding employer

An act of deceiving or defrauding the employer would inevitably reflect on the fitness of the employee to continue in office and the discipline and morale of the service. Whether or not the deceptive or defrauding conduct warrants dismissal is a question of fact which is dependent on the nature and degree of the dishonesty based on the circumstances in each individual case. For it to entail dismissal, such conduct must violate an essential term or condition of the employment relationship and is such that the deceptive conduct gives rise to a breakdown in the employment relationship. The example include swipe in or out from work. An employee should not punch the time card of another especially when that other has not arrived. Even attempting to clock-in and out for another employee is considered a serious offense and will result in disciplinary action. In *Mohd Ali Awang & Ors v MISC Haulage Services Sdn Bhd & MISC Integrated Logistics Sdn Bhd,* the claimants were dismissed for punching in attendance cards belonging to other workers. The punch card offence was not even among the misconducts listed in article 21 of the collective agreement which implies that the said offence was not so serious as to attract a grave punishment using the doctrine of proportionately of punishment. The Industrial Court held inter alia, that the punishment of dismissal was too harsh in the circumstances.

Again, conducts such as theft, fraud, breach of trust, and various types of deceptions and misrepresentations may form a valid basis for the termination of employment although in some cases the employee’s single act of dishonesty may not sufficient to justify the employer’s decision to terminate for cause. In *Ang Tin Huat v The Store (Malaysia) Sdn Bhd,* the claimant, a Branch Manager, was dismissed for misusing the company's cash for unauthorized purpose and misappropriating the company's trading stock for unauthorized

A single lie can constitute just cause if it deals with a serious enough matter. In *Susu Lembu Asli Marketing Sdn Bhd v Tan Chong Hin* [2005] 2 ILR 953it was stated that ‘a single display of blatant dishonesty and self-serving interests deserves the most serious form of punishment and shall constitute justification of a summary dismissal of the same’.

However, in *Cahajaya Timber Industries Sdn Bhd v Zolkafli Md Nawi* [2004] 1 ILR 576, *Tobacco Importers & Manufacturers Sdn Bhd v Ponniah @ Chandran Ponniah* [1996] 1 ILR 579, and *Hume Redland Readymix Sdn Bhd v K Selvarajoo Karappuia* [1999] 2 ILR 535, the Industrial Court held that the dismissal of employee for punching the card of another employee was with just cause or excuse. In the above cases the misconduct committed was serious and that the claimants were aware that it was wrong to swipe someone else's card.
purpose. The claimant had been in continuous employment with the company and its predecessors for a good 28 years. There was no evidence of any previous misdemeanors or delinquency on the part of the claimant. Further, the misconduct established against the claimant was by no stretch of the imagination beneficial, advantages or of profit to him personally. Hence, the Industrial Court held that the punishment imposed on the claimant in this instance was ‘somewhat draconic, to say the least. Surely after 28 years of loyal service the claimant deserved a modicum of mercy. Hardly a reasonable reaction from a reasonable employer in the whole circumstances of the case!’

In Armi Syahrin Ab Razak v MISC Agencies Sdn Bhd / MISC Berhad, the claimant was alleged to have misrepresented the company by authorising the issuance of a false computer generated receipt for the sum of RM810 and RM25 which was not in accordance with the established payment process in the company. The claimant’s act was tantamount to a fraudulent act aimed at deceiving the company. The Industrial Court held inter alia, that while claimant’s acts of misconduct detailed in the charges cannot be denied, the respondent's decision to dismiss the claimant was however without regards to equity, good conscience and substantial merits of the case. The unchallenged evidence was that the claimant was informed that there was a cash payment of RM835 and was told that this sum could be used to advance for the Family Day trip to Lumut. In the premises, the court held that the punishment of dismissal in this case was rather harsh.

Again, in Aidawani Razak v Malaysian Airline System Berhad, the domestic inquiry panel found the claimant guilty for misleading the company for approval of the travelling claims amounting to RM445.60. The evidence clearly establishes that the claimant did not deny the improper manner in which her claims were made. She however said that it was an honest mistake. The Industrial Court held that on the evidence before the court, the company had not established the element of fraud on the part of the claimant. The claimant should not have been dismissed in the given circumstances and that the company had been too harsh in imposing that punishment on the claimant who had an unblemished record having worked for the company for 6 over years with the company. Based on the facts that the breach on the

14 [2015] 1 ILR 324.
15 [2014] 2 LNS 0723.
claimant's part did not merit the punishment of dismissal. The company ought to have considered the extenuating factors present in this case posed by the evidence itself when it was deciding the appropriate punishment for her misconduct. The sense of fairness as it has been said must ultimately prevail and not the employer's view.

Lastly, in *Hussein v Wagner Global Services (M) Sdn Bhd*,\(^\text{16}\) the claimant had formulated a proposal and sent it by way of e-mail to the chairman of the company as well as the Group Chief Financial Officer and other key personnel of the company. When questioned by the Chairman as to whether he had sent the said proposal to anyone else, the claimant denied having done so. Subsequently, the claimant was accused of having lied by the said Chairman and was dismissed by the company for gross misconduct. The Industrial Court held that to constitute just cause, the lie must cause a breakdown in the employment relationship that is irrevocable. In particular, the court noted that ‘applying these postulates to the case at hand the Court was baffled as to how what the claimant did could cause a damage to the employment relationship that can never be repaired.’ Hence, the claimant's dismissal on the facts and evidence was too grievous for the proven conduct of the claimant.

**(ii) Dereliction of duty**

An employee who utterly disregarded his work and his employer's interest is deemed to have committed gross dereliction of duties. For example, security officer deserting his place of duty without an acceptable reason or when the employee gives the strongroom keys to an unauthorised person in order to go on a long lunch, among others. Whether or not the dereliction of duties warrants dismissal is a question of fact which is dependent on the nature and degree of the dereliction based on the circumstances in each individual case. In *Nurul Aida Ahmad Nori & Anor v Global Educare Sdn Bhd*,\(^\text{17}\) the claimants' were dismissed as they had left the classroom unattended, with the children napping, for a period of 15 minutes whilst another teacher in an adjoining classroom watching over. The Industrial Court held that although the claimants committed misconduct, it nevertheless does not warrant dismissal

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\(^{16}\) [2012] 3 ILJ 34.

\(^{17}\) [2014] 2 LNS 1175.
from employment. In the premises, the punishment of dismissal was harsh and was thus, set aside as being without just cause or excuse.

Again, in Khairul Anuar Abd Radzai v Maybank Banking Berhad, the claimant was alleged to have authored an anonymous letter which was sent to the company's Industrial Relations Unit via fax transmission. The said letter contained various allegations against the named individual officers of the company. However, the company had not proven that the claimant had authored and send the said letter. The Industrial Court held inter alia, that although the contents of the letter had perhaps been a little mischievous and had probably been targeted at embarrassing the individuals named therein, it had been too much of a stretch to consider it as embarrassing or hostile towards the company per se or how, if at all, it could have seriously and/or adversely affected the relevant employment relationship between the claimant and the company. In the aforesaid circumstances, a reprimand would have been more appropriate rather than a dismissal.

Likewise, in Shell Malaysia Trading Sdn Bhd v Arunageri Periasamy, the claimant who was employed as a senior lorry driver with the company for about 20 years, deviated from his assigned delivery route which was prohibited by the provisions in the driver's handbook. The claimant's misconduct was not so serious as to indicate that he was no longer willing to be bound by his original contract. Furthermore, the claimant had a long and clean record of service with the company. Dismissal is the severest form of punishment. In the circumstances of the present case, the Court was of the view that a lesser punishment would have been sufficient. However, as the claimant was guilty of misconduct and since his dismissal was of his own making, the Court could only award a monetary compensation and this shall be reduced by 50%.

18 [2015] 1 ILR 47.
(iii) Absenteeism and lateness

Persistent absenteeism and lateness can trigger dismissal of the employee for cause if the employee is blameworthy for the absenteeism and/or lateness. However, before dismissing the employee it would be appropriate that a warning is issued to the employee that his or her employment is in jeopardy if the absences continue and giving the employee an opportunity to improve. However, a single act of absenteeism or lateness will not be a just cause to dismiss the employee unless in circumstances where the employee was not only absent but also insubordinate or refused to follow the employer’s instructions thereby prejudicing the employer’s operations. If the proposed dismissal is due to employee’s attendance, the employer must ensure that it took steps to enforce its attendance policy. Failure to do so the company will be deemed to have condoned the employee’s absences.

In Ong Wei Wah v Berjaya Times Square Theme Park Sdn Bhd, the claimant was ‘missing in office’ as alleged in charges 1, 2, 4 and 6 and the claimant could not explain his absence during the working hours. However, his ‘missing in action’ was not for long hours. The Industrial Court held inter alia, that the claimant’s dismissal over those few hours that he was missing in office was clearly too harsh a punishment. The company had not shown that the claimant had any record of disciplinary action or warnings had been given previously for similar offence. Hence, the punishment of dismissal was not proportionate to the misconduct the claimant had committed. Therefore, the court held that the dismissal was without just cause or excuse.

(iv) Insolence

Insolence means offensive, disrespectful, impudent, cheeky, rude, insulting and contemptuous language, generally directed at a superior. Insolence may very well become insubordination where there is an outright challenge to the employer’s authority. The act of abusing the superior and worst still if done in front of his subordinates destroyed the very

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20 [2014] 4 ILR 44.
basis of trust and confidence. In *Intan Zafina A Rahman v Power Cables Malaysia Sdn Bhd*, YA Mary Shakila Azariah, Chairman of the Industrial Court stated: ‘the use of derogatory, insolent and impertinent language towards superior officers is treated as a misconduct. Such are languages which lessens or impairs the authority, position or dignity of a person. Insolence is language that is contumacious. The test is whether such a language tends to lower the dignity or position of the superior officer. An employee is expected to act in a manner that is not inconsistent with his relationship which he has with his employer. Otherwise it would be impertinent or derogatory.’

In *Lim Chean How v BIC-GBA Sdn Bhd*, the claimant had walked out of a meeting with his superiors which had shown insolence. Again, in *Florence Chang Mee Kheng v Kelab Taman Perdana Diraja Kuala Lumpur*, the Industrial Court stated inter alia, that the use of disrespectful and rude language cannot be tolerated by any employer. If rude, sarcastic and abusive language towards superiors is allowed, it will be impossible to maintain discipline among employees and peace and harmony will have to be compromised in the workplace. Similarly, in *Faber Merlin Malaysia Bhd v. Raja Mohar Raja Zainal Abidin*, the claimant, who was manager of human resources, had allegedly used language that was disrespectful, insolent and impertinent towards the chairman of the meeting who was also the deputy chief executive officer and members of the management committee and had rudely left a meeting without seeking permission. In *S Haren C Seganathirajah v Minconsult Sdn Bhd*, the claimant was also guilty of insolence and disrespect to his superior by using words such as "I am not answering your bloody letters", had been rude to his superior and had accused the panel of inquiry of being dyslexic.

Having said the above, it is noteworthy that insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. For example, where insolent language has been used in conjunction with either a refusal to follow an employer’s instructions or where it has been accompanied by threats or assault. However, minor

22 [2013] 2 ILR 373.
23 [2013] 2 LNS 1895.
24 [2003] 3 ILR 1447.
disciplinary sanctions have been deemed appropriate where the employee’s language and conduct isn’t particularly disruptive, insulting or contemptuous of management. In Sunmugam Subramaniam v JG Containers (M) Sdn Bhd & Anor, the appellant was dismissed for alleged use of vulgar language on the expatriates and the Managing Director to wit by calling the Managing Director ‘pondai mavan’, ‘chiunni payal’. The Industrial Court upheld the dismissal.

The High Court in allowing the applicant’s judicial review application noted that the Industrial Court erred in law in dismissing the applicant's claim. The Industrial Court failed to apply the doctrine of proportionality. It was noted that the applicant's dismissal on a single charge of misconduct, namely the use of vulgar language, did not warrant the extreme penalty of dismissal. It was further noted that the Industrial Court failed to take into account and give due weight to the following material facts: (i) that the lunch at which the alleged misconduct took place was informal; (ii) that the managing director upon whom the foul language was used was not present at the said lunch; and (iii) that the applicant had served 21 years with the company without any record of prior misconduct.

(v) Conflict of Interest

An employee is to serve the best interests of the employer with good faith and fidelity. The duty includes rendering faithful and loyal service towards the employer at all times and not to place himself in a position where his fiduciary duties come in conflict with his interests. An employee must avoid any conflict of interests or even potential conflict of interests with his or her employer. This necessarily includes not involving in business activities which are in conflict with his duties to his employer, or harm the employer’s

27 In Pearce v Foster [1886] QBD 536, Lord Esher stated as inter alia, that ‘the relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him.’
28 In Kvaerner Petrominco Engineering Sdn Bhd v Virginia Jaqueline Chan [2007] 1 ILR 494, the Industrial Court stated: "the relationship between an employer and an employee is of a fiduciary character. The employee is required at all times to act in a faithful manner and not to place himself in a position where his interest conflicts with his duties. If the employee does an act which is inconsistent with the fiduciary relationship, then it will be an act of bad faith for which his services can be terminated.”
business interests. Whether or not a conflict of interest arises in any particular case will depend on the nature of the appointments, the functions required to be carried out by the employee and the manner in which the functions are to be performed, among others things.

In Muhammad Asri Hassan v Amoco Chemical (M) Sdn Bhd, the claimant, a section manager at the material time, was also the director of another company namely, Senggara Mahir Sdn Bhd. When the company discovered this, a domestic inquiry followed and they dismissed him on the ground that his involvement with Senggara was against their policies. The company contended that the claimant had committed an act of gross misconduct by placing himself in a position where his duties to the company conflicted with his personal interests by his involvement with Senggara without first seeking the written consent of his employer. The Industrial Court held inter alia, that as the claimant was basically a director of Senggara, he was not an employee of it in the strict sense of the word. Hence, he was not obliged to obtain the prior written consent of the company. Of importance was also the fact that the company's witnesses had testified that there was no conflict of interest between the company and that of Senggara as they were not in competition. The company had not proven its case of gross misconduct in material particulars against the claimant.

Further to the above, an employee who finds himself in an actual, perceived, or potential conflict of interest must disclose the matter to his supervisor, manager, or other designated officer in the organisation. The disclosure must be made as soon as the employee knows of the conflict, and then annually thereafter for as long as the conflict continues to exist. Any non-disclosure of a conflict of interests or even a potential conflict of interests is viewed seriously and may warrant dismissal from employment depending on the facts and circumstances of each individual case. In Lim Eng Khong v IKA Works (Asia) Sdn Bhd, on the evidence it was not established that the claimant's performance was poor except that he had failed to meet his sales targets. However, there was some contributory misconduct on his

29 See Hivac Ltd v Park Royal Scientific Instrument Ltd [1946] 1 All ER 350.
30 See Wong Kok Chin v Singapore Society of Accountants [1990] 1 MLJ 456. See also Mintel International Group Ltd v Mintel (Australia) Pty Ltd [2000] FCA 1410 (FC, Aust); Estate of Hancock (Deceased) v Bennett (Executor) [1999] FCA 295 (FC, Aust) and Brierley Investments Ltd & Ors v Australian Securities Commission & Anor (1997) 148 ALR 158.
31 [2005] 3 ILR 635.
32 [2014] 2 LNS 1132.
part namely, engaging in other business without company’s prior approval. Having regard to the facts and circumstances of the instant case, the Industrial Court held that the claimant’s dismissal in the instant case was an extremely harsh punishment. The company could have considered a more appropriate lesser form of punishment to be imposed on the claimant for contributory misconduct for which he is responsible instead of dismissing him from employment.

(vi) Carelessness or indifference

The inability of the employee to observe due diligence in the performance of his duties in which the employer suffers and incur damages may well form a basis for the employer to take appropriate action against the employee up to and including dismissal. Again, failure to exercise reasonable supervision of his subordinates’ work which had thereby led to the substantial losses suffered by the employer will justify dismissal. It is noted that generally minor acts of carelessness may not necessarily justify dismissal. What is necessary is to show that the injury to the company is substantial (gross) such that a penalty of dismissal would be seen as a proportionate punishment against the employee responsible for the damage. In *Loke Foong Ying v Saga Fire Engineering Sdn Bhd*, the claimant was found to have neglected her job in supervising the quantity of material to the site which resulted in an oversupply of 1,558 fire extinguishers when the company was required only to supply 393 fire extinguishers. It had not been shown by the company that the oversupply of the fire extinguishers was a direct result of the claimant’s neglect in her duties. Even if the claimant had anything to do with the oversupply of the fire extinguishers, the punishment of dismissal was too harsh in the circumstances. For the claimant to be dismissed without any inquiry for one mistake that should be the collective responsibility of the whole company was indeed too severe.

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33 The collective agreement in *Kesatuan Kebangsaan Pekerja Perusahaan Petroleum Dan Kimia Semenanjung Malaysia v Unichamp Mineral Sdn Bhd* [2014] 2 LNS 0732 provides inter alia, that gross negligence resulting in damage to company’s property or financial loss to the Company shall be liable to immediate dismissed.

34 [2014] 2 LNS 1033.
Again, in *Ahmad Rosli Arif v Rubberex (M) Sdn Berhad*,\(^{35}\) the claimant was found guilty of serious misconduct in that he had made it possible for attempted theft of company’s property. In this case, the company discovered that 12 sacks of the company’s rubber gloves numbering 6,000 pairs, valued at RM10,000.00 were concealed in a lorry carrying waste that had exited the company’s compound. The lorry’s attempt to exit the company’s compound had been facilitated by a ‘security check point authority slip / exit pass’ which had been executed by the claimant. The claimant was alleged to have signed the ‘exit pass’ without inspecting the contents of the lorry.

The Industrial Court held inter alia, that the company had succeeded in establishing that the claimant had been negligent in his duty and responsibility owed to the company. As the company had lost the trust and confidence in the claimant, they dismissed the claimant. The Court noted that there was no persuasive evidence to show that the claimant had actual knowledge that the gloves were in fact in the lorry or that he had been willfully reckless in his actions. All that can really be ascribed to the claimant was the fact that he had not exercised reasonable care and skill in the performance of his duties on the day in question. Considering the claimant’s long years of service to the company, the Court was of the view that the punishment of dismissal in the instant case was rather harsh. In setting aside the dismissal, the Court nevertheless held that the claimant, in all good conscience, must be made to bear some responsibility for his misdeed. Under the circumstances, Court rescaled downward the award for backwages to the extent of 40%.

**(vii) Hostile work environment**

An employee who engages in sexual harassment at the workplace thereby creating a hostile work environment is at risk of being terminated for cause if the misconduct is of sufficient severity. In *Gelau Anak Paeng v Lim Phek San and Ors*,\(^{36}\) Roberts CJ stated: “The common law duty of an employer is to take reasonable precautions to protect his workers against danger. He is not required to insure them and to protect them against all risks of any kind but he is obliged to provide a reasonably safe system of work and to take reasonable

\(^{35}\) [2009] 2 LNS 1149.

care for his employees”. Whether or not an act constitutes sexual harassment has to be determined with reference to the surrounding circumstances such as the victim’s age, upbringing, culture, religious sensitivities and nature of the relationship between the parties, among others.

In *Freescale Semiconductor Malaysia Sdn Bhd v Edwin Michael Jalleh & Anor*, the punishment of dismissal for ‘slapping the buttocks’ according to the Industrial Court was too harsh in the circumstances. The High Court dismissed the appellant’s application for judicial review to quash the award of the Industrial Court. In particular, the High Court stated: "The [Industrial] Court in determining whether the punishment of dismissal was too harsh is perfectly entitled to take into account, as it had done above, the circumstances in which the incident took place and the character evidence of the First Respondent."

In allowing the said appeal, the Court of Appeal held that Industrial Court failed to take other equally relevant matters into consideration. ‘[T]he misconduct was committed by a superior, for the Respondent was the senior manufacturing supervisor, increases the magnitude of the misconduct, as it invites the implication he was taking advantage of his subordinate who might be afraid to complain. That the misconduct was committed in a place where a saw machine is used suggests a certain disregard for safety. That it was committed in full view of other employees does not make it any less objectionable. It merely excludes suspicions of worse things. Likewise, that fact that the victim was fully attired and protected by her work clothes. The misconduct was not of any inadvertent or accidental physical contact, but wilful. One must expect in a multicultural society such as in this country, that the workplace is also multicultural. In such multicultural work environment, industrial harmony, one of if not the main object(s) of industrial relations, is achieved not by one acting on the norms acceptable to himself, but he must be sensitive to what is acceptable by others.’

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37 [2013] MLJU 660.
Conclusion

The doctrine of proportionality of punishment which is inbuilt into the Industrial Relations Act 1967 through item 5 of the second schedule demands that the alleged misconduct of the claimant and the punishment meted out on him must be proportional to his culpability in doing what he did. In other words, there must be proportionality between the severity of the misconduct and discipline or dismissal imposed on the claimant. Hence, the Industrial Court has the jurisdiction to decide whether the punishment of dismissal meted out against the employee was too harsh in the circumstances by using the doctrine of proportionality of punishment. The Court could substitute its own view as to what was the appropriate punishment for the employee's misconduct. In determining whether the alleged misconduct of the claimant and the punishment meted out on him was proportional, the circumstances and surrounding facts of each individual case are matters of considerable importance. As a final remark, it would be worthwhile reproducing the observation by the UK Employment Appeals Tribunal in Taylor v Parsons Peebles Nei Bruce Peebles Ltd: “In determining the reasonableness of an employer's decision to dismiss, the proper test is not what the policy of the employer was but what the reaction of a reasonable employer would be in the circumstances. That the employer's code of disciplinary conduct may or may not contain a provision to the effect that any one striking a blow would be instantly dismissed, therefore, is not to the point. The provision must always be considered in the light of the law it would be applied by a reasonable employer having regard to equity and the substantial merits of the case. That includes taking account of the employee's length of service and previous record.”

39 In Syarikat Kenderaan Melayu Kelantan v Transport Workers Union [1995] 2CLJ 748 [1990] 1 MLJ 5, Idris Yusof J held stated that the term 'misconduct' refers to conduct so seriously in breach of the accepted practice that by standards of fairness and justice the employer should not be bound to continue the employment.
POTENTIAL LIABILITY OF UNIVERSITIES IN PROVIDING INTERNET ACCESS TO STUDENTS UNDER THE MALAYSIAN LAW

Ismail Nawang, N.1., Hamid, N.A.2 & Zakariah, A.A.3

Abstract

The phenomenon development and widespread use of the Internet in the Information Age has witnessed its crucial role in all spheres of our lives, including education. The Internet, which consists of a network of millions of interconnected computers worldwide, is undoubtedly the largest information resources in the world. Since students can access unlimited amount of information on the Internet, many universities provide computer systems and Internet access to their students. Nonetheless, these facilities may be exploited by unscrupulous students to access and communicate a host of unlawful online content such as pornography materials, sexual and racial harassment, copyright works, defamatory publications and many others. In view of that, universities may potentially be exposed to panoply of liabilities as Internet facilities providers for unlawful materials disseminated by their students. Further, the insertion of a new section 114A of the Evidence Act 1950, which is referred to as the Presumption of Fact in Publication, has now presumed Internet facilities providers as publishers of all materials disseminated via their devices unless the contrary is proved. As such, this paper intends to analyse the potential liability of universities as Internet access providers for unlawful materials of their students under the law in Malaysia.
1. Introduction

The Internet has had an enormous impact on almost all aspects of our lives including education. The Internet, which consists of a network of millions of interconnected computers worldwide, is undoubtedly the largest information resources in the modern world. Since the Internet holds unlimited amount of information which is beneficial and crucial to students at tertiary level, universities provide computer systems and Internet access to their students. Nonetheless, these facilities may be exploited or misused by unscrupulous individuals to access as well as disseminate a host of unlawful content such as hate speech, defamatory remarks, pornography materials and many others. In view of that, universities may potentially be exposed to panoply of liabilities as Internet facilities providers for unlawful materials originated from their students. Further, section 114A of the Evidence Act 1950 has now presumed Internet facilities providers as publishers of all materials disseminated via their devices unless the contrary is proved. As such, this paper intends to analyse the potential liability of universities as Internet facilities providers for unlawful content of their students under the law in Malaysia.

2. Providers of Internet Facilities – Are They Online Intermediaries?

In general, universities merely provide computer systems and Internet access to their students who then rely on the facilities to access the Internet and transmit online messages to the cyberspace. Nonetheless, it is worthwhile to analyse whether they could be regarded as online intermediaries as there are special legal protections accorded to online intermediaries.

Online intermediaries play an important role in online publication as they generally perform one of three functions, mere conduits, caches or hosts of information. They provide platforms on the Internet for the exchange of goods, services or information. They ‘bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties’. (OECD, 2010). For that reason, online intermediaries have been categorically classified into connectivity intermediaries such as ISPs, navigation intermediaries such as Google; and commercial and social networking
providers and other hosts such as Wikipedia, Facebook, Twitter, blogs and many others (Kohl, 2012).

In the past, online intermediaries have become an attractive target in legal proceedings since they represent a point of control or gatekeeper over materials on the Internet. Further, most intermediaries may also have deeper pocket and are more capable of paying damages than individuals in civil suits.

3. **Online Intermediaries under the UK Law**

The legal position of online intermediaries in the UK have been established in a number of decided cases. A good illustration would be the leading case of *Goodfrey v Demon Internet Ltd*\(^4\) whereby libel proceedings were brought against the defendants (ISPs) for their failure to remove third party’s defamatory content from the bulletin board they administered after notification was given by the plaintiff. It was ruled by Morland J that online intermediaries are to be treated as publishers at common law regardless of whether they have actual knowledge of the content or not.

A bold departure from the orthodox approach that treats all online intermediaries as publishers was established in *Bunt v Tilley*.\(^5\) It was explicitly underlined by Eady J that ‘as a matter of law that an ISP which performs no more than a passive role in facilitating postings on the Internet cannot be deemed to be a publisher at common law’. This principle has then been applied in the subsequent case of *Metropolitan International School Ltd v Designtechnica Corp*\(^6\) whereby it was decided that third defendant search engine operators (Google Inc) could not be characterised as a publisher at common law as it has not authorised or caused the disputed snippets to appear on the user’s screen. This seems to be in line with the previous judgment that requires actual knowledge on the part of online intermediaries before they could be imposed any liability.

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\(^4\) [2001] QB 201, [2003] 3 WLR 1020  
\(^5\) [2006] EWHC 407 (QB), [2007] 1 WLR 1233  
In the recent case of Tamiz v Google Inc,\(^7\) the respondent (Google Inc) was sued for providing Blogger.com, a blogging platform which had been used by one blogger to post defamatory comments of the appellant. Nonetheless, the comments had been removed by the respondent three days after it was notified by the appellant. It was held by Eady J that though the comments complained of were arguably defamatory, the respondent was not a publisher on the common law principles either before or after it was notified of the complaint. The decision was however reversed by the Court of Appeal as it was observed by Richards LJ that "there was an arguable case that the respondent was a publisher after notification. Since the respondent allowed the defamatory postings to remain, "it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of the material."\(^8\) Nonetheless, the appeal was dismissed as the court concluded that any damage to the appellant’s reputation after notification by the appellant but before removal would have only been trivial.

Therefore, the aforesaid judicial decisions have explicitly established that online intermediaries in the UK will only be treated as publishers of the third party content if they have actual knowledge of the existence of such content.

4. Online Intermediaries under the Malaysian Law

As to the position in Malaysia, the liability of online intermediaries for third party content has been raised in Kho Whai Phiaw v Chong Chieng Jen.\(^9\) In this case, the petitioner presented a petition to the Election Court to have the respondent’s victory in the Parliamentary election be declared void for undue influence. The respondent was alleged to have exerted undue influence by publishing or allowing to be published on his blog, Chong Chieng Jen’s Blog, an article written by Mr Smith (Mr Smith’s article) which was said to contain threatening statements towards the voters. The petitioner contended that the respondent has absolute control over his blog and that he could control all blog entries including hiding, editing and deleting postings, or limiting the type of visitors who could add postings or comments on his blog and moderate those comments. Consequently, the

\(^7\) [2013] EWCA Civ 68 (CA), [2013] WL 425761.
\(^8\) ibid [34].
\(^9\) [2009] 4 MLJ 103.
petitioner argued that the respondent should be regarded as publisher of all information on his blog, including Mr Smith’s article, though it was written and posted by third parties since the act of publication could not have taken place without his consent or knowledge. The court ruled that since there was no sufficient evidence to prove that Mr Smith’s article was posted on the respondent’s blog with his knowledge or consent, the respondent could not be regarded as the publisher of Mr Smith’s article.10

The case has clearly established that in the absence of any knowledge or consent on the part of bloggers (intermediaries), no liabilities could be imposed on them as they are not to be treated as publishers of the third party content.11 In relation to this, a crucial question arises as to whose duty is to establish the element of knowledge. It was observed by Clement Skinner J that:

The general law is that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. Accordingly in this election petition, the burden of proving that Mr Smith’s article was published with the knowledge or consent of the successful candidate i.e. the respondent, is on the petitioner who wishes the court to believe in its existence.12

Thus, the judgment appears to adopt the same approach with its counterpart in the UK which necessitates the element of actual knowledge on the part online intermediaries before they could be imposed with any liability. Nonetheless, it is pertinent to note that the case was decided before the insertion of section 114A of the Evidence Act 1950.

10 On appeal, the findings and conclusion of the trial judge has been unanimously upheld by the judges of the Federal Court. Kho Whai Phiaw v Chong Chieng Jen [2009] 4 MLJ 776.
11 It was alleged that blogs or other Internet communications should be distinguished from the traditional print media as the online materials are generally not subjected to supervision or moderation prior to their publication. See Aishath Muneez, ‘The Milestone of Blogs and Bloggers in Malaysia’ (2010) 3 MLJ cvii.
12 Kho Whai Phiaw v Chong Chieng Jen (n 97) 125.
Section 114A of the Evidence Act 1950

Section 114A was primarily incorporated into the Evidence Act 1950 to tackle the burgeoning problem of online anonymity since the enforcement agencies faced an uphill task in identifying the true identity and location of anonymous online users. The section, which came into force on 31 July 2012, reads as follow:

(1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

There are basically three different presumptions as provided under subsections (1) – (3) of section 114A. The implication of subsection (1) is that if a person’s name, photograph or pseudonym appears on any online publication as the owner, host, administrator, editor or sub-editor, then that person is presumed to be the publisher that published or re-published the content of such publication.

As for the presumption of subsection (2), it will hold Internet users liable for any content posted through their registered networks. They are to be regarded as the publishers of any content that originates from their account with the network service providers unless the contrary is proved. This subsection may affect universities which provide computer facilities and Internet access to their students as well other entities such as restaurant owners that offer free wireless fidelity (Wi-Fi) services to their customers. Further, this subsection would even
affect individual subscribers who fail to take safety measures to secure their Wi-Fi account (Peters, 2012).

Subsection (3) on the other hand relates with the content that originates from a computer. The definition of computer is intended to encompass wide array of devices as explicitly stated in section 3 of the Evidence Act 1950 and section 2 of the Computer Crimes Act 1997. As a result, any electronic device will be deemed as a computer as long as it is able to perform four functions namely; logical, arithmetic, storage and display functions. Consequently, a smart TV, smart phone, digital camera any many others will also be regarded as a computer under the law. Thus, even text messages sent from a mobile phone will amount to publication that originates from a computer.

6. Conclusion

Prior to the coming into operation, universities may not be held liable for any unlawful content of their students as they may not have actual knowledge of such content. This could be drawn from the position of online intermediaries under the Malaysian law which seems to adopt the same approach that has been established in the UK, even though by providing computer facilities and Internet access to their students do not automatically render universities as online intermediaries.

Nonetheless, the situation has now changed with the coming into operation of section 114A of the Evidence Act 1950. Subsections (1) to (3) of the section may have effectively rendered all persons who act as owners, hosts, administrators, editors or sub-editors, or who facilitate to publish or re-publish any publication to be presumed as publishers under the law unless otherwise stated. By applying the aforesaid provisions, any universities that provide network service to their students to access the Internet may be held liable for any content posted by their students even though they have no actual knowledge of such content. The universities may be deemed to have published or re-published such content since they are the registered owners of the network service. Further, universities have actual physical custody over the computer facilities and Internet access. Nonetheless, there is yet any reported case on the application of this new amendment and it is therefore very premature to hold universities to be strictly liable for any illegal materials of their students.
DETERMINANT OF MAHATHIR’S FOREIGN POLICY TOWARDS PALESTINE CONFLICT

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Abstract

Malaysia during the tenure of Tun Mahathir Mohammed as the premier always has put Palestine in the special place. It was during Mahathir’s era that sees the high commitment of the government towards the Palestine – Israel crisis. This paper will attempt to analyze the reasons that influence Mahathir decisions or also known as determinants of Mahathir’s foreign policy towards the Palestine conflict.

In analyzing the foreign policy of a country, it is not normal to attribute the name of a president or a prime minister to it. However, in the case of Mahathir and Malaysia this is quite normal and the reasons are many. Some of them were because he was the longest ever serving prime minister of Malaysia. His tenure of almost twenty two years had synonymized him with Malaysia and vice versa. Upon appointed as the fourth premier replacing Tun Hussein Onn, he took a very close attention on the matter of foreign policy and international affairs. Even though at that time Malaysia had a foreign minister but the de-facto foreign minister is none other than him. Therefore, this paper is termed in such a way because of his influence in the issue of Palestine.

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The conflict between Palestine and Israel had started in 1948 and has continually worsened from time to time and to this moment, there seem to be no solutions to this conflict. Indeed, this conflict has opened the eyes of majority of the countries and some of them had responded by aiding Palestine, and one of them is Malaysia. The help rendered by Malaysia towards Palestine and the Palestinians started since the time of the first prime minister of Malaysia that is Tunku Abdul Rahman. The help and aids are still given and channeled to the Palestinians up until today. The successors of Tunku, namely Tun Abdul Razak, Tun Hussein Onn, Tun Dr. Mahathir Mohammad, Datuk Seri Abdullah Ahmad Badawi and the incumbent sixth Prime Minister, Datuk Seri Najib Abdul Razak basically continue and follow this policy set up by the Tunku’s administration.

However, during the time of the fourth Prime Minister, Tun Dr. Mahathir Mohammad, the level of commitment shown by Malaysia towards the issue of Palestine heightened. Tun Dr. Mahathir during his years as the Premier of Malaysia took this issue close to his heart and the commitment shown by Malaysia and himself is significantly greater than any other prime minister of Malaysia. Therefore, one might ask why is it that Malaysia during Mahathir’s administration showed significant interest in the cause of helping the Palestine.

The Mahathir's administration went to the extent of committing some of their resources in order to help the Palestinians. Donations, scholarship, sponsorship and other means have been given in order to decrease the degree of miseries and sufferings of the Palestinians. In addition, Malaysia was also vocal in voicing their critics towards the Israelis as well as the major powers who seem not to care about the fate of the Palestinians. Malaysia was indeed very critical in questioning the commitment of the major powers who have promised to bring about peace and security especially after the establishment of United Nations (UN) after the end of World War II. Not only that, Mahathir in one of the conferences that he attended critically criticized the world for not doing anything despite seeing the mass killing in their televisions.

Assessing the behaviour shown by the Mahathir’s administration, critics may well conclude that the determination of Malaysia’s foreign policy towards Palestine is because of
the shared faith that the Malaysians and Palestinians which is Islam. However, this is too simplistic of a conclusion.

Malaysia, since its independence in 1957 has shown itself as a diplomatic nation and would avoid any conflicts that could affect its people. Therefore, as a country, that detests aggression and injustice, Malaysia has shown its support towards the cause of the Palestinians. The supports shown by Malaysian is also based on the humanitarian ground because this issue is beyond the issue of faith and it is actually concern with all the people in this world.

The installation of Dr. Mahathir Mohammad as the fourth Prime Minister of Malaysia after Tun Hussein Onn saw the change in Malaysia’s foreign policy. Upon taking office, he outlined the priority of Malaysia’s foreign policy towards, first ASEAN, second Islamic Countries, third the Non-Aligned Movement and fourth the Commonwealth (Nair, 1997). This move has indicated that he has come up with a revolutionary move of positioning the West as the last priority in Malaysia’s foreign policy strategy. This was unlike Tunku Abdul Rahman, who, during the early days of independence, viewed the relations with the West, and the Commonwealth particularly as very important. In hindsight perhaps the very survival of Malaysia depended on these relations.

The influence of Mahathir’s foreign policy of minimizing the relations with the West, can be seen when he introduced the policy of “Buy British Last”. He also brought Malaysia’s attention by introducing the “Look East Policy”, which aimed at emulating Japan and Korea in their productivity. These are just some example of how, upon given the responsibility as the Prime Minister, he changed the direction of Malaysia’s foreign policy. However, when it comes to the issues pertaining to Muslims for example in the Palestine issue, Afghanistan and et cetera, he is continuing his predecessor’s policy but perhaps with a deeper involvement and commitment. Mahathir had manifested his support and stand of helping the Palestinian when his administration granted full diplomatic status to the office and representative of Palestine Liberation Organization (PLO) in Kuala Lumpur on 21st August 1981 (Chandran, 2007). This action indeed has demonstrated his serious stand and commitment of helping the Palestinians.
One would guess why is it that Mahathir bring this issue of Palestinian conflict very dear to his heart. What was the reason behind his high level of commitment towards the sufferings of the Palestinians? What motivated him to help the Palestinians? There are a lot of contributing factors that motivate him to be deeply involved in this issue and one of the factors is because of Islam or to be more precise because of co-religionist factor.

Because of this by 1980s, Malaysia under his administration had aligned with Islam and had championed the international Muslim issues. With the active participation in OIC and UN in fighting and condemning the aggressions towards the Muslim, Malaysia has become an activist of Muslim community.

There were few important events that happened during his tenure as Prime Minister that affect the member states of OIC. One of it was the struggle of Afghan Mujahiddeen. In this matter, Malaysia rendered the support and helps towards the Afghan Mujahiddeen, which officially started in 1979, when the Russian invaded Afghanistan. The support showed by Malaysia included the monetary fund donated to the Afghan Mujahiddeen. Some RM400,000 had been donated by people in Malaysia by 1982 of which the sum of RM150,000 coming from the government. Another initiative in commemorating the Afghan Mujahiddeen struggle towards liberating Afghanistan was by declaring March 21 as the “Afghanistan Day” and being celebrated since 1982. Apart from that, the government also allowed the Afghan to set up an office in Malaysia in supporting their struggle. The Mahathir’s administration goes extra mile in supporting the Mujahiddeen of Afghanistan by bringing their children to study in university in Malaysia through scholarship. This was another example of co-religionist support shown by Mahathir’s foreign policy.

Another example that needs to be highlighted in order to show Malaysia’s commitment towards co-religionism as well as the principle of self-determination and territorial integrity and humanitarian ground was the crisis faced by the former Yugoslavia i.e. Bosnia Herzegovina. Immediately after the massacre of the Bosnian Muslim begun, Malaysia tries to help the helpless Bosnian Muslim. Apart from the voicing out and condemning this brutal act of the Serbs, Malaysia also sent out their peacekeeping forces under the banner of UN. Seeing that this effort was not enough, Mahathir’s administration
follow one of the effort that they have used in helping the Afghan, where they bring the Bosnian Muslim to Malaysia and give them scholarship to study in Malaysia’s university. His efforts in trying to stop the war in former Yugoslavia included writing the letters to the superpower countries to urge them to do something to stop this massacre. In his letter to the Prime Minister of France, Mr. Edouard Balladur dated November 24 1993, he urges (Abdullah, 2008);

“It is my sincere hope that France which plays a leading and influential role in the international community, particularly at the UNSC and the European Community, would not allow the senseless killing and suffering in Bosnia-Herzegovina to continue. Malaysia looks forward to working with France not only on the in the humanitarian relief efforts, but also in the just and peaceful settlement of that shocking conflict.”

In another letter that he wrote to the Prime Minister of France, he again asked France to use its influence over the EU as well as the UNSC and to play its critical role in order to do something to stop the inhumane killing and the ethnic cleansing of Bosnian and Croats by the Serbs. When NATO started moving its forces towards the conflicted sites and put an effort to settle this conflict once and for all, Mahathir wrote a congratulatory letter to Bill Clinton, the President of USA. In his letter dated December 29 1995, he writes (Abdullah, 2008);

“For my part, I would like to register my humble appreciation of your role in stopping the slaughter of Muslims and Croats in Bosnia-Herzegovina. I had always believed that without a show of strength the Serbs cannot be brought to the negotiating table. Your decision to use air power to punish the Serbs was the right decision and I congratulate you.”
This letter clearly shows how grateful Malaysia is towards the ending of the brutal massacre faced by the Muslim in Bosnia. This has shown how Malaysia highly regarded its relationship with the Muslim and how Malaysia would strive for the issues pertaining to Muslims.

Since then Malaysia had made several effort at persuading the superpower country from taking atrocious actions towards the Muslim countries. This was profound especially after the 9/11 attack on the World Trade Centre in New York. Malaysia condemned US President Bush’s decision to attack Afghanistan and Iraq consecutively for the alleged conspiracy of attacking USA and the possession of Weapon of Mass Destruction (WMD).

Malaysia’s close attention towards the issue of Palestine was the hallmark of the Malaysia’s foreign policy where the King always address the Parliament on the need for Malaysia to continuously fight towards this issue. It had been the stand of Malaysia that the reason for their continuous support for Palestine and denouncement of the Israel is due to the Palestinian right to self-determination and territorial integrity.

Another factor which led to the active role played by Mahathir's administration in the issue of Palestinians is because of the issue of humanity. He condemned the major powers for not trying to help the diabolical conflict faced by the Palestinians. Thus Mahathir took charge of this issue by critically condemning the Israel as well as the major powers. The Palestinian issue is not an isolated case because other crises also occurred in other parts of the world especially in the third world country. Therefore, Mahathir looked at the issue of Palestine as serving his agenda in also championing the issue that happened in the third world country on the ground of humanitarian.

As can be seen, one of the features of Malaysia’s foreign policy during the time of Mahathir was his efforts in bridging the gap among the Third World Country. He always has been critical when criticizing the unfair treatment of the West towards the Third World Countries. He explains in his words (Abdullah, 2008);

“As a Third World Country, we should maintain a low profile, but the atrocities and the unfairness of the powerful has forced us to be openly critical of them and to try to influence their leaders.”
Therefore, it can be demonstrated that Malaysia apart from being an activist of the global Muslim community was also becoming the activist of the Third World Countries. To some Mahathir was one of the prominent leaders of the Third World Countries.

Another factor that comes into play when analyzing Mahathir's policies towards Palestinians is the idiosyncratic factor. Idiosyncrasy is defined as “peculiarity of the mental constitution or temperament of a person.”(Oxford English Dictionary, 2002). It is referring to how one’s state of mind is influencing or shaping one’s behavior due to several reasons. It can be the experiences, educational background, memories, social background attributes, values, perception and beliefs (Dhillon, 2009). Looking at Mahathir's policies towards the Palestinians it may have the influence of idiosyncratic factor. As it has been defined earlier, idiosyncrasy is formed through one’s prior experiences and other factors like social and educational background. It is very interesting to look at some of the events that Mahathir has experienced and how this experienced had shaped his behavior in dictating the nation foreign policy and especially towards the Palestinians.

Mahathir is different from his predecessors in terms of his educational background. As all his predecessor received their tertiary education in United Kingdom, Mahathir studied in Singapore. Perhaps that is why he did not look at the UK as how his predecessors look at it and that is why when he was installed as the prime minister he came up with “Buy British Last” policy.

However, looking at his policies towards Palestinians, it may due to his prior experience that influences his decisions on this issue. He lived through the time when Malaysia was colonized by British, Japan and again British. He had experienced the rough time of living under the colonial masters and therefore understands what the Palestinians feel when their land and home were taken by the Israelis.

Perhaps the last factor that motivates his policies towards Palestinians is the most important one. It should be noted that Mahathir’s administration had always met with a challenge from the opposition party especially PAS and especially in the matter concerning Islam. His administration had been called ‘un-Islamic’ by this people. It was a serious challenge for him because the opposition party together with a few NGOs can pose a threat
especially in the election (Dhillon, 2009). The opposition will use this issue in order to get support especially from the Malay Muslim. In order to survive in politics, several initiatives need to be taken by him and one of them is through the Palestinian issue.

The challenge was not coming from PAS only but also from NGOs and one of them is Angkatan Belia Islam Malaysia or ABIM. At its inception, ABIM was led by Anwar Ibrahim and was considered to be successful in appealing to the educated Malay elites (Dhillon, 2009). In order to maintain his administration and for his own political survival, Mahathir responded to this challenge. During his time he introduced a lot of Islamic related institutions for example the International Islamic University and Islamic Development Foundation in 1983, an Islamic Bank in 1984 and Islamic Insurance company in 1985 (Dhillon, 2009).

At the international level, Mahathir critically voiced his concern over the Islamic issues especially things that happened in Palestine, Afghanistan, Bosnia Herzegovina, and Iraq. All his twenty speeches that he delivered at the UN revolved around Palestine (Dhillon, 2009). For this Mahathir received the acknowledgement as the Islamic statesman and therefore manage to undercut the threat pose by PAS at the domestic level.

REFERENCES


KEMATIAN DALAM TAHANAN POLIS DAN USAHA KE ARAH MENANGANINYA DI MALAYSIA: SATU TINJAUAN

Ab. Kadir1, N.A., Bidin, A.2, Salleh, K.3 & Harun, N.4

Abstrak

Saban tahun, rakyat Malaysia dihebahkan dengan kes-kes kematian beberapa individu yang sedang ditahan oleh pihak berkuasa sama ada PDRM, Jabatan Imigresen, Jabatan Penjara atau semasa dalam proses siasatan oleh pihak SPRM. Kewujudan dan peningkatan kes-kes kematian dalam tahanan dikatakan berpunca daripada kegagalan pihak-pihak berkuasa terlibat mematuhi peraturan-peraturan mengenai pengendalian kes, ketiadaan undang-undang yang jelas dan khusus bagi menangani kes seumpama ini serta kekangan dan risiko konflik kepentingan seandainya kes kematian ini berlaku semasa dalam tahanan pihak polis. Artikel ini membincangkan senario kes kematian dalam tahanan polis di Malaysia serta menganalisis cadangan penubuhan badan penyiasat bebas bagi menangani isu ini dan fungsi serta peranan Suruhanjaya Integriti Agensi Penguatkuasaan atau Enforcement Agency Integrity Commission (EAIC).

Pengenalan

Kematian dalam tahanan merujuk kepada kematian sesorang individu semasa beliau berada di dalam tahanan sesuatu badan, agensi atau pihak berkuasa. Keadaan ini termasuklah juga sekiranya seseorang individu tersebut meninggal di tempat-tempat tertentu seperti hospital.

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semasa beliau masih dalam tahanan pihak berkuasa tersebut. Lazimnya individu dalam tahanan pihak berkuasa ialah mereka yang terlibat dengan jenayah, orang kena tuduh (OKT) atau dalam proses penyiasatan yang melibatkan kes mereka. Antara kes kematian dalam tahanan yang pernah mendapat liputan meluas dalam media di Malaysia ialah kematian dalam tahanan pihak Polis DiRaja Malaysia (PDRM), Suruhanjaya Pencegahan Rasuah Malaysia (SPRM) dan Jabatan Penjara. Beberapa pihak telah mencadangkan bahawa kes kematian dalam tahanan pihak berkuasa berlaku dan semakin meningkat disebabkan oleh beberapa faktor seperti kegagalan pihak-pihak berkuasa tersebut yang gagal dalam pengurusan atau mematuhi standard tatacara (SOP) dalam mengendalikan kes tahan dan kejadian-kejadian penyeksaan semasa mendapatkan maklumat dari si mati/ OKT (Suaram, 2008) dan masalah dalam pengurusan dan cara pengendalian tahanan dalam lokap polis. Pihak OKT dilihat sering dinafikan hak terhadap layanan dan perkhidmatan kesehatan malah didiskriminasi di atas kesalahan undang-undang mereka (Mstar, 2015). Setiap tahun Suhakam menerima aduan mengenai salahlaku atau perlanggaran hak asasi manusia oleh agensi-agensi pengutkuasaan seperti PDRM dan SPRM. Sebagai contoh pada tahun 2010, Suhakam telah menerima aduan sebanyak 105 kes terhadap pasukan polis, 9 kes terhadap jabatan imigresen dan 7 kes terhadap jabatan penjara (Suhakam, 2011). Pada tahun 2014 pula, sebanyak 54 aduan diterima terhadap polis antaranya menggunakan kekerasan yang melampau semasa tangkapan dan siasatan (13 kes), penyalahgunaan kuasa (21 kes) dan tidak mengambil tindakan terhadap laporan (20 kes) (Suhakam, 2015).

kematian di negara ini wujud beberapa kelemahan dan masih mempunyai ruang untuk dibuat penambahbaikan. Suaram juga berpendapat yang sama dengan mencadangkan supaya Akta Koroner yang baru perlu digubal bagi membolehkan penubuhan Mahkamah Koroner dan kuasa-kuasa yang jelas diberikan kepada pihak-pihak yang terlibat (Suaram, 2008). Akhir sekali, penglibatan pihak polis sebagai penyiasat pula boleh memberi kesan wujudnya konflik apabila kes-kes yang disiasat melibatkan kematian dalam tahanan pihak polis sendiri. Ini tidak dapat dinafikan apabila berlaku kes kematian, dalam prosedur inkues, antara pihak-pihak yang terlibat ialah polis, mahkamah dan pendakwaraya. Keterlibatan pihak polis dalam prosedur inkues bagi kes kematian dalam tahanan pihak polis sendiri boleh mewujudkan sesuatu yang bias dan persepsi yang negatif dalam kalangan masyarakat yang boleh menjejaskan integriti dan ketelusan mereka (Human Rights Watch, 2014).

**Objektif dan Metodologi Kajian**


**Senario Kes Kematian dalam Tahanan Polis di Malaysia**


Jadual 1: Statistik Kematian dalam Tahanan Polis

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Jadual 2: Individu Mati dalam Tahanan Polis

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<td>Balai Polis Dang Wangi</td>
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Cadangan penubuhan the Independent Police Complaint and Misconduct Commission (IPCMC)

Berlakunya kes-kes kematian dalam tahanan polis serta aduan-aduan salahlaku mengenai badan ini yang dikemukakan sama ada oleh orang awam atau organisasi, memberi kesan kepada wujudnya keraguan dalam kalangan rakyat terhadap tahap kompetensi dalam


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**Peranan Suruhanjaya Integriti Agensi Penguatkuasaan (EAIC) dalam Menangani Isu Kematian dalam Tahanan Polis**

Pekerjaan, Jabatan Pendaftaran Negara, Polis Diraja Malaysia dan lain-lain (Laman Web Suruhanjaya Integriti Agensi Penguatkuasaan). Di bawah seksyen 4 (1) dan 4(2) Akta 700, Suruhanjaya mempunyai kuasa untuk menjalankan 8 fungsi utama penubuhannya iaitu:
1. Menerima aduan salah laku daripada orang ramai terhadap pegawai penguat kuasa atau agensi penguatkuasaan dan menyiasat serta mengadakan pendengaran mengenai aduan tersebut;
2. Merumuskan dan mengadakan mekanisme bagi mengesan, menyiasat dan mencegah salah laku oleh seseorang pegawai penguat kuasa;
3. Melindungi kepentingan orang ramai dengan mencegah dan menangani salah laku seseorang pegawai penguat kuasa;
4. Mengadakan pengauditan dan pemantauan mengenai aspek tertentu operasi dan tatacara sesuatu agensi penguatkuasaan;
5. Menggalakkan kesedaran, penambahbaikan dan pendidikan berhubungan integriti di dalam sesuatu agensi penguatkuasaan dan mengurangkan salah laku di kalangan pegawai penguat kuasa;
6. Membantu Kerajaan dalam merumuskan perundangan, atau mengesyorkan langkah pentadbiran kepada Kerajaan atau sesuatu agensi penguatkuasaan, demi menggalakkan integriti dan menghapuskan salah laku di kalangan pegawai penguat kuasa;
7. Mengkaji dan mengesah apa-apa pelanggaran tatacara penguatkuasaan dan membuat apa-apa syor yang perlu berhubung dengannya; dan
8. Membuat lawatan ke premis sesuatu agensi penguatkuasaan, termasuk melawat balai polis dan lokap mengikut tatacara di bawah mana-mana undang-undang bertulis, dan membuat apa-apa syor yang perlu.

Dalam melaksanakan fungsinya, Suruhanjaya mempunyai bidangkuasa aduan dan siasatan. Menurut seksyen 22, Suruhanjaya mempunyai kuasa untuk menyiasat apa-apa aduan, merujuk apa-apa aduan yang diterima kepada pihak-pihak yang berkaitan seperti aduan jenayah kepada pihak pendakwa raya manakala aduan tatatertib dirujuk kepada pihak Berkuasa Tatatertib yang berkomen. Setelah aduan diterima, Suruhanjaya mempunyai bidangkuasa untuk menentukan jenis salah laku yang telah diadukan dan sama ada Suruhanjaya patut meneruskan siasatan penuh terhadap aduan tersebut (seksyen 25, Akta
Selain daripada kedua-dua perkara ini, Suruhanjaya juga mempunyai kuasa penyiasatan secara khusus iaitu:

1. mengadakan pendengaran jika perlu atau wajar
2. mendapatkan dan menerima semua keterangan, sama ada bertulis atau lisan, dan memeriksa semua orang sebagai saksi sebagaimana yang didapati perlu atau wajar
3. menghendaki keterangan mana-mana saksi, sama ada bertulis atau lisan, dibuat atas sumpah atau ikrar (sumpah atau ikrar sedemikian hendaklah seperti sumpah atau ikrar yang boleh dikehendaki daripada saksi itu jika dia memberikan keterangan dalam mahkamah undang-undang) atau melalui akuan berkanun;
4. memanggil mana-mana orang yang bermastautin di Malaysia untuk menghadiri mana-mana mesyuarat atau pendengaran untuk memberikan keterangan atau mengemukakan apa-apa dokumen atau benda lain dalam milikannya;
5. mengeluarkan waran penangkapan untuk memaksa kehadiran mana-mana orang yang, selepas dipanggil untuk hadir, tidak berbuat sedemikian dan tidak memberikan alasan bagi ketidakhadiran itu dengan memuaskan.
6. mengenakan denda yang jumlahnya tidak melebihi lima ribu ringgit ke atas mana-mana orang yang, apabila dikehendaki oleh Suruhanjaya untuk memberikan keterangan atas ikrar atau untuk mengemukakan sesuatu dokumen atau benda lain, enggan berbuat sedemikian dan tidak memberikan alasan bagi keenggananannya dengan memuaskan Suruhanjaya;
7. menerima, walau apa pun apa-apa peruntukan Akta Keterangan 1950 [Akta 561, apa-apa keterangan, sama ada bertulis atau lisan, yang mungkin tidak boleh diterima dalam prosiding sivil atau jenayah;
8. mengaward mana-mana orang yang telah menghadiri mana-mana mesyuarat atau pendengaran apa-apa jumlah wang
9. membenarkan atau tidak membenarkan orang ramai untuk menghadiri pendengaran itu atau mana-mana bahagiannya.

Menurut Majlis Peguam Malaysia (2015), walaupun telah wujud EAIC yang memantau salahlaku pihak polis, terdapat perbezaan yang nyata antara IPCMC dan EAIC, justeru mereka masih mengharapkan agar penubuhan IPCMC dapat disegerakan. Walaupun EAIC
telah diberikan kuasa untuk menyiasat pelabagai agensi pengutkuasaan, bukan sekadar pihak polis sahaja, terdapat beberapa kelemahan yang mungkin akan mengurangkan keupayaan badan ini bertindak. Antaranya ialah:

1) Tidak mempunyai kuasa untuk menyiasat salahlaku pegawai yang telah bersara atau meletak jawatan.
   EAIC tidak mempunyai kuasa untuk menyiasat salahlaku pegawai-pegawai yang telah bersara atau meletak jawatan. Ini merupakan kekangan yang besar EAIC dan boleh mencabar keberkesanan sistem keadilan di negara ini.

2) Tidak ada kuasa untuk mendakwa
   EAIC tidak mempunyai kuasa untuk mendakwa. Semua kes salahlaku pegawai hanya boleh disiasat jika dirasakan perlu oleh EAIC dan urusan pendakwaan di luar bidangkuasa pihak badan ini. Keputusan penyisastan akan diserahkan kepada Jawatankuasa Tatatertib agensi terlibat seandainya melibatkan kes tatatertib dan akan jika sekiranya ia melibatkan kesalahan jenayah, EAIC akan merujuk perkara tersebut kepada pendakwaraya. Adalah diluar bidangkuasa EAIC memastikan sama ada cadangan yang dikemukakan oleh badan itu dilaksanakan atau tidak.

3) Kuasa budibicara kepada EAIC sama ada untuk meneruskan penyiasatan
   Menurut seksyen 25 Akta EAIC, ia mempunyai kuasa untuk membuat keputusan sama ada perlu meneruskan penyiasatan atau tidak terhadap pegawai yang terlibat. Ini jelas boleh membantutkan proses keadilan di negara ini.

4) Aduan perlu dibuat secara bertulis
   Semua aduan yang hendak dikemukakan kepada EAIC hendaklah dibuat secara bertulis. Syarat ini juga dilihat sebagai sesuatu yang boleh mengurangkan keberkesanan fungis EAIC di mana dalam masyarakat kontemporari yang serba canggih dengan teknologi ini, sebaiknya urusan aduan hendaklah dipermudahkan.
Keberkesanan EAIC sebagai badan pemantau adalah diragui berdasarkan kepada jumlah aduan yang diterima oleh badan ini, sebahagian besar daripadanya telah ditolak. Daripada 838 aduan yang dibuat kepada EAIC, sebanyak 422 telah ditolak dan 30 lagi dirujuk kepada pihak Lembaga Tatatertib PBT. Daripada jumlah ini juga hanya 117 telah dijalankan siasatan awal, 120 sedang menunggu siasatan penuh dan hanya 108 sahaja yang telah diselesaikan (Majlis Peguan Malaysia, 2015). Ini ditambah lagi dengan kekangan jumlah badan penyiasatEAIC yang sedikit berbanding dengan jumlah aduan yang banyak dan merangkumi pelbagai jenis agensi. Berdasarkan kepada kemampuan EAIC menangani aduan-adaun mengenai salah laku termasuk kes kematian dalam tahanan dalam tahanan pelbagai pihak berkuasa, sebahagian pihak merasakan bahawa satu badan khas perlu diwujudkan bagi memantau serta menyiasat kes-kes kematian dalam tahan pihak polis (Majlis Peguam Malaysia, 2015).

Penutup
Rujukan


REFUGEE CRISES IN SOUTHEAST ASIA: MALAYSIAN EXPERIENCE

Ahmad, A.A.¹, Abdul Rahim, Z.² & Mohamed, A.M.H³.

Abstract
In South East Asia the available protection space for refugees, asylum-seekers and stateless people is fragile and unpredictable. This is due to lack of national legal frameworks in most of these countries. In fact, some States introduced restrictive policies such as denying safe disembarkation or access at the airport, and narrowing protection space and access to asylum. There is also an increase in maritime push backs and instances of refoulement. Although, Malaysia is not a party to the 1951 Refugee Convention, and lacks a legislative and administrative framework to address refugee matters that has created various challenges to its sovereignty for decades. As a result, all asylum-seekers and refugees are treated as irregular migrants and in the absence of any substantive engagement by the authorities, then UNHCR remains the last option that shoulder the burden of their international protection responsibilities. The current development of unsightly humanitarian problems washing up on its shores in Myanmar and Bangladesh had revealed new face off, and echoed serious concern for Malaysia, such as its impact on the lucrative western tourist trade. This concern runs deeper especially when it has already home to about 150,000 foreign migrants of which roughly 45,000 are Rohingya. Consequently, it also occurred at a difficult situation when the domestic economy faces tough challenges. The paper investigates the impact of refugees in Malaysia as a non-signatory party to the Refugee Convention 1951, how it has tackled various refugees’ issues. It further examines the mechanism in place to safeguard the rights of refugees, and how such initiation has been managed without contravene with its sovereignty integrity (Refugees in Malaysia, 2009).

Keywords: Refugees Crises, ASEAN, Malaysian Experiences, Refugees Convention, Foreign Immigrant, and Sovereignty integrity

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Introduction

The practice of granting asylum to people fleeing persecution in foreign lands is one of the earliest hallmarks of civilization. References to it have been found in texts written 3,500 years ago, during the blossoming of the great early empires in the Middle East such as the Hittites, Babylonians, Assyrians and ancient Egyptians. Over three millennia later, protecting refugees was made the core mandate of the UN refugee agency, which was set up to look after refugees, specifically those waiting to return home at the end of World War II (Flowing Across Borders, 2016).

The 1951 Geneva Convention is the main international instrument of refugee law. The Convention clearly spells out who a refugee is and the kind of legal protection, other assistance and social rights refugee should receive from the countries who have signed the document. The Convention also defines a refugee’s obligations to host governments and certain categories or people, such as war criminals, who do not qualify for refugee status (Hathaway, J. C. 2002). Although, the Convention was limited to protecting mainly European refugees in the aftermath of World War II, but the 1967 Protocol, expanded the scope of the Convention as the problem of displacement spread around the world. As stated in the 1951 Convention Relating to the Status of Refugee, a refugee is defined as, a person who, owing to a well-founded fear of being prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country (Melander G., 1987).

In other words, a refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries. In comparison to economic migrants, who have the freedom of protection by their home country and are free to go back as they please, refugees instead have the right for safe asylum outside of their country’s borders. Malaysia has quietly taken in quite a significant amount of refugees and asylum seekers under its care despite not being a signatory of the United Nations 1951 Convention relating to the status of refugees and its 1967 Protocol.
ASEAN and Refugees Crisis

A growing Southeast Asian refugee crisis largely involving Myanmar’s persecuted Rohingya minority has strong echoes of the humanitarian disaster on Europe’s doorstep. International observers have similarly called on Myanmar; refugee destinations such as Malaysia, Thailand, and Indonesia; and regional bloc the Association of Southeast Asian Nations (ASEAN) to face up to the challenge, as the European Union finally appears to be doing with its own crisis. At beginning, the Southeast Asian situation appears more easily under control: both the origin and intended destinations of the refugees are in the same region, and the main countries concerned are all members of ASEAN (Muntarbhorn, V. 1992).

Recent study indicates that thousands of refugees predominantly seeking improved economic fortunes from Myanmar and Bangladeshis adrift in the Andaman Sea and Straits of Malacca due to denial of passage by several countries. This followed the earlier discovery of mass graves of refugees in Thailand, tied to human trafficking by transnational criminal networks. Increase in the number of refugees was the result of the ongoing persecution of the Rohingya, who are denied Burmese citizenship and regularly subjected to violence at the hands of the military. It was alleged that not less than 25,000 people have left the Bay of Bengal in the first quarter of 2015, double the number in the same period of 2013 and 2014. It was reported that not less than 300 of them lost their life while attempting the crossing (Paul Chambers, 2015).

A group called ASEAN Parliamentarians for Human Rights, a long-standing advocacy for a region-wide solution to the Rohingya called for adequate solution to the issue of refugees in the region. It made it known that the situation contained nearly every risk factor identified in the UN Framework for Analysis of Atrocity Crimes. The Organisation of Islamic Cooperation has also expressed it concern and called for ASEAN to act. The United Nations High Commissioner on Refugees (UNHCR) has appealed to Southeast Asian governments to put in place search and rescue operations and keep their borders open for those stranded at sea. In the longer term, a set of policies would ideally seek to improve the plight of the Rohingya and thus stem the tide of dangerous migration; break up the international trafficking rings; increase the safety of those journeys still attempted; and provide an effective long-term resettlement process for migrants that do complete their passage.
This is inline with the multifaceted approach adopted by the EU in response to the significant refugee problem largely from sub-Saharan Africa and Arab states such as Iraq and Syria cross the Mediterranean and where thousands have been lost their live through Mediterranean Sea (Security screening required for Syrian refugees in Malaysia February 13, 2016). Even though, it has created problem among European nations such has the last destination of each refugees, but the UNHCR has praised the new European direction which includes providing for a fair distribution of refugees among member states. It is believed that the progress being made in Europe could offer a credible way forward for ASEAN to embark. However, one should accept the reality that there are significant barriers. For instance, European integration is much older and more advanced than Southeast Asia. Majority of ASEAN members have not signed the UN’s 1951 Refugee Convention or 1954 Statelessness Convention. Malaysia, where those who do make landfall are unable to work legally and often forced into low-paying exploitative labor, because she is yet to be a signatory member of either of the two (Hathaway J. C., 2002). While the proximity of the source of the problem might otherwise provide an opportunity for an effective solution, in Southeast Asia it has only highlighted a limited capacity for cooperation. A spirit of non-interference in member states’ domestic policies, a policy inherited from opposition to colonialism and the military expeditions of the Cold War, and a conflicting regional mix of cultural and religious histories outlined by ASEAN’s founding charter, the 1967 Bangkok Declaration, and adopted by all initial and expansion members. The bloc instead largely focuses on issues of collective gain, such as economic and security partnerships (Charis Chang, 2015).

Most significant criticism of ASEAN focused on its unwillingness to address human rights abuses. This includes frequently failing to censure, let alone expel, Myanmar throughout its long history of state-sanctioned violence, and taking too long to respond to the upheaval caused by East Timor's independence from Indonesia in 1999-2000. It should be noted that ASEAN has made some progress towards modifying its non-critical position during the past decade, including offering a strong and unified rebuke of the Burmese junta following its crackdown on civilian protestors in 2007. But efforts supposedly aimed at boosting its human rights-promoting infrastructure have frequently been derided. The ASEAN Intergovernmental Commission on Human Rights (AIHCR), established in 2009, was seen by many to be toothless, while ASEAN’s human rights declaration of 2012 was also dismissed as a
declaration of government powers disguised as a declaration of human rights (Ahmad Shah Pakeer Mohamed & others, 2011)

Human Trafficking and in Malaysia

Trafficking in persons is a serious crime that affects the human rights, dignity and integrity of all its victims including women, men, and children in the Association of Southeast Asia Nation (ASEAN) region. ASEAN has made efforts to fight human trafficking through *inter alia* the establishment of regional counter-human trafficking laws and human rights bodies to establish best norms and practices for its member countries. Nevertheless, the International Labour Organization (ILO) recently declared that there are more than 11.7 million forced labor victims in the Asia-Pacific region encompassing the biggest concentration of forced labour victims in the world. This volume reviews the achievements and the deficiencies of ASEAN’s counter-human strategies at the national and regional level. It offers suggestions for the reform of ASEAN’s anti-trafficking laws and for the creation of a regional anti-trafficking human rights body specialized in preventing human trafficking, promoting equal protection of all trafficking victims, and prosecuting human traffickers. ASEAN member countries have committed themselves to the fight against trafficking, to identify and protect the victims, and to ensure that offenders are punished (Ahmad Shah Pakeer Mohamed & others, 2011).

To succeed in the fight against such trafficking, ASEAN member countries need access to the best possible information. This includes the raw data about the trafficking situation, and the information and knowledge to determine how to prevent trafficking, protect victims and prosecute traffickers. Four ASEAN member countries, namely Cambodia, Indonesia, the Philippines and Thailand, allowed external researchers to examine and assess their internal processes of data collection. This demonstrates their commitment to continual improvement. This report is the first step in getting access to better data and ultimately better information and knowledge about trafficking in persons. The uncovering of mass graves believed to be that of Myanmar and mostly rohingyah refugees through what is termed human trafficker saw Thai Prime Minister Prayuth Chan-ocha call for a three-way meeting with Myanmar and Malaysia, an attempt strategic of invoking any wider ASEAN powers. Even though at later
date, a regional meeting was called at address the issue, but it can be sum up that the outcome has no tangible step further (Charis Chang, 2015).

Malaysia and the UN Convention on Refugees
Malaysia is not a signatory to the UN Convention on Refugees and refugees and asylum seekers who find themselves in the country lead a precarious existence on the margins of society, at risk of arrest as illegal immigrants as Malaysia makes no distinction between undocumented workers and refugees. Most live in the cities, but they are not allowed to work or send their children to school. Malaysia, like most other Southeast Asian countries, has not signed the refugee convention and protocol and therefore asylum seekers and refugees are deemed to be illegal In 2011, what is known as the Malaysia Arrangement was signed between Australian and Malaysian. The agreement highlights the role of Malaysia in Clause 10. It allows the transfer of individuals who have already engaged Australia’s international protection obligations to a country which is not bound by equivalent obligations under international law or its own law, and which cannot be relied upon to behave as if it were (Arrangement between the Government of Australia and the government of Malaysia on Transfer and Resettlement, 2011).

According to Human Rights Watch, Malaysia’s willingness to recognize a group of asylum seekers as being lawfully present was also a positive development. However, creating an exception for 800 “swapped” people while 90,000 other refugees and asylum seekers in Malaysia remain illegal migrants subject to deportation is unacceptable. There was outcry within and outside Malaysia regarding the deal. Domestically, people believed that the country will look stupid in the eye of international community, hence it’s not party to the UN refugee convention of 1951. Others opined that the country needs not to burden itself to pursue something totally illegal even contradict with domestic laws. Similar criticism was waged by activists and human rights organization against Australian government, calling to alter the agreement. As a result, the Australian High Court by majority held and declared that it is invalid for asylum seekers who entered Australia at Christmas Island to be transferred to Malaysia (UNHCR, 2016).
History of Refugees and Asylum Seekers in Malaysia

The first significant experience of Malaysia towards refugees and Asylum seekers occurred after the fall of Saigon in 1975, Vietnamese boat people started to arrive in Malaysia. Soon they were arriving in large numbers and Malaysia became the temporary home to more than 250,000 of them. But Malaysia was only willing to act as an offshore processing entity as it deemed the influx of such vast numbers and their ethnic make-up (many were ethnic Chinese) as problematic. Under the Comprehensive Plan of Action for Indochinese Refugees of 1989, Malaysia became a first protection space for these boat people. They were housed in camps and had to wait several years for a durable solution that usually meant resettlement in a third country. In 2005, the last Vietnamese refugee left Malaysia and was voluntarily repatriated to Vietnam after spending more than 20 years in Malaysia (Melander G., 1987).

Although, the situation has improved over the last few years with increase in raids and less overt rent-seeking on the part of the authorities, refugees and asylum seekers continue facing tough challenges in Malaysia because UNHCR did not provide them financial support for housing and food. Thus they must find illegal work to support themselves and their families. Having found it difficult for tens of refugees to bear the new incoming contemplate the treacherous journey by boat to Australia. But this is only the smallest part of the story. In Malaysian alone, there are around 100,000 asylum seekers and refugees registered with UNHCR in Malaysia, and additional tens of thousands of asylum seekers outside of UNHCR purview. Due to similar reason, and in particular lack of legal status, the vast majority of them have found some limited protection in Malaysia, many have work and some access to community run schools and health centers. In 2011, UNHCR resettled 8,370 refugees to third countries (Martin, D. A. 1997).

Malaysia wants to provide refugee protection on its own terms - it wants to choose when and for whom it provides protection," Alice Nah, a lecturer in the Centre for Applied Human Rights at the University of York, wrote in an email. "As such, it prefers to resettle refugees from afar rather than provide a status to those who have already arrived on its shores. These decisions are partly political. They are partly related to concerns about irregular movement," Nah explained. There are some four million foreign workers in Malaysia, about half of them working illegally in the kind of jobs, according to government officials - on construction sites, plantations and as kitchen and waiting staff - that Malaysians themselves
do not want to do. The UN has stepped up calls to register people more effectively and allow registered refugees to work. In November, the home minister told parliament that the government was considering that option for the Rohingya Muslims, Myanmar’s persecuted Muslim minority, who have been coming to Malaysia for decades and currently number about 50,000 (Hathaway J. C., 2002).

Refugees from Myanmar, one of the vast majorities of refugees and asylum seekers in Malaysia, are very well organized, maintain community organizations and provide an array of services in combination with local NGOs. This is much harder for smaller refugee communities, which do not have the resources, cultural or religious support networks and critical mass of leaders and organizers at their disposal. Due to the fact that refugee communities in Malaysia varied experiences, which influence their responses to long waiting times for resettlement, educational and work opportunities. This situation makes it paramount to respond to the people dying on their way here through a regional lens that incorporates an understanding of the pressures in source, transit and destination countries.

**Malaysian Handling of Refugees**

For the past 40 years, Malaysia has been a major destination for refugees seeking either temporary or permanent refuge from devastating conflicts in the region and further afield. Unlike many ASEAN member states, Malaysia is not a signatory to the 1951 Refugee Convention and its 1967 Protocol, therefore refugees and asylum seekers who find themselves in the country lead a precarious existence on the margins of society, at risk of arrest as illegal immigrants as Malaysia makes no distinction between undocumented workers and refugees. Most live in the cities but they aren’t allowed to work or send their children to school (Kate Mayberry, 2014).

Asylum seekers have included Filipino refugees from Mindanao arriving during the late 1970s and early 1980s, in which over 50,000 fled to Sabah, Cambodian and Vietnamese refugees during the 1980s and 1990s, a small number of Bosnian refugees in the early 1990s, and Indonesians from Aceh in the early 2000s (Human Rights, 2004).

Malaysia also continues to receive refugees from Myanmar’s troubled ethnic minorities, especially the stateless Rohingya. Unlike most of these Myanmar asylum seekers who arrive by crossing the Thailand-Malaysia border illegally. Interestingly, Malaysia has at best an *ad
hoc policy towards refugees and there is no clear and official plan from the Malaysian Government on how best to handle these groups. Furthermore, despite not being a signatory to the UN refugee convention, Malaysia does allow for the presences of refugees in the country on the basis of humanitarian grounds, and cooperates with the UNHCR in addressing these issues (UNHCR, the UN Refugee Agency in Malaysia). The researcher will investigate further on how Malaysia has handled refugees from 3 significant Nations namely; Vietnam, Myanmar, and Syria (Refugees in Malaysia, 2009).

I. Vietnam Refugees in Malaysia

Vietnamese refugees fled Vietnam by boat and ship after the Vietnam War, especially during 1978 and 1979, but continuing until the early 1990s. It was estimated that 2 million refugees left Vietnam by any means between 1975 and 1995, while the number of boat people leaving Vietnam and arriving safely in another country totaled almost 800,000 between the same period of years. It was believed that majority of the refugees failed to survive the passage, facing danger and hardship from pirates, over-crowded boats, and storms. The refugees’ immediate destinations were the Southeast Asian countries of Hong Kong, Indonesia, Malaysia, Philippines, Singapore and Thailand (McInnes, Colin; Rolls, Mark G., 1994). Due to the sharp uptick of refugees fleeing Vietnam by boat in 1978-9 coincided with the 1978 Vietnamese invasion of Cambodia and the 1979 Chinese invasion of Vietnam, which further destabilized the country and resulted in tens of thousands of casualties. While North Vietnam had been the object of a U.S. trade embargo since 1964, which was applied to all of re-unified Vietnam in 1975, Vietnam's military actions against the Khmer Rouge provoked further condemnation by the U.S. and its allies, resulting in additional harsh economic sanctions being imposed on Vietnam by a number of countries. Although, in 1994-5, the economic sanction imposed on Vietnam by the United States and its allies was lifted, and Vietnam was re-admitted to the Association of Southeast Asian Nations. As a result, thousands of refugees returned to Vietnam and their number declined drastically from their host nations (Cockburn, Patrick, 1994).

On August 8th, 1978, Bidong was officially open to house refugees from, however, there were people from Vietnam had lived on the island soon after Saigon fell into communist. From 1978 until 1991, the island was mostly home to Vietnamese refugee Boat People, who
escaped Vietnam to flee Communists. In the late 70s, Pulau Bidong was also home to Cambodians, who tried to flee the Khmer Rouge regime. In other words, Malaysian Government and United Nations High Commissioner for Refugees (UNHCR) agreed to temporarily located Vietnamese refugees in Pulau Bidong instead of the mainland. In the early years, people lived under the trees, tents, or anything they could find to avoid the tropical hot sun, rain, and ocean storms. As years went by, Malaysian Government, Malaysian Red Crescent Society (MRCS), UNHCR, and other relief agencies organized the island into a more orderly conducted. It had longhouses, hospital, schools, clinics, temples, churches, coffee shops, post office, vocational school, and some refugee owned shops like bakery shops, tailor shops, fruit stands, small markets (Kagan, M. 2005).

During this time, the Malaysian Police Task Force was organized and did an excellent job to protect people from getting hurt such as illegal fishing, illegal wandering into the mountain for wood, crimes, and orderly conduct. Jail like Monkey House was established to jail people, who violated the island policies. Later, they set up multiple Security offices in each residence zone along with the main Island Camp office, which refugee people would vote or appoint officials enforce policies, nightly patrola, and security of everyone. The forbidden area covered 90% of the island. Only the small portion of the south side was used for UNHCR offices, and refugee housing (Lamvi Dao, Rosli Mohamad, and Ghani Ibrahim, undated)

To stop waves of boat people, who kept leaving Vietnam, the UNHCR posted March 14th of 1989 as a closing date for “automatic acceptance to the third country”. For those arrived the island after this closing date, they had to go through screening processes, which they must prove that they were political refugees and not economical refugees. They were also given three chances to prove their political status. Due to this screening process, over 9,000 refugees were repatriated back to Vietnam from Malaysia because they were not qualified for political status. However, majority of these repatriated refugees were again given another chance from Vietnam by the UNHCR and most of them were granted asylum in third countries, thereafter. Also, for those arrived after March 14th, 1989, they spent longer time on Pulau Bidong until the island shutdown in October, 1991 and Sungei Besi Refugee Center in Kuala Lumpur. The average time was between 2 - 3 years. However, some of them would spend more 10 years in hopping to “pass” the screening. Unfortunately, some of these longtime residents were repatriated to Vietnam. It was estimated that 250,000 Vietnamese
refugees landed on the eastern shores of Malaysia and camped in two different locations of Pulau Bidong and Sungei Besi. Although, the Pulau Bidong camp officially closed in 1991, and the Sungei Besi camp was officially closed in 1996, and he had to blend in to local Malaysian life outside the camp. The last remaining Vietnamese refugees finally left Malaysian sore on August 28, 2005 (*Bram Steen*, 2005).

II. **Bosnian refugees in Malaysia**

Although, few number of Bosnian refugees arrived Malaysia as early as 1991, a public demonstrated by Malaysia in its 1994 and sense of Islamic solidarity made Malaysia offered asylum to 350 Muslim fleeing refugees from the collapse of Yugoslavia. The Malaysian government helped by providing scholarships for students, as well as basic housing and allowed them to work. Malaysia was one of the strongest supporters of the Bosnian cause during the war and it remained the only Asian country that accepts Bosnian refugees. During the war, Malaysia sent UN Peacekeeping troops to the former Yugoslavia. She maintains a number of investments in Bosnia-Herzegovina, one of the most significant is the Bosmal Group. A joint venture set up between Malaysian and Bosnian interests. At the time, a number of Bosnian students studied at the International Islamic University Malaysia in Gombak. Malaysia maintains an embassy in Sarajevo and Bosnia-Herzegovina maintains an embassy in Kuala Lumpur. After the war, and upon completion of their studies, majority of Bosnians resided in Malaysia returned home (*Kate Mayberry*, 2014).

The historical treatment received by Bosnian in the 1990s made certain quarter criticized the government over reckless handling of Rohingya refugees. The conservative Muslim group’s vice president Abdul Rahman Mt Dali said Malaysia, as a Muslim-majority country, is obliged to take in the Muslim refugees who suffer state-sanctioned discrimination in Myanmar. He acclaimed that: “Abdul Rahman said the Rohingya refugees can be given training and job opportunities. Malaysia reportedly offered refuge to Bosnian Muslims in 1994 fleeing ethnic conflicts, as well as to some 250,000 Vietnamese refugees in the 1970s and 1980s until the Pulau Bidong refugee camp in Terengganu closed in 1990, with the last Vietnamese refugee leaving Malaysia in 2005 (*Malay Mail* online, May 17, 2015).
III. Myanmar and Rohingyas Refugees in Malaysia

Tens of thousands of Muslim Rohingya fled Myanmar in the past year, many of them taking to the sea in the spring of 2015 to try to reach Indonesia, Malaysia, and Thailand. The latest surge in refugees was prompted by a long-building crisis. The discriminatory policies of the Myanmar government in Rakhine State have caused hundreds of thousands of Rohingya to flee since the late 1970s. Their plight has been compounded by the responses of many of Myanmar’s neighbours, which have been slow to take in the refugees for fear of a migrant influx they feel incapable of handling. Therefore, more than thirty-two thousand registered Rohingya refugees have sought refuge in Bangladesh, while over two hundred thousand additional unregistered Rohingya refugees are believed to live in the country, according to UN High Commissioner for Refugees (UNHCR) estimates. In Malaysia, more than 137,000 refugees from Myanmar were registered as of September 2014 according to the UN, including tens of thousands of Rohingya. The Global Emergency Overview, which tracks humanitarian crises, tallied more than 40,000 UN-registered Rohingya as of last December, but activists say there are roughly an equal number of unregistered Rohingya in the country. Malaysia has signalled a growing unease with the migrant influx. As a result, in May 2015, Malaysian Deputy Home Minister Wan Junaidi Jafaar asserted that Malaysia has treated the Myanmar migrants humanely but they cannot afford to allow them to flood their shores. The Rohingya also seek refuge in Indonesia, although the number of refugees there remains relatively small, estimated at roughly two thousand Rohingya as of June 2015. Indonesia’s military chief has earlier expressed concerns that for his country to ease immigration restrictions would spark an influx of people coming in the thousands (Mark Davis and Peter Cronau, 2015).

Thailand serves as a common transit point for Rohingya leaving Myanmar through boats before moving on foot to Malaysia or continuing by boat to either Indonesia or Malaysia. Reuter’s report of 2013 found that some Thai authorities were colluding with smuggling and trafficking networks in the exploitation of detained Rohingyas, with the deputy commissioner general of the Royal Thai Police conceding that officials might have profited from smuggling. In May 2015, amid international pressure, Indonesia and Malaysia offered temporary shelter to thousands of migrants, Malaysia launched search-and-rescue missions for stranded migrant boats stranded, and Thailand agreed to halt pushbacks.
Myanmar’s navy also conducted initial rescue missions at the end of the month. Similarly in June 2015, several secret mass graves were detected by Malaysian police in the Thai border town of Padang Besar. The U.S. State Department downgraded Thailand to Tier 3 the bottom rank, as a source, destination, and transit country for men, women, and children who are subject to trafficking in its 2014 Trafficking in Persons report. Recently however, the military-led government in Bangkok has prioritised a crackdown on smuggling and trafficking rings following the discovery of mass graves in what are believed to have been detention camps. But some experts say that new punitive measures directed at traffickers are responsible for the increases in abandoned vessels at sea, a development that has worsened the humanitarian crisis (Mark Davis and Peter Cronau, 2015).

IV. Syria Refugees in Malaysia
The United Nations High Commission for Refugees says nearly 2.5 million people are now "persons of concern" as a result of the conflict in Syria. The overwhelming majority have sought refuge in Turkey, Lebanon, Jordan and other countries in the Middle East. But others especially those with some money behind them have found their way further afield. Travelled all the way to Southeast Asia, the Malaysian office of the UN's refugee agency said it had registered 822 Syrians by the end of December 2013, compared with 285 in October and just eight before the war started. Refugee activists who work closely with the community said because of the length of time it takes to register officially, the actual number is probably even higher perhaps in the low thousands. Despite not a party to the UNHCR, Malaysia has good records of allowing refugees reside on its soil on humanitarian reason. Having recognized that, the local office of the UNHCR last year thanked the Malaysian government for not forcibly returning any Syrian asylum-seekers to their homeland (Kate Mayberry, 2014).

The Malaysian Social Research Institute works with what it calls "minority refugees" - including Afghans, Somalis and the new arrivals from Syria. It gets financial support from the UNHCR and Credit Suisse, which helps fund the group's community school, but admits it's been "pushed to its limits" by the new arrivals. In October 2015, Prime Minister Najib Razak, during is address at the 70th session of the United Nations General Assembly in New York, announced that Malaysia would open its doors to 3,000 Syrian migrants over the next three years to help with its refugee crisis. In line with the pledge, recently, Zahid, Home
Minister, declared that five Syrian refugee families had been brought into the country under the first phase and the government was now in the process of bringing the second group of Syrian migrants. He further promised “We will give priority to Syrian students in Malaysia who want to bring their families here, families of Syrian workers working in Malaysia, like chefs in restaurants, and families of professionals, like medical doctors and those in the field of engineering,” (Security screening required for Syrian refugees in Malaysia February 13, 2016).

Zaid further downplay the danger that Syrian can cause to Malaysia if terrorist found their way through refugee umbrella, he said that Screening will be done with the cooperation of Interpol and the United Nations High Commissioner for Refugees (UNHCR) to ensure they are refugees. “We are taking this move to check the background of the refugees concerned to see if they are directly, or indirectly, involved, for example as Daesh terrorists,” (http://www.freemalaysiatoday.com/February 13, 2016).

Malaysia's Prime Minister Najib Razak announced his plan to take in the Syrians at the United Nations in October. Millions have fled Syria since the civil war started five years ago, mostly to neighbouring countries such as Turkey, and increasing numbers of people continue risking their lives at sea to reach Western Europe. Mohamed said he applied to the government for permission to bring his family to Malaysia, and arranged all the travel himself. "We are the starting point," he said. Malaysian officials are still working out the details of the programme, but the government has indicated that the Syrians would be given temporary residence passes and allowed to work. Their children would also be able to attend school (Kate Mayberry, 2014).

**Recommendation**

Malaysia has strict immigration rules that prohibit illegal entry into the country and enacts severe punishment for anyone found guilty of doing so. However, the humanitarian grounds exception means that at certain times these rules are not enforced. It is also important to note that by allowing these refugees to stay do not involve the state playing an active role in protecting them or their rights. Instead the UNHCR, since 1975, and other NGOs, including religious-based organisations, have played crucial roles instead of state. The major flaw of Malaysia’s current ad hoc refugee policy is that the government is trying to deny existing
problems related to asylum seekers and refugees. It also causes greater uncertainty and confusion for all parties, especially the Malaysian authorities tasked with handling refugees. Malaysia’s most successful handling and adequately managing refugees came almost 30 years ago during its role in what is known as the international Comprehensive Plan of Action (CPA) for Indochinese Refugees. A major flow of Vietnamese refugees to Malaysia in the 1970s and 1980s that led to the drafting of the CPA in Kuala Lumpur in March 1989 and its subsequent adoption at the international conference in Geneva in June of same year (Coutland W. Robinson, 2004).

The international agreement was not only set up to stop the flow of boat people from Vietnam, Cambodia and Laos, but provided a framework for refugee status determination for these asylum seekers and their voluntary repatriation and resettlement to third countries. Consensus was achieved between the countries of origin, host countries of first asylum, including Malaysia, and third countries beyond the region. Under the agreement, Malaysia accepted around 250,000 Indochinese boat people who resided at Pulau Bidong refugee camp in Terengganu. Malaysia managed to give temporary protection to the refugees at that time because of the coordination with third countries, and countries of origin, while the refugees sheltered at refugee camps in Malaysia were processed to determine their refugee status.

Once they were proven to be genuine in fleeing persecution, third countries such as Australia, the United States, the United Kingdom, and European states resettled them. As for the non-refugees, Vietnam was willing to accept their voluntary return. The international consensus between different countries and the leadership of the UNHCR were key factors in this successful example of what is termed “burden sharing” in solving the major refugee issue at that time. After the last Vietnamese 1996, there have been no more comprehensive multilateral agreements regarding the issue. With so much uncertainty and inconsistency caused by current policy, and with so many refugees living in limbo, perhaps it is time for Malaysia to revisit a comprehensive and multilateral approach to the movement of asylum seekers in the region (Assalam Abd Jalil, 2015).

This study strongly suggests that Malaysia officially recognize the presence and existence of refugee in her territory by regulating the group and facilitate their enjoyment of their rights. By recognizing the rights of refugees such as the right to education, it may prevent direct consequences of lack of access to basic education that resulted in illiteracy and other social
problems. Hence education has always been considered as a factor to guarantee the social stability of a community, it is also vital to deviate from practicing what violates the principle of human rights of refugees. Moreover, practices which are inconsistent with the provisions of the CRSR, such as detention and imprisonment will not serve any good purpose to Malaysia. As a consequence, the refugees cannot be easily sent back and they may remain in detention center for longer, placing more financial burden on the authorities especially relating to infrastructure and resources. If the refugees are to be deported, Malaysia is actually contributing to human trafficking and smuggling since traffickers are known to take advantage of refugee deportations. Since Malaysia’s economy relies so much on migrants’ workers, the country should utilize the working age refugees by letting them to join the local work force. This will make it more reasonable for the government to combat economic migrants. It is high time that Malaysia devises a specific legal and institutional framework to deal with refugees in the country. There is no way that we can stop them from coming in since our border is porous and many unofficial point of entry are being used. Furthermore, the phenomenon never ceases since 1970s. To avoid further mistreatment and violation of refugee rights, we need express protection granted under written law and thus inconsistencies and change of policies will not victimize refugees. The law should also require the establishment of an independent refugee screening mechanism which is subject to appeal and judicial review.

Conclusion
The ability to truly address the situation would be enhanced if the larger coordinating powers of ASEAN could be invoked. The association does have some precedent in effectively dealing with the effects of regional disasters, as when it played a leading role in the humanitarian response to Myanmar’s Cyclone Nargis in 2008, after first facing opposition from the government there. Addressing the causes of the refugee crisis, including the domestic policies of its members, will prove a sterner test. Nonetheless, a good guide to what ASEAN could undertake is found in the recommendations of the report from ASEAN Parliamentarians for Human Rights. These include expanding the mandate of the AIHCR to include country visits, inquiries, complaints, and emergency protection mechanisms, and ensure adequate independence and staffing support. This could help improve the domestic
The discussion in this paper shows that the UNHCR is facing growing challenges. The challenges lie not only in the increase in the number of refugees and other persons of concern who fall under its mandate, but also because the UNHCR’s duty of screening asylum-seekers on behalf or in lieu of a state’s own machinery is tainted with several issues of credibility and fairness. There are also problems when states completely ignore UNHCR’s work while letting the office carry out the refugee status determination; at the same time, UNHCR has no outright control over state matters, which makes the effort less effective than it should be.

Even with direct assistance from the UNHCR, refugees and asylum seekers find themselves in uncertain legal status; identification papers are not recognized and relied on easily altered policies to protect them. Even though UNHCR is allowed to operate in Malaysia in order to process the applications for refugee status, the actual weight attached to UNHCR identity papers or documentation is highly questionable. In simple words, UNHCR presence is accepted by the authority but their powers are not recognized. Malaysian authority in its actions and practice seems to be trying to undermine the UNHCR mandate and is failing to acknowledge as refugees individuals holding such documents.

Countries participate in treaty making provided its services on the basis of the national interest, in building global or regional alliances and through them, seek to influence the standards by which international relations are conducted. Hence, ratification of international treaties does not involve a handing over of sovereignty to an international body. Treaties may define the scope of a State's action, and treaties which state ratifies may influence the way in which such state behaves, domestically and internationally. Despite's decision to ratify a treaty is a judgement that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement. In Malaysia, for instance, the ratification of international treaty has to pass through the legislative body and be formally legislated in the constitution in conformity with various domestic laws before it can be finally considered legally ratified. Moreover, this cannot be done unless it has been convincingly considered a national interest. Malaysia has been actively accommodating refugees either from neighboring state like Vietnam, Cambodia, Laos, Aceh and Myanmar or overseas such as
Bosnian and Syrian refugees. Regardless of this commitment that cost the government both man power and capital, it remains unrealistic to hosts several thousands of refugees of this nature without any legal stands. On the other hand, Malaysian efforts was not receive due recognition by UNCHR due to her non-signatory party to 1951 convention on refugee. It does Malaysia no good reputation in the eye of international communities if such effort cannot be reputedly recognized. Therefore, it remains a future debate whether Malaysia will keep the status quo or do otherwise hence the human rights law has been widely attended to by ASEAN in recent year (Human Rights Watch, 2004).

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REMEDIES FOR VICTIMS OF ABUSE AMONG THE ELDERLY UNDER ISLAMIC FAMILY LAW IN MALAYSIA

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Abstract

The elderly have been identified as a vulnerable group. Due to their vulnerability, they should be protected. However, in a contemporary society, they have been made victims of abuse, neglect and abandonment. Elder abuse is not a new issue at the international level. It is in fact a serious social problem that is a growing concern. Some countries have enacted specific legal mechanisms to address and prevent the problem. In Malaysia, the abuse of the elderly is recognized as a form of domestic violence. The legislation dealing with matters pertaining to domestic violence is Domestic Violence Act 1994 (Act 521) (DVA) and Penal Code. These statutes are applicable to both Muslims and non Muslims. Despite the growing literature on the issue of elder abuse in Malaysia and the legal protections offered by the DVA to the elderly victims, little has been written on the protections of the elderly abused victims among muslims as provided under the under Islamic family law in Malaysia. Using content analysis, this paper aims to explore the remedies given to the abused elderly as provided for under the Islamic Family Law (Federal Territories) Act 198.

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Introduction

In Malaysia, the elderly refers to those who have reached the age of 60 years. The ruling with regard to age limit is based on the resolution of the United Nations (UN) World Assembly on Ageing in Vienna in 1982 (DOC, n.d.). It is undeniable fact that the elderly belongs to a group of citizens who are at risk of and vulnerable to violence and crime. Due to their old age, vulnerability and weak physical compared with younger people, they often being victimised by criminals or unscrupulous individuals. In the United Nations General Assembly in 2011, it was declared that four challenges faced by the elderly these days are discrimination, poverty, crime and abuse. In Malaysia, abuse of the elderly is classified as a form of domestic violence. Generally domestic violence are all types of violence committed against any member of the family including spouses, children, the elderly or any member of the family. Previously, domestic violence is frequently associated with abuse of wife and children. However, the elderly nowadays were not spared from becoming victims of domestic violence.

Definition of Elderly Abuse

There has yet to be any specific definition of elderly abuse which is globally accepted so far (Fallon, 2006). In fact, abuse of the elderly is indeed a very complex issue because it can be studied from various perspectives according to different disciplines or fields of specialization of the study (Department of Justice, Canada, 2009). In addition to the diversified disciplines, abuse of the elderly are often examined from the local community’s perspective. Thus, it resorts to different results based on the perspective of those who study and evaluate the issue. For example, harsh treatment or verbal abuse against the elderly may be considered as an act of abuse in a society, but it may possibly be regarded as normal treatment in a different community. According to Islam, the word "ah" or "uh" which are uttered by a person to his parents is an act which is strictly forbidden let alone acts that cause physical injury to any or both of his parents who are old. If the feeling of the parents is hurt by the slightest word such as "ah", it will be considered as an act of insurrection. Insurrection against parents, especially elderly parents is a major sin in Islam. In view of different disciplines and insights as well as culture of a society, it is difficult to come out with one definition of elderly abuse which can be accepted worldwide.
In the United Kingdom alone there are several definitions proposed. Among them are: The Social Services Inspectorate of the UK Department of Health (1993): “Abuse may be described as physical, sexual, psychological or financial. It may be intentional or unintentional or the result of neglect. It causes harm to the older person, either temporarily or over a period of time”.

In a report by SAVE Project, it was stated that: “Abuse is the physical, psychological or financial mistreatment of an older person by an individual, who has a relationship with them. The abuse is a violation of a person’s human and civil rights causing distress. The violation can manifest itself once or repeatedly” (SAVE Project, Lewisham Social Services 1995).

Although there are various definitions given, most of the writings and researchers nowadays are more inclined to use the definition given by Action on Elder Abuse (AOA) in the United Kingdom which has also been adopted by the International Network for the Prevention of Elder Abuse in the United States, namely: “Elder abuse is a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which may cause harm or distress to an older person” (Krug et al., 2002).

In contrast to the two previous definitions that include the types of abuse and the effects of the actions to the elderly as an element in the definition of abuse, the definition used by the AOA tends to define abuse of the elderly as a breach of one’s trust against a victim. When there exists a trust relationship between a person and an elderly, breach of the latter’s trust will result into a condition called abuse. The trustee is usually composed of children or the elderly caregiver. This definition is also applied in Malaysia (Tengku Aizan, 1999).

Types of Elderly Abuse

Elderly abuse may occur within family range and in institutions. For domestic abuse, perpetrators of abuse are usually comprised of family members such as children, siblings, in-laws and other caregivers who have family relationship with the victim. The elderly living in institutions or care centers can also become victims of abuse either by their children, caregiver staff as well as fellow inmates at the institution. American Psychological Association (2012) divides the abuse of the elderly into five types: physical abuse,
psychological or emotional abuse, financial or material abuse, sexual abuse and neglect. While the National Center on Elder Abuse (1998) classifies the elderly abuse into seven types namely:

1. Physical abuse: Suffering from pain, injury or physical coercion on the elderly. Examples are elderly who are being kicked, slapped, pushed roughly or being subject of other forms of physical severity.

2. Psychological / emotional abuse: Acts which lead to mental, emotional suffering or which cause fear in the elderly. Psychological / emotional can be divided into two, namely, verbal or non-verbal acts. Some examples of psychological abuse via verbal acts are harrassment, calling them rudely, using harsh words or other kinds of acts that can leave emotional impact on the elderly. Psychological / emotional abuse / emotional which are not in verbal form includes obstruction of the elderly’s freedom to socialise, and isolation from family and/or friends where they are not allowed to communicate with the surrounding communities.

3. Sexual abuse: Abusive and exploiting acts involving intimidation, coercion or inability of a person to give consent to a sexual act.

4. Financial / material exploitation: Improper or illegal exploitation and/or use of money, funds or other resources belonging to the elderly. Examples are misuse money or property of the elderly, or committing fraud or coercion which lead the elderly to make transactions involving his or her property either knowingly or unknowingly. It is also called as economic abuse.

5. Neglect: The failure of a person who holds the mandate to provide the basic needs of the elderly person’s life. This situation can also occur where the caregivers leave the elderly alone at home and neglected in terms of self-care, health, hygiene and so on.

6. Dumped / eliminated: Left alone or deserted by family members or ultimately dumped out of their families by not acknowledging that particular elderly as family members or parents.

7. Self- neglect: Act of neglect by an elderly against his own self. This situation occurs when an elderly person neglects his own condition by not taking care of his own self, hygiene, or refuses to take medication as prescribed by a doctor and so on, or refuse to eat proper food.

Looking at the classification of elderly, it can be said that elderly abuse is quite different from other types of domestic violence such as abuse of wives and children. Abuse against a wife may not occur in institutions, while abuse of children is more towards physical abuse. In addition, self abuse also
does not apply in cases of abuse against wives and children. The scope and type of abuse of the elderly is wider than the abuse of wives and children.

The Scenario of Elderly Abuse in Malaysia

Elderly abuse is a global issue. Most countries with large populations of elderly are experiencing this problem. The studies carried out abroad affirm the existence of such abuse cases. In fact, the incidence of abuse has been detected as early as 1975 (Krug. Et.al, 2002). In Malaysia, abuse of elderly and old parents is still considered as a new issue and news on elderly abuse has yet been pushed into the limelight. Even so, it has been recognised as a social problem (Rahimah, 2007) and a sort of crime in society (Jal Zabdi, 2010). Although many studies have been carried out on the abuse of the elderly by international researchers, the writings are still limited in Malaysia. Apart from the lack of research and writing, the issue is not much discussed openly by social activists and local academics. Hence, not much information is made known to the public relating to it. In Malaysia, study on abuse of the elderly is still considered to be in its early stages compared to studies conducted by researchers abroad. Most cases of abuse are not fully disclosed due to several factors such as constraints in getting real data, the difficulty of identifying cases of abuse and also the refusal of the elderly to reveal their cases even if they are victims of abuse. Moreover, abuse of the elderly is less exposed in the mainstream media in Malaysia (Jal Zabdi, 2009). Thus, the extent of the problem of abuse against the elderly occurring in Malaysia can not be evidently identified.

Despite of lack of data, Malaysia is expected to face the problems of elderly abuse in near future when it will soon become a longstanding country. Through the experiences of other countries, abuse of the elderly is a critical issue and it became one of the main agenda of the elderly population of the country when they dominated the citizen population. Therefore, Malaysia should learn from the experience of other countries in dealing with the increasing population of the elderly.
OBJECTIVE AND METHODOLOGY

The purpose of this article is to explore the remedies given to the abused elderly as provided for under the Islamic Family Law (Federal Territories) Act 1984. The provisions in the Enactment will be analysed to highlight the rights given to the elderly abused victim.

Remedies under the Islamic Family Law (Federal Territories) Act 1984

Discussion on remedies or rights of victims of domestic violence is oftenly founded on the Domestic Violence Act 1994 (DVA 1994). Undoubtedly so far DVA 1994 provides certain rights to victims. Victims of domestic violence such as spouses, children, the elderly or anyone in their family members can apply to court to seek protection from being further abused by other family members. The court may order for the grant of protection, either temporarily or permanently to victims of violence. Additionally DVA 1994 also provides for the right of victims to claim compensation from the abuser.

As for Muslims, besides DVA 1994, any victim of domestic violence may also apply to the Syariah Court under Islamic Family Law. In contrast to the DVA 1994 that provides remedies to the victims by stipulating the rights to apply for protection for shelters as well as compensation for accruing damages consequence to the violence within the family, the Muslim can apply for several court orders in relation to marriage provided under Islamic Family Law in every state in Malaysia. The discussion in relation to this issue will highlight the rights of the elderly to make a claim under the Islamic Family Law (Federal Territories) Act 1984 (Act 303).

The Act 303 is an Act which entitles the elderly to claim for mal cases. It specifically stipulates provisions concerning marriage, divorce, custody and other matters of Muslim family life. There are two statutory provisions in the Act 303 which are relevant to victims of domestic violence. Section 52(1) entitles a wife to apply to the court to dissolve her marriage or to apply for fasakh due to some certain reasons caused by her husband. Section 60 on the other hand entitles parents to claim maintenance from the children. It should be noted that both of these provisions are very general and do not mention the rights of the elderly in particular. However, these provisions also apply to cases of elderly who become abuse victims by husbands or are being neglected in term of maintenance by their children. Below are the rights provided for by Act 303 to any victims of domestic violence.
Right to Apply for Dissolution of Marriage or Fasakh due to Neglect of Maintenance by Husband

A wife is entitled to receive maintenance from her husband. Maintenance of a spouse is obligatory on every husband. Maintenance consists of outward and inward needs. Failure on the part of a husband to pay alimony or fulfil the outward or inward needs of his wife entitles the wife to apply for dissolution of marriage. Section 52(1) (b) states that a wife has the right to apply to the court to dissolve the marriage if her husband has neglected or failed to provide her maintenance for a period of three months. Subsection (d) of the same provision stipulates the right to apply for fasakh if the husband does not fulfill the conjugal obligation of marriage without reasonable cause for a period of one year. The court in the case Ayu Indira Seak Pei Tang vs. Abdullah Mohd Rosli bin Sahid [2006] 1 CLJ (Sya) 298 had allowed the dissolution of marriage on the failure of the husband to provide maintenance for three years.

Right to Apply for Dissolution of Marriage (Fasakh) due to Neglect or Cruelty by Husband

Section 52(1) (h) outlines some circumstances where a wife is allowed to apply fasakh in cases of abuse by her husband. According to this section, a wife can apply to the Syariah Court to dissolve her marriage or to apply fasakh if her husband:

i) habitually assaults her or makes her life miserable by acts of cruelty; or

ii) associates himself with immoral women or lives out vile behaviour according to Islamic Law; or

iii) forces the wife to live in an immoral life; or

iv) disposes the wife’s property or prevents her from using her rights in law over the property; or

v) obstructs her in the observance of obligations or duties or practice of the religion; or

vi) if he has more than one wife, he does not treat her equally in accordance with the requirements of Islamic Law.

The above sections do not specifically outline the rights of the elderly but it is understood that any women who aged 60 years and above (of elderly age) may invoke these provisions if they are experiencing any of the above conditions. The conditions set out in the above provisions can be
regarded as abusive towards the physical or emotions or psychology of the wife if committed by a husband.

There are several cases in which the court allowed the application for a wife to dissolve the marriage based on the provisions of the above section. Though the cases initiated by the wife at the Syariah court under such provisions does not include those who are elderly, this right is granted to all spouses regardless of age. In the case of *Hairun binti Mohd Sharif vs. Omar bin Mohd Noor* [2004] CLJ (Sya) 75, the appellant in this case applied for dissolution of marriage by way of *fasakh* under section 52 (1) of the Family Law of the Islamic State Selangor 1984 on the ground that the respondent (her husband) had abused and beat her. The medical report submitted supports the appellant’s claim, in which it proved that the blows by the respondent had caused wounds and bruises on the appellant’s body. The judge acknowledged that abuses committed by the respondent was a form of persecution under the Islamic law, but was of the view that there was no sufficient evidence to suggest that the respondednt had constantly hurt the appellant as required under section 52 (1) (h) Enactment. Therefore the appellant’s application for *fasakh* was dismissed by the court. The appellant appealed against this decision. In allowing the appeal, the court held that the injuries suffered by the appellant and the physical blows by the respondent is a vicious blows that should not be done by a husband on his wife. It is obvious that such blows sufficiently proved the persecution on the appellant according to Islamic law.

Meanwhile, in the case *Rosliah bint Abu Kassim vs. Abdul Rahman bin Ibrahim* [2004] CLJ (Sya) 270, the wife applied for dissolution of marriage due to ongoing conflicts. The issue to be decided by the court was whether the situation described as continuous dispute fall within the meaning of suffering, which entitled the wife to seek the dissolution of marriage. The appellant claimed that the respondent (her husband) was irresponsible, had beaten her and threatened to kill her. Evidence was submitted to show that the marriage of the appellant and the respondent was always in a state of tension, where they often involved in disputes and quarrels. The judge in this case has allowed an appeal by the wife and decided:
Marriage is built on the virtuous ground and not on persecution. Even divorce is not encouraged in Islam; no one should be forced to suffer in a marriage that one does not like. In other words, if a marriage has failed and if its aims are not achievable, what more if it causes harm, hardships, suffering, quarrels and fights, then to separate in kindness is better as a solution.

Through the provision of section 52 (1) (h) (iv) above, right to apply fasakh is available for the wife if the husband had committed financial exploitation against her. A wife is allowed to apply for dissolution of marriage if her husband disposes her property or prevents her from using her legal rights over her property. Example of case involving financial exploitation by a husband can be seen in a court decision in the case Ruaida lawn Che Nora’zam binti Othman bin Noordin [2012] 1 CLJ (Sya) 262. In this case the plaintiff (the wife) applied for fasakh on the ground that her husband had disposed her property. In other words her husband had committed abuse or financial exploitation on his wife. During cross-examination, the defendant admitted that he had pawned a necklace belonging to the plaintiff twice. The necklace was bought by the plaintiff herself at a price of RM3,000. During the second time he pawned it, the defendant did not redeem it. The court allowed the petition for dissolution of marriage by the plaintiff and held that subsection 49 (1) of the Administrative Law of Islam (Terengganu) Act 1985 provides for the grounds that allows for court order to dissolve a marriage. Based on the facts of this case and the provisions of Islamic Law, adopted by the plaintiff, the reason for this application was within the list in the subsection.

**Maintenance Claims by Parents against Children**

If the liability to provide maintenance for the spouse is on the husband, Islam requires that children with sufficient financial means to maintain their parents who are not able to earn their own living. Among the maintenance required on the parents are shelter, clothing, food and health. In Surah al - Talaq (65: 7), Allah says:
Lodge them during the prescribed period in the houses wherein you dwell, according to the best of your means; and harass them not that you may create hardships for them. And if they be with child, spend on them until they are delivered of their burden. And if they give suck to the child for you, give them their recompense, and consult with one another in kindness; but if you meet with difficulty from each other, then another woman shall suckle the child for him (the father). (al-Talāq, 65: 7)

If all the conditions setforth in Islam are met, it becomes the responsibility of the children to provide maintenance for their parents. Failure fulfill such obligation will give rise to the parents to apply to court for the right to maintenance. Parents have the right to apply for rights to alimony based on the provisions of section 60 of Act 303 which empowers the court to order in favour of one’s maintenance. Section 60 states:

The Court may order any person liable thereto according to Hukum Syara', to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health and the Court is satisfied that having regard to the means of the first-mentioned person it is reasonable so to order.

In connection with the maintenance claim by elderly parents, in case Kassim bin Othman & Fatimah binti Salleh vs Raja Suzana binti Raja Kasim & Zul Azli bin Hashim [2010] 3 LNS 8, the plaintiffs claimed maintenance from his son and the daughter in law pursuant to the provisions of section 61 of the Islamic Family Law (Negeri Sembilan) Enactment 2003. Plaintiffs in this case had pleaded inter alia that the defendants are to feed them during their lifetime, are allowed to stay at home that they claimed for their whole lives, are allowed to move freely and reasonably and perform their activities in the house and the surrounding area as well as the right to be visited by other children. In allowing the plaintiffs’s claims, the court has given a judgment among others that the two defendants should maintain both the plaintiffs (both parents and parents-in-law) during their lifetime. Plaintiffs were also allowed to stay in their homes with rent paid by the defendants and allowed to move reasonably and freely.
Earlier in the case of *Khalil bin Ahmad v Kamal bin Khalil* [2004] CLJ (Sya) 451, the plaintiff, a father, has applied to the court for the right to maintenance which had been neglected by his son since the past 10 years. The plaintiff had sought alimony payments of RM500 per month, arrears of maintenance of RM36,000 for the neglected period of ten years and claimed RM2,000 for settlement of medical debt of the defendant’s stepmother who was critically ill. In allowing part of the plaintiff’s claim, the court ruled that provision of money for life expenditure for parents is obligatory on the children subject to conditions, including (i) that the child has spare in terms of food, clothings and his own families and dependants; and (ii) the parents do not have wealth. Taking into consideration the facts and circumstances as well as the defendant’s ability and income, the court decided that the defendant should pay a sum of RM2,000 for medical debt and pay the balance of RM200 every month to the plaintiff (father) as maintenance.

The above two cases reflect that the court will allow the claim for maintenance by parents, especially those who are not able to earn their own living. Under such circumstances, the children will be made accountable to provide maintenance to both of their parents.

**Conclusion**

Based on the above discussion, it clearly shows that elderly who are Muslims and suffer from any abuse, have the right to make an application to court to seek remedies for the abuse he endured. For victims of abuse, in addition to the rights provided under the civil law, they are also entitled to make an application for any remedies under the governing family laws of their respective states. All of these laws give rights to victims of domestic abuse to seek remedies or *fasakh* or dissolution of marriage (in the case of a husband and wife) and to seek an order to earn the right for maintenance in the case of parents. Through the above discussion, it further reflects that victims of abuse or domestic violence who are Muslims have been allocated with certain rights, i.e. rights which can be claimed in civil court by virtue of the Domestic Violence Act 1994 or filed under the Islamic Family laws by virtue of acts or enactments enforced in each state. The types of abuse described in the Islamic Family Law
(Federal Territories) Act 1984 is physical abuse which refers to financial abuse, obstruction to exercise rights towards religion and the neglect in term of maintenance aspect.

Reference


Website: www.alislam.org
SHAREHOLDERS ACTIVISM AND SHAREHOLDERS POWER TO INSTRUCT

Mohd Sulaiman, A.N.¹ & Hassan, H.²

Abstract

Objective: While there are many forms of shareholder activism, the power to initiate and approve proposals is considered as an important measure of shareholder primacy and activism. However, in many countries which have transplanted or inherited the Anglo-Saxon governance model represented by the UK, shareholders intending to present their proposals to the general meeting often face a significant legal barrier due to the division of power doctrine prevalent within. The article examines recent decisions within the Commonwealth where attempts have been made to reconfigure the division of power doctrine which functions to confer to the board the power to decide on management matters.

Method: The article examines the position in several Commonwealth countries regarding director primacy.

Result: This article provides guidance to directors and investors in navigating the limits of the legal framework regarding the power to instruct and offers insights to policy makers interested in enhancing shareholders empowerment.

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INTRODUCTION

Shareholders activism is considered as a means of addressing mismanagement and management's lack of accountability because a regime that does not empower shareholders will result in poor accountability as it creates mandatory deference to management. (Bebchuk, 2005; Fairfax, 2008, Smith et al, 2011). There are many forms of shareholder activism. (Sjöström, 2008) Nonetheless, the ability to propose and initiate shareholder proposals is considered as a crucial component in the arsenal of rights of an active shareholder and a significant component to measure state of minority shareholders empowerment and protection. (Lele and Siems, 2007; Armour et al, 2009; Spaman 2010; Anderson et al, 2012)

However, shareholders intending to present their proposals to the general meeting often face a significant legal barrier due to the division of power doctrine prevalent within countries which have transplanted or inherited the Anglo-Saxon governance model represented by the UK. The division of power doctrine within a majority of countries within the Commonwealth, including Malaysia, has primarily been in favour of conferring power over business decisions to directors. The traditional and prevailing view relating to the power to manage the company is that shareholders cannot interfere or intervene in the directors’ exercise of their power to make business decisions, including not having the power to instruct the board. The directors primacy theory is backed by efficiency arguments, specifically that modern companies can only function efficiently if shareholders cede control to a select group to enable business decisions to be made expeditiously. (Bainbridge, 2006a, 2006b). A corollary to the director primacy theory is that although shareholders may convene meetings themselves or to request that the company convene a meeting on behalf of the requisitionists, and to put items on the agenda, the purpose of the meeting must not be an improper one and that the agenda cannot include resolutions that the general meeting has no power to pass. (NRMA Ltd v Parker (1986) 6 NSWLR 517; 4 ACLC 609) This restriction applies even where the resolution is expressed to represent a non-binding opinion or request. (NRMA Ltd v Parker (1986) 6 NSWLR 517; 4 ACLC 609)
Attempts to reconfigure the director primacy governance model have normally been rejected by the courts. However, recent decisions from Australia, Ireland and Malaysia have reignited attempts to reformulate the 'division of power' doctrine and director primacy theory. These cases indicate an increasing trend of shareholder activism within the Commonwealth, reflecting changing community and business expectations.

SHAREHOLDER PROPOSALS BY SOCIAL ACTIVISTS.

One of the criticism against expanding shareholders power to initiate and propose resolutions is the possibility that this may create conflicts amongst shareholders as managers will inefficiently accommodate activist or institutional shareholders (Bainbridge, 2006; Anabtawi, 2006; Stout, 2007; Matsusaka and Oguzhan, 2013). Activist shareholders is often identified as shareholders who desire to influence companies to adopt socially responsible practices and policies particularly relating to environmental, social and governance issues (ESG). The connection between shareholders activism and corporate sustainability agenda is that expanding shareholders power by enabling them to propose resolutions is considered as a means of incentivising companies to adopt sustainable business practices by 'forcing' management to accede to shareholders' request to adopt socially responsible practices and policies. However, due to the division of power doctrine, most proposals will not be added to the agenda because it relates to a matter that the general meeting has no power to decide.

In 2015, the Federal Court of Australia handed down its judgement in Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2015] FCA 785 (ACCR v CBA) which reiterated the director primacy model of governance for Australian companies. The case arose out of attempts by the Australasian Centre for Corporate Responsibility (ACCR) to include several of its social and environmental proposals to be included in the annual general meeting (AGM) of the Commonwealth Bank of Australia (CBA). The ACCR v CBA case was not the first time that activist shareholders tried to change a company's strategy and practices to consider environmental, social and governance issues. There were attempts since 1999 where environmental and union activists in Australia utilized the right to convene AGM to highlight concerns about environmental degradation and little protection.
of employees’ interests in companies such as Rio Tinto and Westfarmers. (Anderson & Ramsay, 2006; Biefeld et al, 2004). The ACCR website also listed down several other shareholders resolutions involving ESG related proposals which it and other activist shareholders had presented to various energy companies.\textsuperscript{iv}

In \textit{Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia} [2015] FCA 785, ACCR lodged its proposals to be considered at the company's meeting. The three proposals which ACCR sought to present to the AGM were as follows:

1. In the opinion of shareholders it was in the best interest of the company for directors to provide a report outlining the quantum of greenhouse emissions that CBA was responsible for financing, the risks to the company from un-burnable carbon and the current approach adopted to mitigate those risks (the First Resolution);

2. That shareholders express their concerns as to the absence of a report identifying the level of greenhouse gas emissions CBA was responsible for financing and associated risks (the Second Resolution); and

3. That each year at about the time of the release of CBA's annual report, the director's report to shareholders on their assessment of the quantum of greenhouse gas emissions CBA was responsible for financing (the Third Resolution). ACCR proposed for CBA's constitution to be amended to incorporate this resolution.

However, on 15 September 2014, CBA published its notice of meeting for the 2014 AGM which included only the third proposed resolution. ACCR was informed that the other two resolutions cannot be presented for voting as they impinged on the board's authority to make business decisions. The notice also included a statement by the CBA's board that it did not consider that the resolution was in the best interest of shareholders and \textit{recommend shareholders to vote against the resolution}. CBA's announcement to the ASX included the same statements.

ACCR then brought an action for an injunction for CBA to include the two excluded resolutions. ACCR argued that the company could not refuse to include the matter on the agenda to be voted as it was merely recommendation of a non-binding nature and would therefore not be in contravention of the rule that the board has the power to manage the company's business. The court had to consider whether the board was correct in refusing to
include two out of the three resolutions presented in the notice of the AGM. The court decided that:

"…the CBA constitution vests all powers concerning the business of CBA in the board (or in management under the board’s direction). The only powers that shareholders have are those which the Act “requires” be exercised by the company in general meeting and none of those powers include a power to pass non-binding advisory resolutions. The terms of the constitution, which make clear that management of the company is vested exclusively in the directors, preclude the implication of any power in the general meeting to pass resolutions proffering opinions on the way in which the board exercises its powers.

The court also decided that under the Australian Corporations Act, there is no power given to shareholders to pass non-binding resolutions. This is only conferred in relation to the non-binding resolution on a listed company's remuneration report. In addition, despite the legal framework giving shareholders power to ask questions and comment on the management of the company in the general meeting, these are to enable them to express views on the company's management and not to pass non-binding resolutions or make recommendations to the board.

SHAREHOLDER PROPOSALS ON BUSINESS AND OPERATIONAL MATTERS.

There have been several recent decisions involving shareholders proposal on operational matters. Obviously, the division of power doctrine is also applicable to non ESG proposals. In *Re Molopo Energy Limited v Keybridge Capital Limited* [2014] NSWSC 1864, a substantial shareholder of the company lodged a request for the company to convene a general meeting. The requisitioned meeting was for the purpose of proposing amendment to the constitution conferring the power to the general meeting to decide on a reduction of share capital and a further resolution to effect reduction of share capital. The company then applied to court for a declaration that the board was not required to convene the meeting as requested by the shareholder. this was on the basis that the general meeting has no power to propose a reduction of capital but only to approve it and "the shareholders, as a body in general meeting, are not an apt body to make a decision to effect a reduction in capital where the reduction is not proposed by the directors( para 77)."
It is worth noting that the shareholders proposal in *Re Molopo Energy* was in the form of an amendment to the constitution which confers management powers to the board. Although the court conceded that shareholders may propose an amendment to the constitution, in this case, that amendment was intended to effect a capital reduction. This would not be possible because to do so would allow the contravention of other provisions in the Australian Corporations Act.

*Re Molopo Energy* decision highlights a criticism often made against shareholders proposal in that this will encroach on operational matters with adverse impact on shareholder value. (Bainbridge, 2006a, 2006b). For example, there are shareholders who have agitated for higher payment of dividend or for the company to return capital by way of a share buy back. (Behrmann and Humber, 2013; Satariano, 2016) this type of shareholder proposals could hinder directors making decisions in the best interest of the company and could be detrimental to creditors' interests. *Re Molopo Energy* is evidence that this criticism may not be as grim as it sounds. The courts is unlikely to allow the power to overide the board's management decision to be exercisable if the decision affects creditors' interests (Watson, 2015) Various corporate transactions require compliance with specific procedures or requirements with the corollary liability for non-compliance. The payment of dividends for example or reduction of capital cannot be made unless certain rules particularly relating to solvency are complied with. Directors also have control over reporting of the firm's earnings which will be the basis for any decisions relating to return of capital to shareholders. Further, when these rules are breached, liability may attach to directors and shareholders who approve the dividends with awareness or knowledge that the company may not be able to comply with dividends rules. The courts would also be guided by the directors' duty to act in the best interest of the company. It is unlikely that absent bad faith or conflict of interest, the directors could be ordered to issue debentures instead of issuing shares or raising capital via private placement instead of a public offer.¹

In *Petroceltic International PLC v Worldview Capital Management SA & anor* [2015] IEHC 612, the Irish High Court was asked to grant an injunction preventing a shareholder of the company from convening an EGM to consider the passing of a shareholder
sponsored resolution. The resolution was related to Petroceltic decision to issue bonds. The company had written to Worldview that the requisition would be against the articles of association and therefore could not be validly made. It requested Worldview to withdraw the notice of the EGM and inform the company's shareholders that it will not take any action regarding the EGM. Worldview refused to do so. The company then applied for an injunction. The court decided that since the power is given to the directors under the article of association, the members, in general meeting, cannot, by ordinary resolution, seek to override or fetter that exclusive power. The court followed the decision of the English Court of Appeal in *Automatic Self Cleansing Filter Syndicate Co. v. Cunningham* [1906] 2 Ch. 34, stated clearly that the division of powers between the board of directors and the company in general meeting dependent, in the case of registered companies, entirely under construction of the articles of association, and that, where powers have been vested in the board, the general meeting could not interfere with their exercise. The articles were held to constitute a contract by which the members had agreed that the directors should manage certain aspects of the company’s affairs.

One reason why the court granted an injunction in favour of the company was because of the possibility that successive resolutions seeking expressions of opinion could be abusive and could, therefore, be prevented by court if repeatedly made. In this case, Worldview had on four previous occasions requisitions an EGM. The court stated that:

"To allow resolutions “for the expression of opinion” which in varying degrees would amount to a de facto restraint or impediment in market terms would be adding an intolerable risk to the jungle of risks faced by those working in the commercial world, so that the creation of value added such as employment, product, interest, and profit would, be greatly hampered. It was submitted by the defendants that to deny the possibility of such resolutions expressing opinions would amount to “disenfranchisement and marginalisation” of the members on key issues and the suppression of their freedom of expression and the damage which would result to the members from that course of events is self evidently inestimable; and further, that it was “counter intuitive” that shareholders cannot collectively express an opinion on the matter of concern in an era of increasing incorporate democracy and shareholder activism. However, the artificial construct of the company does, in fact, in an ordered way restrict the decision making powers of the shareholders. The articles of
association of any company may in particular cases increase such involvement with decision making and therefore aid democracy of shareholders but it is difficult to envisage any changes however liberal which would not at least in some way seek to put order on the expression of shareholders views so that such expression did not have the direct or indirect effect of altering the way in which the company did business as it was intended by articles, statute and regulation, or (as in this case) to have to face de facto market impediments engendered by such “expressions of opinion”.

The Malaysian decision in Expo holdings Sdn Bhd v Toyo Ink Group Bhd [2014] 10 MLJ 674, on the other hand, was an attempt by the shareholders of a Malaysian company to challenge the board’s decision to make a bonus issue of shares. The minority shareholders challenged the bonus issue and the special resolution amending the memorandum and articles of association to enable the board to make a selective bonus issue of shares. They sought to declare these resolutions void. The court held that although sect 60 provides that the amount in the share premium account can only be used for certain purposes, the section does not require that if the share premium account is utilised to pay for the bonus shares, the bonus shares must be issued to all existing shareholders. Although the question in this case was whether there was a breach of duty by making a selective bonus issue, the court reiterated the view that the directors have the discretion to decide how to utilise the shareholders funds and to capitalise sums in the reserves and share premium account as conferred on them by the constitution.

DEVELOPING LEGAL ISSUES

(a) The Future For Directors Primacy

Despite the above decisions which were not in favour of expanding shareholder's power, the directors' primacy could lose its stronghold in the future. Several common law jurisdictions have embarked on corporate law and the issue on whether shareholders could initiate proposals on matters which were traditionally within the board's domain are being reviewed. A case in point is Malaysia. In December 2015, the Companies Bill 2015 was presented to the Malaysian Parliament. The introduction of this Bill slated for Parliamentary approval mid-2016 and replacing the current Companies Act 1965, will introduce wide
ranging reform, amongst others, section 195 which will enable shareholders to give instructions to the board relating to board’s management functions.

Section 195 of Companies Bill 2015 provides
"(2) a meeting of members may pass a resolution which makes recommendations to the Board on matters affecting the management of the company.
(3) Any recommendation shall not be binding on the Board, unless the recommendation is in the best interest of the company, provided that—
(a) the right to make recommendations is provided for in the constitution; or
(b) passed as a special resolution."

Section 195(3) of the Companies Bill lays down several conditions before the board is obliged to act in accordance with the general meeting’s instructions. The recommendation is binding if the right to make such recommendation is conferred to the general meeting by the constitution. Although sub 195(3)(a) does not specify the voting threshold, the constitution may specify situations where the general meeting may make recommendations that will bind the board as well as whether an ordinary resolution or any higher percentage is needed. Alternatively, where the constitution is silent, the general meeting must pass a special resolution to instruct the board to do or refrain from doing something. The implication of these provisions is that even when the general meeting’s power is expanded so that it has reserve power to instruct the board in managing the company, shareholders would still require at least majority support for any such proposal. Without at least majority support, the board retains decision making authority regarding management of the company.

From a comparative law perspective, the change places Malaysia in a unique position compared to other common law jurisdictions such as UK, Hong Kong, New Zealand, Singapore and Australia. The present model Articles of Association for companies limited by shares in the UK Companies Act 2006 has made the UK as the most shareholder-centric jurisdiction (Enriques et al, 2009). The new rule arguably will make Malaysia more shareholder-centric than the UK. Unlike the UK where the statement regarding the power to instruct is placed in the constitution and its binding effect is dependent on the constitution stating so, the new power to instruct the board given to the general meeting in Malaysia is embedded in statute and cannot be contracted out of. This is also the case under the Hong Kong Companies Act 2014. Out of the above-mentioned countries, New Zealand Companies
Act was one of the earliest to confer on shareholders the power to make binding recommendations; this is to be found under sec 130 of the New Zealand Companies Act 1993. However, unlike the Malaysian Companies Bill 2015, sec 130 of the New Zealand Companies Act states that the recommendation is only binding if the constitution so provides and if it does not intrude on the 'reserve list', i.e., schedule 2 which contains a list of transactions which are within the board's power. Reform is also underway within the European Union with its Shareholder Rights Directive 2007/36/EC adopted in July 2007, which introduced amongst other, minimum standards for admission to meetings, shareholders' access to meeting-related information, proxy allocation and distance voting, and participation rights in terms of shareholders asking questions and tabling their own proposals.

(b) legitimate strategies to influence the board.

It is worth noting that in *ACCR v CBA*, the court affirmed that shareholders have the power to propose amendments to the constitution even if the amendment has the effect of making directors subject to shareholders' instructions. Similarly in *Petroceltic*, the court stated that the legitimate avenues open to the shareholders are in the form of obtaining support to pass a resolution of 50% of the shareholders required to change directors or the 75% required to alter the articles of association. These two strategies are within shareholders existing rights. ix

For jurisdiction which retains the traditional division of power doctrine, much depends on the wording in the constitution. Australia did consider expanding shareholders power but the law reform committee decided not to recommend any changes to the existing practice. (Companies & Securities Advisory Committee, 2000) Singapore embarked on a review of its company law and in 2002 published the *Report of the Company Legislation and Regulatory Framework Committee*, Ministry of Finance with another review undertaken in 2007 by the Steering Committee for the Review of the Companies Act which was completed in 2011. The respective reports stated that the review follows closely the development of the UK law reform development. However, to date, Singapore has not followed the UK Companies Act 2006 in giving shareholders power to make binding recommendations. Its model constitution for companies limited by shares does not have the equivalent of the UK
The Indian Companies Act 2013 identifies matters that are reserved for the board and provides that the constitution may provide for additional matters that are also reserved for the board. While there is no explicit provision giving the general meeting power to instruct the board, sec 179 states that the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do but this may be limited by the Companies Act, the constitution or regulations made by the company in general meeting. However, the shareholders' power to instruct does not enable the shareholders to order the board to enter into a course of conduct which contravenes any other provisions of the Companies Act itself. In these situations, the power to instruct does not mean that shareholders' recommendation even if passed as a special resolution has the effect of waiving compliance with statutory procedures and requirements. (Re Molopo Energy Limited v Keybridge Capital Limited [2014] NSWSC 1864)

The ACCR however has not considered the ACCR v CBA judgment as a setback and has not slowed down its ESG proposals. With other activist shareholders such as Getup, the Asset Owners Disclosure Project and a number of ethical financial advisers, it has lodged shareholders proposals with Origin and AGL seeking to require further information about ongoing power generation and supply chain emissions management and public policy positions relating to climate change in annual reporting. Unfortunately, none of these have been successful.

CONCLUSION.

It is likely that the debate regarding shareholders' right to initiate resolutions, to propose, approve or review corporate actions and attempts to reconfigure the division of power doctrine will continue. This is due to law reform and in some cases perseverance of activist shareholders. The ACCR v CBA case for example is on appeal. The ACCR v CBA litigation is a departure from the normal strategy adopted by activist shareholders. Shareholders proposals are quite rare in the common law world. Even in the US, where shareholder proposals are quite common, they are relied on:
"... to trigger dialogue and help ensure a topic is raised at the board level. Investors that submit proposals generally view them as an invitation to a discussion, preferring to reach agreement with the targeted company without the proposal going to a vote. If agreement cannot be reached, they generally believe that votes on shareholder proposals provide management with valuable insights into investor views." (EY, 2015)

In the other cases such as Re Molopo and Petroceltic, the traditional view prevailed due to the constitution of the respective companies. However, even if the constitutions were changed to enable shareholders to instruct the board, the experience in Australia involving social activist shareholders indicates that rational shareholders are aware that despite managing to propose resolution, there is no guarantee of success. Shareholders are generally "aware of their own ignorance" and normally insert themselves in management only when necessary. (McDonnell, 2011)

Shareholders are more likely to follow management unless there are clearly visible signs of managerial failure - such as repeated unsatisfactory dividend distributions, continuous share price drops or blatant private rent extraction by directors. (Dignam and Galanis, 2004)

Nonetheless, the cases discussed earlier are significant to activist shareholders to manoeuvre around the legal quagmire restricting the shareholders’ ability to propose resolutions. There are also lessons for companies in crafting the appropriate response to shareholders proposals.

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THE APPLICATION OF SHARI'AH PRINCIPLES OF ADR IN MALAYSIA CONSTRUCTION INDUSTRY.

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Abstract:

In Malaysia the implementation of alternative dispute resolution (ADR) in the construction industry mainly concentrates on arbitration. Being one of the standard contractual terms in building contracts, arbitration is one of the measures adopted to resolve disputes between contractual parties. Other methods of ADR includes mediation and adjudication. With the introduction of Construction Industry Payment and Adjudication Act 2012 (CIPAA), adjudication is also emerging as a method to resolve disputes on payment issues in construction contracts. Under the Islamic law, an amicable settlement of disputes, either in personal or commercial matters is encouraged and allowed, except if it shall turn something from prohibited (haram) into permitted (halal) or from permitted (halal) into prohibited (haram). In fact, ADR has been part and parcel of the Islamic judicial system more than 1000 years. It is highly acknowledged due to the recognitions on sulh (negotiation, mediation and compromise of action), tahkim (arbitration), a combination of sulh and tahkim (med-arb), and muhtasib (ombudsman). This paper discusses the legal principles behind ADR; from both the Malaysian law and Shari’ah perspectives. It is anticipated that the discussion would be able to highlight what are the differences between Shari’ah and the Malaysian law concepts of ADR and whether the Shari’ah principles of ADR could be applied in Malaysian construction contracts. Research methodology adopted in this paper is doctrinal and case law analysis.
1. Introduction

The Malaysian construction industry constitutes an important element of the Malaysian economy.\(^1\) This industry generates wealth and improves the quality of life of the people through the provision of social and economic infrastructure such as schools, hospital, houses, roads, airports, ports, bridges, dams etc.\(^2\) The industry also acts as a catalyst for and has multiplier effects to the economy.\(^3\) Although it accounts for only 2.5% of the gross domestic product (GDP) in 2007, it grew to 3.5% in 2009 despite the economic slowdown.\(^4\) The construction industry in other parts of the world has also provided ample opportunities for Malaysian contractors to flourish. Since 1986 a total of 386 overseas projects valued at RM22 billion have been completed.\(^5\) It is envisaged that the long-term sustainability intended by the implementation of the Malaysian Construction Industry Master Plan will result in the construction industry contributing 5% to the country’s GDP by 2015.\(^6\)

2. Construction Disputes

The construction industry is known for its conflict, with its characteristics mix of complex contractual relationships,\(^7\) huge sums of money at stake, highly complex projects and remorseless time pressure, as much as its spectacular construction and civil engineering

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\(^2\) Ibid.

\(^3\) Executive Summary Construction Industry Master Plan Malaysia 2006 – 2015, via <http://www.cream.com.my/publications/cimp.pdf> (viewed on 28 December 2009), at 1 and 4. The industry has generated some 800,000 jobs opportunities and creates a multiplier effect to industries such as manufacturing, financing and professional services.

\(^4\) Speech by Datuk Ahmad Husni Hanadzlah, Second Minister of Finance, on 10 Nov 2009 during the Sidang Kemuncak Pembinaan Malaysia Kedua 2009. The first quarter saw a growth of 1.1% and increased to 2.8% in the 2\(^{nd}\) quarter of the year. Reported by Bernama.

\(^5\) Ibid., at 6. The projects were mainly in India, the Middle East and the South East Asian Nations (ASEAN) regions.

\(^6\) Id., 9.

projects.\textsuperscript{8} It also has a reputation as a tough and aggressive world in which the weakest and even at times some of the strongest will go the wall.\textsuperscript{9} Disputes result not only from destructive or unhealthy conflict, but also when claims are not amicably settled.\textsuperscript{10} Hence, a construction project is considered by many a dispute waiting to happen.\textsuperscript{11}

Construction disputes itself, typically comprises both technical and legal dimensions,\textsuperscript{12} the former being the dominant issues in disputes. For this reason, litigation may not be the most appropriate forum for dealing with these types of disputes.\textsuperscript{13} The dissatisfaction with the traditional dispute resolution mechanisms which can no longer successfully cope with the growing needs and challenges of the present construction environment has invoked the industry to look towards other alternative methods.\textsuperscript{14} Alternative dispute resolution (ADR) is a generic description used to identify a wide range of resolution processes that aim to resolve disputes speedily and cost efficiently.\textsuperscript{15}

Disputes within the construction industry are inevitably related to time, money and quality. Disputes that are not resolved promptly, in all probability, would incur a considerable escalation in expenses which are hard or impossible to quantify. The visible expenses anticipated include the legal representatives, expert witnesses, and the cost of the dispute resolution proceedings itself. Amongst the less visible costs would be the company resources assigned to the dispute and lost business opportunities, while the intangible costs

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\textsuperscript{13} Ibid, at 224.


\textsuperscript{15} Sai On Cheung, at 224.
are identified as detriment to good working relationships and potential value lost due to inefficient dispute resolution process.\textsuperscript{16}

3. Alternative Dispute Resolution

Over the last few decades the perceived shortcomings of litigation and also arbitration have resulted in attempts to find other quick means to resolve construction disputes.\textsuperscript{17} ADR was first developed in the United States in early 1980s as a result of dissatisfaction with the delays, costs and inadequacies of the litigation process.\textsuperscript{18} However, it only began to receive consideration in the late 1980s and early 1990s.\textsuperscript{19} Since then, its development as a process to resolve civil disputes relatively inexpensive and quickly has gained momentum and is now widely practiced in the construction industries in many countries, especially in Canada, United Kingdom and Australia.\textsuperscript{20} The acronym ADR has also been defined as Additional Dispute Resolution and Assisted Dispute Resolution. With time, it also stands for Appropriate Dispute Resolution\textsuperscript{21} and Amicable Dispute Resolution to reflect these desired outcomes.\textsuperscript{22} The realization of ADR as a process that complements both litigation and arbitration has meant that the processes are constantly expanding to include new techniques which offer no limits to the types of dispute resolution processes that can be utilised. The main attraction of ADR is often the consensual process, but this also means that it will not be successful unless the parties each have a genuine desire to reach a settlement.\textsuperscript{23} Even though the most common ADR methods do not provide assurance of a resolution, in practice most of these methods lead to a final settlement.\textsuperscript{24} The key to a settlement process is that the parties and those assisting in the process understand and agree to the same process.

\begin{thebibliography}{99}
  \bibitem{18} Mackie, Miles, Marsh and Allen, at 3.
  \bibitem{19} Ibid.
  \bibitem{20} See also Holtham, Russell, Hird and Stevenson, at 121.
  \bibitem{21} Mackie, Miles, Marsh and Allen, at 20. The authors indicates that most advocates of ADR agree that the term ‘alternative’ is inappropriate as it adds to, and not replacing the litigation option.
  \bibitem{22} Sai On Cheung, at 224.
  \bibitem{23} Holtham, Russell, Hird and Stevenson, at 4.
  \bibitem{24} Mackie, Miles, Marsh and Allen, at 14.
\end{thebibliography}
The reasons for resorting to ADR include time savings, less costly discovery, more effective case management, confidentiality, and facilitation of early, direct communication and understanding among the parties of the essential issues on each side of the dispute.\textsuperscript{25} Other reasons are preservation of ongoing party relations, savings in trial expenses and providing qualified, neutral experts to hear complex matters.\textsuperscript{26} Traditionally, arbitration was the forum sought in the construction industry.\textsuperscript{27}

The ADR processes differ in their formality and placement of decision-making power. Some methods are non-binding and allow the parties to have control at all times over the outcome of the dispute, participate in the development of an agreeable settlement in the presence of a neutral third party and withdraw from the process at any point.\textsuperscript{28} Other methods may become binding\textsuperscript{29} where all powers lies with the neutral third party which is mandatory and have a formal structure that require strict adherence to the rules and implementation.\textsuperscript{30} The process chosen should provide a solution to suit the varied nature and size of construction disputes with the object of saving time and costs.\textsuperscript{31} Furthermore, due to the divergence in construction disputes, the right process should also be adapted to the type of problem.\textsuperscript{32}

Apart from arbitration, other ADR methods include mediation, conciliation, early neutral evaluation, expert determination and mini trial as well as other hybrid methods such as med-arbitration and dispute adjudication/review board. Brown and Marriot (1999) have identified eighteen main dispute resolution methods ranging from processes which offer the least control, which is litigation, to those that offer the greatest control, that is, negotiation. Due to the divergence in construction disputes, Mackie et al (2000) is of the view that the right ADR process should be adapted to the type of problem.

\textsuperscript{26} Ibid.
\textsuperscript{28} Pêna-Mora, Sosa and McConé, at 60.
\textsuperscript{29} Non-binding dispute resolution as in mediation, conciliation, mini-trial etc, while binding dispute resolution are as in arbitration (Americans accept arbitration as an ADR) and also adjudication.
\textsuperscript{31} Battersby, at 118.
\textsuperscript{32} Mackie, Miles, Marsh and Allen, at 258.
Although there is no one exclusive ADR for the construction industry, apart from arbitration, which is the most widely form of alternative dispute resolution mechanism in the construction industry, other spectrums of ADR include negotiation, mediation, conciliation, med-arbitration, adjudication, mini-trial, expert determination or appraisal, court-annexed ADR and dispute review board. The array of methods has advantages and disadvantages and despite having similar objectives, the processes involved are significantly different from one method to the other. Thus, there is a need for advice to tailor an appropriate mechanism to resolve a given dispute in a particular circumstance, as it may result in an unresolved dispute.

4. **ADR in Malaysia**

Notwithstanding this wide adoption of ADR within the construction industry, the geographical differences attributed to cultural factors, maturity of the industry, and prevalent legal systems in force influences the use of ADR practices. Furthermore, participation in ADR techniques remains largely voluntary, and the legal implication arising from them remain uncharted.

The most common alternative dispute resolution methods to resolve disputes in the construction industry are arbitration, mediation/conciliation, adjudication and expert determination. However, the dispute resolution methods that are normally incorporated in Malaysian construction contracts are arbitration and mediation. Arbitration is recognised and practice worldwide while mediation is yet to gain the popularity that arbitration has achieved in the resolution of commercial disputes in Malaysia. At present, Malaysia is

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33 Henry Brown and Arthur Marriot, *ADR Principles and Practice*, (1999) 2nd Edition, London: Sweet and Maxwell, at 12, do not consider negotiation as an ADR process. Although negotiation is a necessary component of ADR, it only becomes an ADR only if it is accompanied by neutral intercession and a more structure process framework.
34 Battersby, at 119.
35 Kumaraswamy, at 68.
36 Sai On Cheung, at 224.
37 Ibid.
38 Battersby, at 119.
seeking for an efficient and economical dispensation of justice and a more suitable dispute resolution technique to deal with current and future challenges in the construction industry. In line with the Malaysian CIMP, CIDB is advocating statutory adjudication as a suitable dispute resolution in the construction industry.

This article intends to limit and provide an outline on only three of the aforementioned ADR methods, which are arbitration, mediation and adjudication.

5. Arbitration

While the court is the main forum for resolution of construction dispute, arbitration is a well established part of the Malaysian construction industry.\(^{41}\) Arbitration has been in used in the region of Asia for quite some time and its provisions are included in almost all construction contracts in this region.\(^{42}\) Malaysia is not precludes and arbitration clauses are found in standard forms of contract, which are the PWD 203 and 203A (Rev. 2007)\(^{43}\) series which are used in public sector works, and the PAM Contract 2006\(^{44}\) and CIDB Building Works 2000 Edition\(^{45}\) which are used in private sector works. All these standard forms provide for arbitration as the final form of dispute resolution and has produced a de facto universality of arbitration as the normal method of settling disputes.\(^{46}\) It is a method of private dispute resolution in which the parties to the dispute agree to have it settled by an independent third party and to be bound by the decision he makes.\(^{47}\) This agreement may also be entered into after the dispute has arisen.\(^{48}\) The arbitrator may be chosen by agreement between the parties themselves or may be appointed by a nominating body named in the contract.\(^{49}\)

\(^{41}\) Ibid.
\(^{42}\) Natkunasingam & K Sabaratnam, at 413.
\(^{43}\) Battersby, at 129.
\(^{44}\) Clause 65. See Appendix A.
\(^{45}\) Clause 34. See Appendix B.
\(^{46}\) Clause 47. See Appendix C.
\(^{47}\) Sudra Rajoo, at 72.
\(^{48}\) Holtham, Russell, Hird and Stevenson, at 83.
\(^{49}\) Ibid.
\(^{49}\) Id.
Amongst the advantages of arbitration is the privacy and confidentiality afforded to the parties.\(^{50}\) The parties also have the freedom to determine an arbitrator or appropriate appointing body to ensure that he or she has relevant expertise and experience. They are free to choose their own ruled, with great procedural and substantive flexibility.\(^{51}\) There are very limited grounds of appeal against an arbitration award.\(^{52}\) One of the disadvantages of arbitration is the flexibility of the process can create uncertainty among the parties.\(^{53}\) Depending on the circumstances of a dispute, arbitration can be very quick and cost effective as a means of resolving dispute. On the other hand, it can also be very time consuming, cumbersome, expensive and adversarial which contributed to it earning the name litigation in the private sector.\(^{54}\)

Some the various issues on disputes that have been referred to arbitration have been identified as follows:\(^{55}\)

- Termination of the contract due to failure by contractor/sub-contractor to proceed diligently and competently on site, or the contractor/sub-contractor ceased working, or repudiation of contract by employer.
- Non-payment of variation claims, progress payment claims, extension of time claims, liquidated and ascertained charges against contractor/sub-contractor, validity of final account and certificate.
- Changes in design, defective materials, poor quality of workmanship, delay and extension of time due to local authorities’ requirements, and negligence and nuisance.

\(^{50}\) Id., at 119.
\(^{51}\) Id.
\(^{52}\) Sections 15(5) and 18(10) of the Malaysian Arbitration Act 2005.
\(^{53}\) Holtham, Russell, Hird and Stevenson, at 120.
\(^{54}\) See the judgment in Northern Regional Health Authority v Derek Crouch Construction Company Limited [1984] 1 QB 644, at 70 where Sir John Donaldson MR stated that “Arbitration is usually no more and no less than litigation in the private sector.” See also Battersby, at 121.
\(^{55}\) Rajoo, at 73.
In Malaysia, the guiding principles are set out in the Arbitration Act 2005, which repeals and replaces the Arbitration Act 1952.\textsuperscript{56} It is applicable to all arbitration proceedings commencing after 15 March 2006. This new Act has also addressed some of the perceived and actual failures of the arbitration process in the previous Act.\textsuperscript{57} It is based on the United Nations Commission International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (“the Model Law”) and has been adopted by some 63 countries worldwide.\textsuperscript{58} Although the Model Law was primarily drafted for the purpose of international arbitrations, the member states are free to modify the Model Law for use in their domestic arbitral regime.\textsuperscript{59} Among the common law states that have adopted this suggestion is India and New Zealand. Notwithstanding certain distinctions between their international and domestic arbitration, the New Zealand Arbitration Act applies the provisions of the Model Law in both these regime.\textsuperscript{60} In relation to this, the Malaysian Arbitration Act closely resembles the New Zealand model.\textsuperscript{61}

Although arbitration is a consensual process, the jurisdiction of the arbitrator or the arbitral tribunal and the scope of the arbitration are fixed by the terms of the arbitration agreement and the arbitration will be conducted according to certain prescribed procedural rules. These rules may be expressly agreed by the parties but where the parties do not make such a choice, or where the rules which they choose are silent on a particular point, the procedure of the arbitration will be governed by the statute on arbitration of the country in which the proceedings takes place.\textsuperscript{62} In Malaysia, the rules for arbitration which the parties may agree to submit to be the PAM Arbitration Rules, IEM, and Rules for Arbitration of the KLRCA, ICC Rules of Arbitration or MIArb Arbitration Rules 2000 Edition\textsuperscript{63}. By virtue

\textsuperscript{56} Section 51(1) of the Arbitration Act 2005 also provides that the Convention of the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320). However Section 51(2) provides that 1952 Act will continue to apply to arbitral proceedings commenced before the operative date of the new Act.
\textsuperscript{59} Ibid.
\textsuperscript{60} Id., at 3.
\textsuperscript{61} Id.
\textsuperscript{62} Ibid.
\textsuperscript{63} The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was established in 1978 (under the auspices of the international governmental international law body, the Asian-African Legal Consultative organization
of the doctrine of separability provided in the Act, the arbitration clause agreement has a separate existence and is an agreement independent of the main contract.  

Arbitration is to be distinguished from other ADR methods, in that it is a judicial process involving evidence and submissions by the parties before an independent arbitrator, who subsequently reaches a decision on the parties’ respective rights and obligations under the contract. The decision of the arbitrator is final and binding, subject to a possibility of very limited intervention by the courts. In contrast with adjudication, arbitration is not confined to certain time-limits, more readily enforceable and not susceptible to a rehearing. In comparison to mediation, the parties may be compelled to submit to arbitration.

Majority of construction contracts incorporated arbitration clauses as it is regarded as the main dispute resolution process, which is able to achieve the objectives of ADR. Yet, parties to construction disputes are often dissatisfied with the outcome of arbitration. Some of the discontentment spring from the following reasons:

- Construction arbitration can last for many months or even years due massive documentation to cover and consider, use of experts, representations from various parties and the attempt to be as thorough as possible.
Arbitration can be more expensive if more than one arbitrator is appointed in the tribunal.

The efficiency of a process may be affected if a non-construction arbitrator is appointed when an arbitrator with technical background would be more appropriate for a particular dispute.

Where disputes involve a myriad of technical as well as legal issues, arbitrators are not totally equipped to deal effectively with all the issues and the process reverts back to a process that relies far more on adversarial strengths.\(^72\)

There is no recourse if an arbitrator makes a wrong decision.

Protracted arbitration proceedings not only increase the costs of arbitration but are likely to cause immense harm to business relationships.

As a construction industry normally involves complex processes and multi-disciplinary inputs, this may give rise to complex disputes, which can only be brought to arbitration upon completion of the project.\(^73\) Small disputes which are not compounded as early as possible may lead to large disputes which are more difficult to resolve.\(^74\) In the meantime, this chain of events would have starved the aggrieved party of cash flow which is vital to the completion of the project.

6. **Mediation**

The fundamental of mediation that involves the encouragement of settlement by the assistance of a third party has been a practice of the Eastern region for centuries.\(^75\) The roots can be traced back to the Islamic sulh which covers negotiations, mediation, conciliation


\(^73\) Id., at 122.

\(^74\) Id., at 121.

\(^75\) See Cecil Abraham, Alternative Dispute Resolution in Malaysia, presented at the 9th General Assembly of the Asean Law Association in 2006 via <http://www.aseanlawassociation.org/9GAdocs/w4_Malaysia.pdf> (viewed on 4 November 2009), and Dale Bagshaw, Keynote address in the 4th Asia-Pacific Mediation Forum 2008 Conference, hosted by the Harun M Hashim Law Centre, at the International Islamic University Malaysia on 16th – 18th June 2008, Kuala Lumpur.
and compromise of action, the Chinese xieshang which means negotiation and consultation, and the Hindu’s panchayat which represents a village tribunal of five elders.\footnote{Refer to Abraham, Alternative Dispute Resolution in Malaysia and closing note by Syed Ahmad Idid in the 4th Asia-Pacific Mediation Forum 2008 Conference, hosted by the Harun M Hashim Law Centre, at the International Islamic University Malaysia on 16th – 18th June 2008, Kuala Lumpur.}

Although the modern or formal mediation is yet to mark in the dispute resolution process in Malaysia,\footnote{PG Lim, ‘Mediation, a slow starter in alternative dispute resolution,’ [2004] 1 MLJA 15, via lexisnexis.com.} the promotion of mediation in a number of industries have demonstrated that mediation is increasingly advancing into the society.\footnote{Natkunasingam & K Sabaratnam, at 410.} The insurance and financial industries have established a single forum, known as the Financial Mediation Bureau (FMB), an integrated dispute resolution centre for financial institutions under the supervision of the Central Bank of Malaysia.\footnote{Prior to 2005, there were two separate bureaus; Insurance Mediation Bureau and the Banking Mediation Bureau. On the 20th January 2005, The Central Bank of Malaysia officially launched the Financial Mediation Bureau (FMB) which replaced the IMB. The FMB combines the avenues for redress of the insurance industry and the banking and other financial services industry into a single organization. It was acknowledged at the launch that the two existing bureaus i.e. the IMB and the Banking Mediation Bureau had achieved considerable success in mediating disputes between insurance companies and banks and their customers. Source via <http://www.piam.org.my/annual/2004/003.htm> and http://www.bnm.gov.my/index?ch=9&pg=15&ac=162&lang=bn&print=1> (viewed on 5 January 2010).} This bureau, that was set up on the basis of the ombudsman schemes in the UK\footnote{Natkunasingam & K Sabaratnam, at 433.} offers consumer protection with regard to fair dealing with policy holders subject to certain requirements and limitations.\footnote{Ibid., at 433.} Its main aim is to provide services with regard to complaints or disputes with financial service providers over a claim involving monetary loss arising out of services provided by the bank, finance or insurance company.\footnote{Financial Mediation Bureau via <http://www.fmb.org.my> (viewed on 27 December 2009).} The award or decision of the FMB is binding on the institutions but not the complainant.

Other industries which provides an alternative forum facilitated by statute for resolving disputes or claims, which are simple, inexpensive and fast, are the Tribunal for Consumer Claims, an independent body operating under the Ministry of Domestic Trade, Co-operatives and Consumerism Malaysia, and the Tribunal for Homebuyer Claim operating under the Ministry of Housing and Local Government Malaysia. However, these bureaus and tribunals which are in operation are not strictly a mediatory forum as the
mediators will evaluate the dispute or claim and make a final and binding award in the circumstances the parties fail to reach and agree to a settlement.\textsuperscript{83}

In contrast with the abovementioned industries, there is no investigative complaints bureau in respect of the construction industry in Malaysia.\textsuperscript{84} The Malaysian CIDB is the only body at present that is attempting to regulate the construction industry and to promote standards within the industry. However, their role does not extend to investigating complaints from the public and other members of the industry and is simply an arm of the Government, empowered to carry out its activities by the Minister of Works and is therefore not an independent body.\textsuperscript{85}

The concept of mediation is a totally different process from arbitration in all respects saves only for the parties’ agreement to utilise the process as an alternative to litigation and the objective of privacy.\textsuperscript{86} It is non-binding and involves a neutral third party that does not make decisions.\textsuperscript{87} In construction mediations, this often forms part of the process of mediation in appropriate circumstances.\textsuperscript{88} It is contended that mediation and adjudication is included in a contract not as a replacement for arbitration but only as a means of avoiding arbitration.\textsuperscript{89} Mediation is faster and more cost effective than arbitration.\textsuperscript{90} It also avoids the risk of win-loss situation.\textsuperscript{91} The parties to mediation retain control over their positions and can walk away from mediation or take time to reconsider the situation.\textsuperscript{92} When goodwill exists between the parties, mediation being non-adversarial helps to promote amicable settlements and preserves business relationships.

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\textsuperscript{84} Natkunasingam & K Sabaratnam, at 433.
\textsuperscript{85} Ibid., at 433.
\textsuperscript{86} Battersby, at 119.
\textsuperscript{87} Ibid.
\textsuperscript{88} Id.
\textsuperscript{89} Id., at 129.
\textsuperscript{90} Ibid.
\textsuperscript{91} Ibid., 119.
\textsuperscript{92} Id.
\end{flushright}
Although mediation of construction disputes highly resembles other mediation, there are some peculiarities which merit consideration.\(^{93}\) Normally a mediator chosen to deal with a construction dispute is likely to possess substantial knowledge and experience in the construction industry, thus saving time and expenses for the parties. As construction disputes are document-sensitive, the mediator will most probably be called upon to facilitate the amicable exchange of documents. The mediator may require a longer time for presentations from parties and caucuses with parties as it may involve multiple parties and complex issues. The mediator may also be required to render advisory opinion on matters if this approach is agreed by the parties.

In Malaysia, mediation is gaining recognition in the construction industry, which is evidenced by the incorporation of mediation terms as a first tier of dispute resolution in a number of the Malaysian construction contracts.\(^{94}\) In the CIDB Standard Form of Contract for Building Works 2000 Edition\(^ {95}\) and the PAM 2006\(^ {96}\) parties are encouraged to attempt to settle their disputes amicably by mediation prior to referral to other dispute resolution prescribed in the contract.\(^ {97}\) In relation to these, there are many choices of rules that have been published by different bodies suitable for the Malaysian construction industry. Amongst the rules on arbitration are the PAM Mediation Rules and the CIDB Mediation Rules which are to be used in conjunction with their respective forms of contract, while the Rules for Conciliation/Mediation of the KLRCA, CIArb Mediation Rules, the Malaysian Mediation Centre Mediation Rules\(^ {98}\) or the ICC ADR Rules\(^ {99}\) are stand-alone rules that may be agreed upon by the parties.

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\(^{93}\) Patterson & Seabolt, at 174.
\(^{94}\) Lim & Xavier, at 224.
\(^{95}\) Clauses 47.2 and 47.3 of CIDB Standard Form of Building Contract (2000 Edition). See Appendix C.
\(^{96}\) Clause 35. See Appendix B.
\(^{97}\) Natkunasingam & K Sabaratnam, at 410.
\(^{98}\) The Malaysian Mediation Centre is under the auspices of the Malaysian Bar Council.
\(^{99}\) The International Chamber of Commerce (‘ICC’) sets out these amicable dispute resolution rules, entitled the ICC ADR Rules (the ‘Rules’), which permit the parties to agree upon whatever settlement technique they believe to be appropriate to help them settle their dispute. In the absence of an agreement of the parties on a settlement technique, mediation shall be the settlement technique used under the Rules. Source <http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf> (viewed on 7 January 2010).
It is hoped that the much-awaited judicial reforms in Malaysia which includes the setting up of a mediation system under a Mediation Act which would not only require parties to mediate prior to filing in court, but also assist in clearing the backlog of civil cases. It was agreed that a court-mandated mediation system should be set-up as mediation did not work well if it is outside the court system.\textsuperscript{100}

7. Adjudication

Adjudication is a term long known outside the construction industry, with many and various meanings.\textsuperscript{101} Within the construction industry, the advent of main contractors outsourcing their works has created problems, particularly in making payments to those down the construction chain. Since arbitration proved ineffective for such a dispute,\textsuperscript{102} adjudication made its first appearance in the United Kingdom construction industry in 1976 through its inclusion in the Joint Contracts Tribunal (JCT) sub-contracts form. Although adjudication was known then, it was seldom utilised due to its limited scope for disputes related to set-offs only. In the middle 1980s, adjudication was employed in some bespoke contracts mainly involving large projects in the UK.\textsuperscript{103} This concept was later expanded in various forms to cover a full range of construction projects and disputes.\textsuperscript{104}

Adjudication is regarded as the nearest process to arbitration.\textsuperscript{105} The principal advantage of adjudication over arbitration is that it is quick and relatively cheap. In contrast with mediation, adjudication results in a decision which is temporarily binding until finally determined by litigation, arbitration or settlement agreement between the parties.

\textsuperscript{100} A statement by Khutbul Zaman, Bar Council Alternative Dispute Resolution Committee Chairman in “Mediation system to tackle cases fast taking shape,” New Straits Times, 3 July 2009.
\textsuperscript{103} Robert Stevenson and Peter Chapman, Construction Adjudication. Bristol: Jordan Publishing Limited 1999 at 2. Examples are fixed link crossings, railway works and highway construction.
\textsuperscript{104} James P. Groton, Robert A Rubin and Bettina Quintas, “A comparison of dispute review boards and adjudication” [2001] ICLR, 18(2) : 277 provides that the English Channel Tunnel project as an example which used a designated cadre of neutrals consisting of a three-member panel. This panel would be assigned on an ad hoc basis to deal with disputes as theory arose; the decisions of these panels were binding on the parties for the duration of the construction project, but were subject to appeal in arbitration.
Whilst there are obvious advantages to the industry in making contractual provision for binding interim decisions by an independent third party, one of the reasons for the lack of progress in this dispute resolution process is the common misconception that the engineer, architect or superintending officer (S.O), by virtue of his/her detailed knowledge of the contract, on behalf of the employer is already carrying out an adjudicatory function and should best be able to find common ground for settlement.\(^\text{106}\) The preliminary reference to the architect, engineer or S.O is usually the first tier to resolve disputes unless and until the aggrieved party refers the matter to arbitration, to commence only on completion of the works.\(^\text{107}\) Whilst this position is less than satisfactory, given that the engineer, architect or S.O himself/herself may have been the cause of the dispute, or is not regarded as an impartial and informed third party, the disputing party often prefer to refer any dispute on such decisions straight to arbitration or litigation rather than to make use of a separate and independent expert adjudicator.\(^\text{108}\) Compared to arbitration, which the courts are generally respectful of a parties’ decision to arbitrate, without an underpinning legislation to encourage adjudication as an interim binding decision, it is more likely than not, that the courts would hold an adjudicator’s decision as having “an ephemeral and subordinate character”\(^\text{109}\) and would therefore not treat such a decision on the same footing as an award made under an arbitration agreement despite its binding nature under the contract between the parties.\(^\text{110}\)

In summary, adjudication can be described as a procedure of referring a dispute to a third neutral party, an adjudicator, who must be appointed within seven days. Once a dispute has been referred to the adjudicator, the adjudicator must act impartially and may take the initiative to ascertain the facts and the law. The adjudicator must fulfil his/her obligation to reach a decision within twenty eight days of referral and may extend the period of making decision by up to fourteen days with the consent of the referring party or any further extension agreed by the parties. This process aims is to determine a dispute on a temporary basis to enable work to proceed unimpeded and with less likelihood of serious

\(^\text{107}\) Natkunasingam & K Sabaratnam, at 412 – 413.
\(^\text{108}\) Id., at 413, and Sykes, at 9.
\(^\text{110}\) Natkunasingam & K Sabaratnam, at 413.
injustice being caused. Even if the decision is not accepted by one of the parties, the parties are obliged to implement the adjudicator’s decision. The decision is binding unless and until the dispute is finally resolved by legal proceeding, arbitration, settlement agreement or both parties accept the decision as finally determining the dispute.

It is observed that adjudication is similar to arbitration in that it is a judicial process in which the adjudicator determines the parties’ respective rights and obligations under the contract on the basis of evidence presented by the parties. The difference is the procedure in adjudication is much simpler as it is intended to be a quick process similar to mediation. Adjudication is not a condition precedent to arbitration or court litigation. It is statutorily enabled which entitles a party to exercise their rights to invoke adjudication, otherwise the parties may opt for other dispute resolution.

In Malaysia, the use of adjudication to resolve construction disputes is rare. The CIDB with the backup of the construction industry has recommended statutory adjudication through the Construction Industry Payment and Adjudication Act 2012 (CIPAA). Besides providing a speedy dispute resolution mechanism for the construction industry, the other key features of the CIPAA are to outlaw the practice of pay-when paid and conditional payment, to facilitate regular and timely payment, and provide security and remedies for the recovery of payment.

Under the CIPAA, adjudication is not a condition precedent to arbitration, litigation, or other dispute resolution. It is an entitlement which is statutorily provided in the event a party wishes to invoke adjudication. Once adjudication is initiated, the other party is drawn into it. However, the parties are not prevented from resorting to another dispute resolution process, irrespective of whether the proceedings takes place concurrently with the

112 Battersby, at 120.
113 Ibid.
114 See Natkunasingam & K Sabaratnam, at 412.
115 Several rountable discussions, national forum on payment and international forum on the proposed Malaysian Act, consultation forum with the industry and meeting with the Ministry of Works has been organised by CIDB.
adjudication proceedings. Thus, other dispute resolution mechanisms can co-exist, and complement each other. Similar to the Malaysian Arbitration Act 2005, this proposed Act is also strongly influenced by the New Zealand Construction Contracts Act 2002. At present, the proposed Act is awaiting approval to be tabled before the Malaysian Parliament.

8. The Islamic Perspectives of ADR

The Islamic principle which is equivalent to ADR is *sulh* or compromise. The word *sulh* literally means: “to end a dispute”, or “to cut off a dispute”. Terminologically it refers to an agreement entered into between two disputing parties which results in the termination of the dispute. The Mejelle defines *sulh* as a contract resolving a dispute by consent.

In general, the above terminological definition of *sulh* seems similar to ADR of Common law, in embracing arbitral as well as non-arbitral processes.

Another principle of Islamic law which is relevant to ADR is ‘*tahkim*’, which literally refers to arbitration. *Tahkim* means “the submission, by two or more parties to a third party, of a dispute to be adjudicated according to Shari‘ah”. *Tahkim* is also defined as the appointment of a person by two disputing parties to decide their dispute. The third party is known as ‘*hakam*’ or ‘*muhakkam* (arbitrator)’, who is an ordinary man but must possess all the qualifications of a *qadi* (judge). The *hakam* will determine the dispute according to the Shari‘ah whether or not the dispute has yet to come before the court or already pending before the court. The award of the *hakam* is binding on both the parties.

118 Section 13(1) of the proposed CIPAA.
122 Ibid.
The whole process from the appointment of the hakam to the giving of the award is called ‘tahkim’ (arbitration).

Thus, sulh as a process of dispute resolution in Islamic law covers every mode of settlement by the disputing parties in order to end a dispute. This mutual settlement may involve a little assistance from a neutral third party, as in mediation and conciliation, or without any assistance of a third party, as in negotiations, or with the assistance of a neutral third party as in tahkim or arbitration. The point which is common to all these processes is that the settlement is made without court’s intervention. Though arbitration is given a distinct term (‘tahkim’) in Islamic law, yet this fact does not push it away from under the wide umbrella of sulh because both are based on the mutual agreement of the parties, even though in varying measures.

9. Legal Texts on the Permissibility of Sulh and Tahkim

The legal texts on the permissibility of sulh and tahkim can be found in the primary sources of the Shariah i.e. the Holy Quran and the Sunnah. These two principles are dealt with in the Quran in the following verses (Surah al-Nisa’ 4:128 and Surah al-Nisa’ 4:35):

―If a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best…”

and

―If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they seek to set things aright, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things.”

―If two parties among the Believers fall into a fight, make ye peace between them …”127;

and

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From the *Sunnah* or the Traditions of the Holy Prophet (p.b.u.h.), it is reported by Sahl bin Sa‘d:

“Once the people of Quba’ fought with each other till they throw stones on each other. When Allah’s Apostle (p.b.u.h.) was informed about it, he said, “Let us go to bring about a reconciliation between them.””

Abu Hurayrah also reported that the Holy Prophet (p.b.u.h.) said: “Conciliation between Muslims is permissible.” In another *hadith*, it was reported from Shurayh al-Qadi that the Prophet (p.b.u.h.) said to disputing parties: “Make peace between you.”

Based on *Ijma‘*, Muslim scholars unanimously hold that compromise is lawful due to its benefit of putting off disputes. Al-Zuhayli states that the legal ruling (*hukm*) for compromise is recommendable (*sunnah*).

Judges in Islamic law are under imperative duty to ask litigants to compromise. This is based on the *hadith* narrated by ‘Abdullah bin Ka‘ab to the effect that:

“Abdullah bin Abu Hadrad al-Aslami owed Ka‘ab bin Malik some money. One day the latter met the former and demanded his right and their voices grew very loud. The Prophet (p.b.u.h.) passed by them and said, “O, Ka‘ab,” beckoning with his hand as if intending to say, “Deduct half the debts.” So Ka‘ab took half what the other owed him and remitted the other half.”

Based on the above provisions in the Holy Qur’an and the *Sunnah*, it becomes clear that disputing parties are strongly urged to compromise to settle their disputes either through mutual agreement or according to the decision of an arbitrator, who is appointed by them mutually.

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131 *Mughni al-Muhtaj*, op.cit., p. 177.
Statutory Provisions Dealing with *Sulh* and *Tahkim* in Malaysia

*Sulh* and *tahkim* are recognised in Islamic law. The *Mejelle*, which is perhaps the first and best code of the substantive laws in Muslim world, and mainly based on the Hanafi law, embo dies provisions on sulh and tahkim. Provisions relating to *Du`af* are embodied in the 12th book, which contains 41 articles.\(^{134}\) The provisions relating to arbitration are embodied in Chapter 3 of the 16th book, which contains 11 articles.\(^{135}\) However these provisions are general in nature and do not provide useful guide to procedural details.

With regard to modern legislation on Islamic law in Malaysia, *sulh* and *tahkim* are recognised as methods of dispute resolution besides litigation. For example, section 87 of the Syariah Civil Code Enactment 1991 of Selangor (‘the Enactment’) explicitly encourages parties to employ *sulh* to settle their disputes. The Enactment also provides that *sulh* can be made at any time.\(^{136}\) The court may record *sulh* on the request of either party.\(^{137}\) With regard to *tahkim*, section 48 of the Islamic Family Law Enactment 1984 of Selangor\(^{138}\) allows *tahkim* in *shiqaq*\(^{139}\) cases.

**Conclusion**

The Islamic principles of sulh (compromise) and tahkim reflect the concept of ADR in the common law as they similarly refer to settlement of disputes out of court. In general, we can conclude that compromise appears to come within the folds of ADR. However unlike Common law, which has specific terms, such as negotiation, mediation/conciliation and arbitration, conveying definite meanings, Islamic law has a generic term *sulh* under which various ADR processes may be accommodated. So there is no difference between

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\(^{134}\) *The Mejelle*, arts. 1531 – 1571.

\(^{135}\) *Id.*, arts. 1841 – 1851.

\(^{136}\) S. 125

\(^{137}\) S. 88. This section also lays down procedure to be followed for recording *Du`af*.

\(^{138}\) This provision is similar to s. 45 of the Administration of Islamic Family Law Enactment 1985 of Terengganu.

\(^{139}\) Dispute between a husband and his wife, which is likely to lead to a divorce.
the two legal systems on this point except in terms of nomenclature. Another distinguishing feature between the two systems is relating to the basis of compromise. In civil system, compromise is based on social and psychological needs whereas in Islamic system, it is based on divine revelations.

In the Malaysia construction industry, there are more than 50% of Muslim practitioners who are involved in the construction industry vis-à-vis in the capacity as contractors, developers, consultants and clients. Being Muslim, it is more appropriate to adopt the practices which had been verified by Shari’ah as they are certified by Islam as the best practices which emphasized on fairness and benefits of all parties. Furthermore, as the practices of the Shari’ah ADR are not in much different from the common law ADR which are applied in Malaysia, it is highly commendable that the practices of Shari’ah to be adopted in the Malaysia construction industry; for a start as an option for the Muslim disputing parties who could be given a choice either to adopt the Shari’ah ADR or the conventional practices.
THE EMERGING CRITIQUES TOWARDS THE CONCEPTION OF DIRECTORS’ DUTIES

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ABSTRACT

It has long been established that directors and other officers owe their duties to the company alone. Originated from common law, this rule, although have been strictly applied by the courts in Malaysia to draw the borderline between the interests of a company and its members, it does not mean that directors can simply act without taking into account the interests of members who invested their monies into the company’s capital. This study aims to investigate the reasons for the critiques against the rule arise. The methodology used in this study is an analysis of the literature review, such as books, articles, and court cases related. The study exposes various views highlighted by the experts commenting on the rule and its application in law, as well as the needs for the rule to be revisited.

Keyword: directors, duties of care, company, members

1. Introduction

Fundamentally, directors are regarded as persons who possess certain authority to act on a company’s behalf as they stand in the position of ‘officers’ or ‘agents’ of the company. In Malaysia, the main source of law relating to the directors’ duties is the Companies Act 1965 which is also complemented by the common law principles. The premise that directors owe
their duties to the company actually reflects a legal position on which a company has the capacity to sue or litigate against its own directors upon any breach of such duties.

2. **Rule in *Percival v Wright***

*Percival v Wright* [1902] 2 Ch 401 is a common law case which highlighted the extent and limitation of directors’ duties. It simply holds that directors only owe duties of loyalty to the company, and not to individual shareholders. This judicial decision was later on being adopted in the common law statute through its codification in section 170 of the Companies Act 2006 of the United Kingdom.

In this case, Mr Percival, who owned shares per value of £10 in a company wished to dispose his shares by way of sale. He informed the company’s secretary of his intention. The governing constitution of the company provided that the shares were only transferable with the directors’ approval. Mr Percival appointed his solicitor to ascertain if there was anyone from the company who was interested to buy his shares. Mr Wright, being the company’s chairman together with other two directors of the company decided to purchase Mr Percival’s shares at £12.10 each. Later, Mr Percival discovered that before and during the negotiation for the sale of his shares, there were other negotiations between the directors and other party in respect of sale of entire shares of the company. It was further revealed that should the negotiation succeed, the price of his shares would have significantly increased at much higher than £12.10 which Mr Percival got from the directors. Since Mr Percival was not informed of the negotiation by the directors, he brought an action against the directors claiming among other things, breach of fiduciary duty and negligence for not disclosing such information to him. Swinfen Eady J in his decision held that the directors do not owed duties shareholders individually, but only the company. The above decision shows that the directors who manage a company does not owe a fiduciary duty to shareholders so as to restrain themselves from manipulating the company’s information for their own benefit. (R Tomasic, 1991).
3. Criticism against the rule in *Percival v Wright*

i. Criticism raised in the *Coleman v Myers* case

The fact of the case of *Coleman v Myers* [1977] 2 NZLR 225 was about the plaintiff who filed a suit on the ground of non-disclosure of relevant information by the company's managing director when he bought the shares of the company. The case involved with the take-over of the company’s whole shareholding arrangement by the managing directors who was not originally a shareholder. The arrangement was meant to be completed without disclosing the relevant information to the existing members. The purpose is to avoid bargaining for greater price by them.

The plaintiff in this case submitted:

(a) that the director owed a fiduciary duty towards its shareholders from the moment when he made the offer to buy their shares;

(b) that in consequence of such fiduciary duty and by reason of the directors’ knowledge of and participation in the take-over procedure, they were under a liability to disclose to shareholders. The failure to comply with that duty would provide shareholders with the remedy of recession or alternatively, with the right to recover damages for any loss occasion by sale;

(c) that the liability of the directors for material non-disclosure would be the same with the liability of promoters or directors who are in breach of their fiduciary duty towards the company itself;

(d) that there was no appellate decision in the Commonwealth affirming the decision in *Percival v Wright*;

(e) that the court ought not to follow the decision in *Percival v Wright*;

(1) firstly because it was distinguishable on the facts;

(2) secondly because it was no longer in accord with current views as to the general nature of the liabilities of directors;

(3) finally that in any event the case was wrongly decided. The plaintiffs relied on the decision of the Privy Council on a Canadian appeal in *Allen v Hyatt* (1914) 30 TLR 444, PC where it was suggested that notwithstanding the absence of any general fiduciary duty owed by directors to shareholders, a director might by his conduct place himself in a fiduciary position towards shareholders.
The plaintiffs’ counsel referred to the American approach in *Strong v Repide* (1909) 213 US 419. Here the Supreme Court of the United States held that although a director has no general duty to disclose facts known to him before he purchased shares from members of his company, such a duty may arise if the transaction is based upon “special facts” not at the time known to the shareholder.

The defendant submitted the following defences:

(a) that the rule in *Percival v Wright* was a complete defence to the cause of action based upon non-disclosure by the director;

(b) that in the point of law no fiduciary duties are owed by directors to shareholders;

(c) that the basic duties of directors are founded on their capacity as fiduciaries of the company alone. Thus it essentially comprise duties of good faith and responsibilities to act bona fide for the benefit of the company alone;

(d) that notwithstanding the various criticisms which have been made against the decision in *Percival v Wright*, the Legislatures in England, Australia and New Zealand have not abrogated that decision;

(e) that the New Zealand Parliament had not abrogated the rule in *Percival v Wright*. Neither does the United Kingdom and Australian Legislatures have abrogated the rule.

(f) that the facts in *Percival v Wright* were not distinguishable from the present case.

The criticism against *Percival v Wright* was well highlighted by Mahon J of the Supreme when he decided in the *Coleman v Myers*. He said:

“I must now consider these competing submissions as counsel have said, the decisions has been the subject of extensive and persistent criticism. The *Cohen and Jenkins Committees* on Company Law in the United Kingdom each recommended the enactment of legislation in abrogation of the decision in *Percival v Wright*. Professor Gower has referred to the judgment as “a calamitous decision”. PR Adams in Company Directors in Australia (2nd ed) 146-147 expresses a view that it must be doubted whether the case should now be followed. Professor Loss, one of the leading American experts on the American Securities Exchange legislation and himself a member for some time of the legal staff of the Securities and Exchange Commission, in an article, “The Fiduciary Concept as Applied to Trading by Corporate ‘Insiders’ in the United States” (1970) 33 MLR 34, 40-41, said that *Percival v
Wright was “a monument to the ability of lawyers to hypnotise themselves with their own creations”. Meaning thereby the acceptance by Swinfen Eady J for all purposes of the traditional proposition that a director has no fiduciary obligations towards shareholders individually, as opposed to his dealings with his own company. But despite all this strictures no Commonwealth country has so far enacted legislation effectively abrogating the decision. In the United Kingdom the Companies Act 1967 does not follow the recommendations of the Jenkins Committee in relation to the Percival v Wright case except for providing for more extensive disclosure of shareholdings” ([1977] 2 NZLR 225 at 270).

The ruling in Percival v. Wright was merely a decision of a trial court but it was accepted as a good law and repeatedly followed in many cases. Mahon J nevertheless called for transformation of the legal position and stressed that any possible reform here must be done by careful drafting to avoid the possibility of an indeterminate claims:

“Thus in New Zealand, as in other Commonwealth jurisdictions, nothing has been done by the legislature to vary or abolish the effect of the decision Percival v Wright and this general reluctance on the part of the legislatures to intervene in the matter may be explicable by the difficulty in constructing the appropriate statutory formula. In every ordinary aspect of the administration of the affairs of a limited company it is essential that the directors be the fiduciary agents of the company alone. The concept of corporate management would collapse if there were any general rule that the directors were also the fiduciary agents of the shareholders. For that reason any legislative intervention directed at a remedial alteration of the Percival v Wright position would require very careful drafting so as to avoid any possibility of derivative arguments aimed at extending the new fiduciary concept thus established” ([1977] 2 NZLR 225 at 273).

In distinguishing the facts of Percival v Wright from the instant case, Mahon J said:

“As I have said, the only appellate decision in which the case seems to have been considered is Allen v Hyatt (1914) 30 TLR 444 and I cannot read out of that decision any affirmation of Percival v Wright. The relevant extract from the opinion of the Judicial Committee reads as follows: “No doubt the duty of the directors was primarily one to the company itself. It might be that in circumstances such as those of Percival v Wright… they
could deal at arm’s length with a shareholder. But the facts in the present case were widely different from those in Percival v Wright, and their Lordships thought that the directors must here to be taken to have held themselves out to the individual shareholders as acting for them on the same footing as they were acting for the company itself, that was as agents” ([1977] 2 NZLR 225 at 273).

On Allen v Hyatt Mahon J said:

“It therefore seems to me that there two conclusions to be drawn from Allen v Hyatt. The first is that the Judicial Committee, adopted a careful approach to Percival v Wright and did not distinctly affirm the correctness of that decision. Secondly, the directors were held liable because they had by their conduct placed themselves in the position of fiduciary agents for the shareholders. There is, therefore, no appellate authority in the Commonwealth which confirms the validity of the views adopted in Percival v Wright and I do not exclude the observations of Lord Atkin in Bell v Lever Bros Ltd [1932] AC 161, 228, where he emphasised that the directors of a company were not in any fiduciary position even to those shareholders who owed 99 percent of the shares, because Lord Atkin was plainly there referring to the ordinary cause of administration of a company’s business” ([1977] 2 NZLR 225 at 273).

On the general kind of fiduciary obligations which Swinfen Eady J in Percival v Wright seems to reject, Mahon J said:

“But, in my opinion, it was not for the plaintiffs to assert that the fiduciary position brought into operation by the negotiations for purchase of the shareholders’ shares was in any specific category. The judge seems to me to have not considered the further question whether the approach by the plaintiff shareholders to sell their shares to the directors did not create a fiduciary position of a more general kind…” ([1977] 2 NZLR 225 at 275).

Clarifying on the wider categories of the fiduciary obligation, Mahon J said:

“The creation of a fiduciary obligation is not conditioned by the existence of settled categories of circumstances. The original concept of fiduciary obligations as developed by the Court of Chancery in the latter stages of the 18th century rested upon
the jurisdiction of that court to intervene in any case where there been an abuse by one party of trust or confidence reposed in him by another. The words “trust” and “confidence” were used at that time interchangeably. They were synonymous in their meaning: cf. LS Sealy, “Fiduciary Relationships” [1962] CLJ 69. Thus one finds Lord Aldon LC saying in Gibson v Jeyes (1801) 6 Ves 278; 31 ER 1044 that it is: “… great rule of the Court, that he, who bargains in matters of advantage with a person placing confidence in him is bound to show, that a reasonable use has been made of that confidence; a rule applying to trustee, attorneys, or anyone else” (ibid, 278; 1050). The same basal concept of confidence reposed is to be found in other cases decided in equity at about that time by Lord Hardwicke and Sir William Grant MR” ([1977] 2 NZLR 225 at 275).

The effect of trust, confidence and reliance reposed by the shareholders to the directors was explained by Mahon J:

“The essential basis of breach of fiduciary duty is the improper advantage taken by the defendant of a confidence reposed in him either by, or for the benefit of, the plaintiff. When one considers the legal relationship between the shareholder in a limited liability company and the directors entrusted with the management of that company, it appears to me that in any transaction involving sale of shares between director and shareholder, the director is the repository, of confidence and trust necessarily, vested in him the shareholder, or by his legal status, in relation to the existence of information affecting the true value of those shares” ([1977] 2 NZLR 225 at 277).

Emphasising that the application of the rule is limited to cases where special confidence and reliance exist, particularly in private companies, Mahon J said:

“In the present case, which is the case of a private company with unlisted shares, it seems an untenable argument to suggest that the shareholders on an offer to buy their shares are not perforce constrained to repose a special confidence in the directors ... The application of the role so assumed to exist listed necessarily be confined to private companies and to such transactions in public company shares, listed or otherwise, where the identity of the shareholder is known to the director at the time of the sale” ([1977] 2 NZLR 225 at 278).
On the right to depart from the narrow view adopted by Swinten Eady J in *Percival v Wright*, Mahon J said:

“But a judge is clearly entitled, unless precluded by coercive authority, to disregard a specified decision where in his opinion its ratio decidendi mistakenly supposes a category of common law rights to be closed, or fails, as I think occurred in *Percival v Wright*, to identify the rejected right of action as a permissible extension of an accepted legal principle. In *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, strongly relied upon by Mr Wallace in the present context, the application of fiduciary role. The same process of permissible extension of an equitable principle was available in *Percival v Wright* where in my opinion the error was made of attributing to a director in his corporate capacity. Applying such considerations to the problem in hand, I reach the unhesitating conclusion that the decision in *Percival v. Wright*, directly opposed as it is to prevailing notions of correct commercial practice and being in my view wrongly decided ought no longer to be followed in an impeached transition where a director dealt with identified shareholders” ([1977] 2 NZLR 225 at 280).

On the liability of director for negligent advice made in the course of a take-over bid, Mahon J said:

“The principle of liability upon which the plaintiffs here rely was, of course, the decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465; [1963] 2 All E.R. 575 as qualified in the case of New Zealand courts by *Mutual Life and Citizen’s Assurance Co. Ltd. v. Evatt* [1971] AC 793; [1971] 1 All ER 150. The directors in the instant case were not in the business of giving advice on investment nor had they held themselves out to the shareholders that they claimed to possess the appropriate skills and were therefore competent as well as able to give reliable advice. These were the conditions of liability preferred by the majority opinion in *Mutual Life and Citizen’s Assurance Co. Ltd. v. Evatt*. That opinion, as delivered by Lord Diplock, expressly disaffirms the additional category of potential tortfeasors established by the *Hedley Byrne* decision which includes persons who, without carrying on the business of giving advice or holding themselves out as possessing
that status, nevertheless elect to give advice for opinions affecting the economic interests of the inquirer in the knowledge that he is being relied upon for his supposed skill and judgment. I should have thought it clear that on the basis of the majority opinion in *Mutual Life and Citizens’ Assurance Co. Ltd. v. Evatt* the directors in the present case were not within the scope of the suggested liability for negligent misstatement. They are required to be honest in their recommendations to shareholders, whether statutory or otherwise but are not liable, as it seems to me, for a recommendation or opinion honestly but negligently stated. There is, however, one qualification which may be applied to that view and this arises out of the question whether that form of liability might arise in any event because of the circumstances that here one of the directors had a **financial interest** in the proposed transaction in respect of which he jointly made a recommendation. Such a source of liability under the *Hedley Byrne* principle appears to have been accepted by Cairns J in *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 85 and Lord Diplock, in the final part of the majority opinion which he expressed in *Mutual Life and Citizens’ Assurance Co Ltd v Evatt*, suggested that this particular factor might create a relationship sufficient to found liability, but expressly retrained from expressing from any opinion thereon. Nevertheless, in *Esso Petroleum Co Ltd v Mardon* [1975] QB 819 [1975] 1 All ER 203 Lawson J was prepared to accept the existence of such a special relationship as giving rise to the *Hedley Byrne* duty of care, and although that proposition does not seem to be expressly referred to in the judgment of the Court of Appeal affirming the finding of negligent misstatement on the *Hedley Byrne* principle by Lawson J, I can see no dissent on that particular point in the only report of the Court of Appeal judgment at present available... There certainly seems some justification for the application of the *Hedley Byrne* principle in a case where a person offering advice has a **financial interest** in the transaction because the species of tortious liability established by *Hedley Byrne* essentially depends upon the duty created by an existing relationship between the parties, and perhaps it is possible to say that the factor of financial interest is sufficient to establish the necessary duty even though the other-varieties of relationship insisted upon by *Mutual Life and Citizens’ Assurance Co Ltd v Evatt* are not present. I must admit, however to some doubt about the matter. The *Hedley Byrne* principle and its modification, as prescribed for Commonwealth purposes outside the United Kingdom by *Mutual Life and Citizens’ Assurance Co Ltd v Evatt*,

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appears to be founded upon the assumption of circumstances which intrinsically vest in the
maker of the statement the trust or confidence of the recipient and I cannot for the moment
see that a financial interest in the transaction held by the adviser could be sufficient to
elevate the ordinary relationship between buyer and seller into the special relationship upon
which the *Hedley Byrne* liability depends. It may involve the adviser in a moral, liability but
in the present context the question is one of the legal liability. I have found it necessary to
make those observations because of the view which I have previously expressed that the
directors in the instant case seem protected by *Mutual Life and Citizens’ Assurance Co Ltd
v Evatt* from liability for negligent misstatements…” ([1977] 2 NZLR 225 at 281).

Further Mahon J said:

“In relation to the argument suggesting a *Hedley Byrne* liability on both directors', there is also a
question whether such a liability can apply to precontractual negotiations in view of the
facts the suggested liability is in tort and not in contract. It was held by the Court Of
Appeal in *Esso Petroleum Co Ltd v Mardon* that the *Hedley Byrne* principle extended to
parties in the contractual negotiation, and the point was given detailed consideration by
Cooke J in *Capital Motors Ltd v Beecham* (1975) 1 NZLR 576, where the learned judge
considered the decision of Lawson J in *Esso Petroleum Co Ltd v Mardon* (the appeal not
then having been heard), and also a decision of the Court of Appeal of New South Wales in
*Presser v Caldwell Estates Ltd* (1971) 2 NSWLR 471, and came to the conclusion that a
negligent statement causing economic loss, made in the course of pre contract negotiations
may possibly involve the maker in a duty of care. On the other hand, Cooke J pointed out
the difficulties which would arise if such a principle were universally applied to statements
made by a prospective seller to a prospective buyer, and with that comment I respectfully
agree. *The everyday functions of the marketplace would be totally subverted*. ([1977] 2
NZLR 225 at 281-2).

Mahon J explained the difficulties of the wider concept of liability:

“It will therefore be seen from what I have been saying in relation to the suggested *Hedley Byrne*
liability that here are certain difficulties in the path of the contention advanced in this case
by the plaintiffs that the directors in the instant case are liable for negligent misstatements,
in relation to the statements made to shareholders, on the footing of the tortious liability
established in the *Hedley Byrne* case”. ([1977] 2 NZLR 225 at 282).
On the doctrine of special relationship, Mahon J referred to the opinion of Viscount Haldane L in *Nocton v Lord Ashburton*. The Lord Chancellor, referred to the doctrine of special duty (arising outside the contractual relationship):

“Such a special duty may arise from them circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity if such a duty can be inferred in a particular case of a person issuing prospectus as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I do not find in *Derry v Peek* an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie... I have only to add that the special relationship must, whenever it is alleged be clearly shown to exist”. ([1977] 2 NZLR 225 at 282).

Accepting the dictum of Lord Haldane LC, Mahon J said:

“That opinion, which was confirmed by the other law lords, has ever since been accepted as imposing liability for a negligent misstatement by one who owes a fiduciary duty to the recipient and it was, of course, the failure of the House of Lords in that case to extend the liability beyond the added category of fiduciary obligations which led to the ultimate extention [extension] of the liability in situations from which contractual or fiduciary obligations were absent. It may also be said that in *Robinson v National Bank Scotland* 1916 SC (HL) 154 Viscount Haldane emphasised, as I said earlier in this judgment, that liability for negligent misrepresentation was not intended by him in *Nocton v Lord Ashburton* to be limited to fiduciary relationships but would also apply to other special relationships which the court may find to exist in particular cases” ([1977] 2 NZLR 225 at 283).

The judgment of *Coleman v Myers* [1977] 2 NZLR 298 (NZCA) in the Court of Appeal:

Emphasising the importance of the special facts in the present case, Cooke J said:

“In the particular circumstances of this case it seems to me obvious that each of the respondent directors did owe a fiduciary duty to the individual shareholders. To that extent I fully agree with Mahon J. Broadly, the facts giving rise to the duty are the family character of this company; the positions of father and son in the company and the family, their high degree of inside knowledge; and the way in which they went about the take-over and the
On the evolving categories of the fiduciary duty, Casey J ([1977] 2 NZLR 298 (NZCA) at 370-1) said:

“After a review of the authorities and a lengthy consideration of Percival v Wright [1902] 2 Ch 421. Mahon J felt it had been wrongly decided and should not be followed. In so far as it may suggest that a director can never be in a fiduciary relationship with a shareholder, I concur. But in view of its own facts and of the concessions made, the case may have been correctly decided on the basis that the relation of director/shareholder does not by itself give rise to a fiduciary duty and that Swinfen Eady J did not consider the circumstances warranted such a finding. I agree with Mahon J where he says that the “creation of a fiduciary obligation is not conditioned by the existence of settled categories of circumstances”. Its existence depends upon a consideration of all the circumstances establishing that one party was known to be reposing trust and confidence in the other in the particular transaction and justifying the intervention of the court. I think the following extract from the judgment of Fletcher Moulton LJ in Re Coomber [1911] Ch 723 is apt:

“Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid”.

persuasion of shareholders. In more detail the facts include... From its early days the company had been very much a family one. For many years the second respondent had been its key figure. Inevitably and justifiably the shareholders must have come to repose confidence in him” ([1977] 2 NZLR 298 (NZCA) at 330). “In that setting the two directors made approaches to various shareholders - some written - some oral representing the merits of selling to the son at the price of $4.80 and expressly or impliedly urging the shareholders to do so” ([1977] 2 NZLR 298 (NZCA) at 331)
Applying the doctrine of special relationship or the special facts of the instant case, Casey J said:
“Like Cooke J, I find Percival v Wright of no great relevance here and, for the reasons he and Woodhouse J have set out, I have no doubt that it this tightly-held family company, both directors owed a fiduciary duty to the appellants and to the other shareholders. It must have been clear to Mr A.D Myers particularly that they were reposing trust and confidence in him, from their discussions and inquiries they made. I have no doubt Sir Kenneth Myers was in everyone’s eyes the head of the family group and its associated shareholders, whom they respected and trusted to look after their personal interests in the management of the company” ([1977] 2 NZLR 298 (NZCA) at 371).

ii. Criticism raised by Professor Pennington: A New Status of a Director

Many of the foregoing cases involved part-time directors. The court therefore acted fairly in not imposing to heavy duty on the other directors, particularly when they were part-time, non-executive directors. But this decision cannot form a reliable guide to the standard of care expected of full time executive directors employed under service contracts especially they are each employed to manage some department of the company’s business as well as to supervise its whole undertaking at board meetings. Such directors will usually be specialist in their own field be it accountancy, engineering, marketing, finance, or anything else, and they will be expected to exhibit the skill and care of a competent practitioner in that field when handling the company’s affairs (Pennington, R.R., 1990).

He further added that the service contracts of full-time executive directors will usually require them to devote their whole time and attention to the company’s affairs, which is not the case of a part-time director. Likewise, a neglect of the company’s affairs by a full-time director, whether a managing director or not, will be negligence on his part and will make him liable to the company for the consequent diminution in the value of its business. Probably a full time executive director may trust the honesty competence of his subordinates. The displacement of a part-time director by a full time working director is one aspect of the managerial revolution of the last 50 years, and although the court has not been called on during that time to say whether the altered conditions have brought a change in the
It cannot now be assumed that all the old cases are a safe guide to the standard of skill and care required of the various kinds of directors today (Pennington, R.R., 1990).

iii. Criticism raised by Professor Gower: The Rising State of Professionalism: Secretary Vis-à-vis Director

It is interesting to note a further recognition of the rising professional status of the secretary renders it still more anomalous that no qualifications are required of directors. This is an anomaly of which the Institute of Directors is very conscious. Despite the statutory recognition of the increasingly important status of the secretary, the court seems to continue to treat him as a subordinate servant. The court is left behind in this. However in Panorama Developments (Guildford) Ltd. v Fidelis Furnishing Fabrics Ltd. [1971] 2 QB 711, CA Lord Denning M.R. said:

“But times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day to day business of companies” ([1971] 2 QB 711, CA at 716-7).

Professor Gower added: To describe directors as trustees seems today to be neither strictly correct nor invariably helpful. In truth, directors are agents of the company rather trustee of it or, its property but as agents they stand in a fiduciary relationship to their principle, the company. The duties of good faith which this fiduciary relationship imposes are virtually identical with those impose on trustees, and to extent the description “trustee” still has validity. It is when we turn to the duties of care and skill that the trustee analogy breaks down. While the trustee of a will or a settlement is to be cautious, the managers of a business concern must take risks to earn profit for the company and its members (Gower, 1992). The fiduciary duties which are owed to the company and to the company alone is regarded as firmly established by the much criticised decision in Percival v Wright. Coleman v Myers illustrates the case of a family company, “depending upon all the surrounding circumstances and the nature responsibility which in a real and practical sense the director has assumed towards the shareholder” ([1977] 2 NZLR 298 (NCZA) at 324-5 and at 330 respectively). These views were adopted by Browne Wilkinson V.C in Re Shez Nico (Restaurants) Ltd. The Percival v Wright was severely criticised by the Cohen Committee and forthrightly
rejected by the *Jenkins Committee* in one of its bolder moods (Gower, 1992). The cautious trustee analogy breaks down from what an enterprising director needs to display. *The law might, no doubt, have demanded of directors a high degree of diligence particularly where directors are paid:* National Trustees Co- of Australasia v General Finance Co. of Australasia (1905) AC 373, P.C.; *Re Windsor Steamcoal Company* [1929] 1 Ch. 151, CA.

Professor Gower further added that professionally qualified executive directors are expected to display the normal skill of members of their professions. Full-time executive directors are also expected to display similar diligence but it is not yet clear whether there is so far as they are concerned any objective standard of skill to which they must measure up. *The evolution of a class of company, managers is one of the distinctive features of the present epoch, but the courts hardly seems prepared to recognise that it has attained professional status and standards.*

He further stressed that while the duties of loyalty and good faith are exceptionally strict, their duties of care, skill and diligence is exceptionally lax. The common law duties of care, skill and diligence are admittedly lax - *but this is inevitable unless and until company, directorship is recognised as a profession with professional standards* (Gower, 1992).

### iv. Criticism raised by Professor Farrar: Duty of Care and Skill of Director

This is an area which the common law has failed to keep pace with modern developments and instead presents a lamentably out of date view of directors’ duties. In the past the courts have been reluctant to impose onerous standards of care and skill on directors and have been willing to impose liability only when a director’s imprudence has been so great and so manifest as to amount to gross negligence. *The reasons for these are mainly historical.* Many of the cases reflect a time when directors were part time officers, figureheads, adornments to the corporate Christmas tree, titled people with time on their hands. In keeping with this state of affairs the courts regarded them as pleasant, if incompetent, amateurs who did not possess any particular executive skills and upon whom it would be unreasonable to impose onerous standards of care and skill. Another difficulty was that if a higher degree of care and skill was to be required then this might involve judicial assessment of the managerial skills of the individual concerned. This would involve
investigating the internal management of the company, something which the courts have been reluctant to do.

The impact of corporate collapse on creditors, employees and society at large has raised a legitimate concern. Thus there has recently been a major concern of Parliament in passing the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 and it is as a consequence of these Acts that we are likely to see a raising of the standards expected of directors. As a matter of practice we should see directors bringing greater care and skill to their positions as they attempt to avoid the personal liability and disqualification provided by the Acts for directors who fail to reach an appropriate standard of conduct. The existing case law must now be read in the light of these legislative developments (Farrar, 1991 at p.397).

v. Criticism via Reinterpretation of the dictum of Romer J in Re City Equitable Fire Insurance Co Ltd (1925) Ch 407 in the Light of the Insolvency Act 1986

Professor Farrar has urged (Farrar, 1991) the need to reconsider the first proposition of Romer J dictum in City Equitable Fire Insurance Co Ltd the new statutory policy on directors. The important provision in section 214(4) of the Insolvency Act 1986 provides that a director of a company ought to know or ascertain, that the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both:

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried by that director in relation to the company, and

(b) the general knowledge, skill and experience that that director has.

The above subsection seems to set a standard involving objective and subjective criteria.

The statutory standard is clearly different from the subjective criteria stated in the earlier case of Re Brazilian and Estates Ltd. In that case the judge said that a director need not exhibit in the performance of his duties a greater degree of skill then may reasonably be expected of a person of his knowledge of experience. This is a subjective test with no minimum reasonable amount of skill being required. Under such a test the less knowledge
and experience a director has the less skill is expected of him, and the less likely he is liable when something goes wrong. Thus in *Re Brazilian Rubber Plantations and Estates Ltd* the directors who undertook management of a rubber company in complete ignorance of anything to do with the rubber industry were excused from liability. Referring to the facts about the directors in this case, Neville J said:

“Sir Arthur Aylmer was absolutely ignorant of business. He only consented to act because he was told that the office would give him a little pleasant employment without his incurring any responsibility. H.W. Tugwell ... another was seventy five years of age and very deaf; he was induced to the board by representations made to him...”

According to Professor Farrar if a director has a particular field of expertise in certain area, then must give the company the advantage of his knowledge when acting in the company’s affairs particularly if he is employed by the company in a professional capacity. In that case then he must attain standard of a reasonable competent member of that profession in exercising his professional skills on behalf of the company. An executive director appointed under a contract of employment will be obliged, under normal contractual principles to exercise reasonable skill in the performance of his duties: *Lister v Romford Ice and Coldstorage Co Ltd* [1957] 1 All ER 125. The standard of care required meanwhile is such care as an ordinary man might be expected to take on his own behalf (see *Dorchester Finance Co Ltd v. Stebbing* [1989] BCLC 498 at 501; *Overand, Gurney & Co v. Gibb and Gibb* (1872) LR5 HL 480 at 487, per Lord Hatherly; *Re Brazilian Rubber Plantation and estates Co Ltd* [1911] 1 Ch 425 at 437, per Neville J; *Re City Equitable Fire Insurance Co* [1925] Ch 407 at 428, CA, per Romer J.).

Further Professor Farrar said that the first proposition of Romer J in *Re City Equitable Fire Insurance Co. Ltd.* must be reconsidered in the light of the wrongful trading provision in s. 214 of the *Insolvency Act 1986* which applies to any director or shadow director of a company which has gone into insolvent liquidation and at some time before the commencement of the winding up of the company, that person knew or ought to concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. In such a case the court, on the application of the liquidator may declare that the director be liable to make such contribution to the company’s assets as the court think. A disqualification order may also be made under Company Director Disqualification Act
The important provision is s. 214 (4) which provides the standard of a reasonably diligent person having both - (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and (b) the general knowledge, skill and experience that that director has. This subsection sets a standard involving subjective and objective criteria. Meeting a subjective standard alone will be insufficient for the director’s behaviour will be judged against the standard that may reasonable be expected of a reasonable director in that position. The nature of this test was considered by Knox J in Re Produce Marketing Consortium Ltd (No2) [1989] BCLC 520; Re Purpoint Ltd; Re DKG Contractors Ltd [1990] BCC 903 where the court found that the directors’ knowledge, skill and experience were hopelessly inadequate for the task they undertook (Farrar, 1991).

Professor Farrar also suggested that first proposition in Romer J dictum in Re City Equitable Fire Insurance Co Ltd needs to be reconsidered in the light of the Company Directors Disqualification Act 1986 which contained an expectation of raising standards (Farrar, 1991).

vi. Criticism raised in the Rule in Foss v Harbottle

A major problem, arising from the doctrine of corporate personality, is the enforcement of directors’ duties, in particular overcoming the difficulties posed by the rule in Foss v Harbottle (1843) 2 Hare 461, 67 ER 189. This rule precludes actions by individual shareholders against wrongdoing directors. Breach of a director’s duties of care and skill will be a wrong done to the company and in respect of which the company alone has the right to sue. If the company were to decide not to proceed then a shareholder can only bring an action on behalf of the company if he can bring himself within one of the exceptions to the rule. Negligence in the management of the company’s affairs may, however, justify a petition under s. 459 of the Companies Act (s. 459 provides the right to seeks remedy for unfair prejudice suffered by the individual shareholder). The difficulties in enforcement remain a major problem. It is submitted that a professional concept of directorship and its duties might set new latitude in the interpretation of the rule in Foss v Harbottle.
vii. Criticism raised in the Proposed Fifth European Community Directive

The proposed European Communities Directive on company law, as currently drafted, provides in article 14 that directors should be jointly and severally liable for damage sustained by a company as a consequence of any wrongdoing by a director. Any director wishing to escape liability would have to prove that no fault was attributable to him personally. The fact that the act giving rise to damage was not within his particular area of responsibility will not of itself suffice to exonerate him. Implementation of this requirement would certainly ensure more active monitoring of directors by directors (Farrar, 1991).

viii. Criticism raised by Professor Farrar: The Emergence of a Fact-Based Jurisprudence

Company law is built on the foundation of the doctrine of corporate personality. However in the last fifty years there have been signs of the development of a more fact based jurisprudence in the cases. The various trends can be summarised as follows:

(a) There has been a tendency to disregard the corporate form where the interests of justice require it. These cases are usually referred to as piercing the corporate veil;

(b) There is a trend towards recognition something like personalgesellschaft - a relationship of personal confidence with a network of equitable obligations - behind the corporate form in the case of small-incorporated firms. This development started under the judge and equitable ground for winding up but has been used as the basis of control over a majority, shareholder in two English and one Canadian case. The locus classicus is a speech of Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, HL in 1972 where he said: “...A limited company is more then a mere judicial entity, with a personality in law of its own.: ...

There is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most context, this definition is sufficient and exhaustive, equally so whether the company is large or small. The ‘just and equitable’ provision does not entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal
character arising between an individual an another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in particular way”. At the present time it is difficult to see how far this development will go. *In a way it is a potentially wide doctrine which could change much of established company law as it relates to small and medium sized firms.* (Farrar, 1991).

4. **Conclusion**

The application of the special concept of accountability will serve to underpin the efficacy of the philosophy of disclosure. The current statutory surge for disclosure of corporate information suggests a serious trend towards the doctrine of a responsible corporate management. A more consistent approach in the concept of director’s accountability seems necessary. Further, members of a company would expect the directors to always act within powers. This expectation leads to the issue whether fiduciary duties are also owed to the members. The current practices indicate that the management or the board of directors are required by the law to meet and interact with the members especially of the public companies in respect of certain matters as well as in decision making process. Looking at this perspective, directors definitely owe certain duty to members in respect of all information to be disclosed and recommendation made (if any) to them. The conservative standpoint manifested in *Percival v Wright* has revolved by the codification of such duty into statutory provisions which require the directors to have regard to both the company and the members’ interests in the course of discharging their duties. Hence, the enforcement of the law should be highly regarded in order to prevent mismanagement and manipulation by directors in view of their position in the company.

5. **Reference**


Cases:

*Percival v Wright* [1902] 2 Ch 401

*Coleman v Myers* [1977] 2 NZLR 225

*Allen v Hyatt* (1914) 30 TLR 444, PC

*Strong v Repide* (1909) 213 US 419

*Bell v Lever Bros Ltd* [1932] AC 161, 228

*Gibson v Jeyes* (1801) 6 Ves 278; 31 ER 1044

*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, HL

*Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189

*Re Purpoint Ltd; Re DKG Contractors Ltd* [1990] BCC 903

*Re Produce Marketing Consortium Ltd (No2)* [1989] BCLC 520

*Re Brazilian Rubber Plantation and estates Co Ltd* [1911] 1 Ch 425 at 437

*Overand, Gurney & Co v. Gibb and Gibb* (1872) LR5 HL 480 at 487


*Lister v Romford Ice and Coldstorage Co Ltd* [1957] 1 All ER 125

*Re City Equitable Fire Insurance Co Ltd* (1925) Ch 407

*Re Windsor Steamcoal Company* [1929] 1 Ch. 151, CA

*National Trustees Co- of Australasia v General Finance Co. of Australasia* (1905) AC 373, P.C

*Panorama Developments (Guildford) Ltd. v Fidelis Furnishing Fabrics Ltd.* [1971] 2 QB 711

*Re Coomber* [1911] Ch 723

*Robinson v National Bank Scotland* 1916 SC (HL) 154

*Presser v Caldwell Estates Ltd* (1971) 2 NSWLR 471

*Capital Motors Ltd v Beecham* (1975) 1 NZLR 576

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The Influence of Ulū al-albāb in Social Accounting for Community-Interest Corporations

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ABSTRACT

This study aims to explore the influence of Ulū al-albāb in practising social accounting for community-interest corporations. Ulū al-albāb is distinctive term used in Islam to refer to individuals who are endowed with clear understanding about life and life is connected to the Hereafter world. The basis for Ulū al-albāb is based on Tawhidic paradigm, a value that unifies the differences and diversity for the sake betterment for oneself and the community in this world and beyond. Accounting is about informing financial performance through a standard of book keeping, recording, and interpreting performance of corporations. Social accounting prepares and makes the reports financial standing with key stakeholders. This study argues that accounting personnel with ulū al-albāb characteristics enhances their roles to practice sustainability social accounting for the performance of community-interest corporations to service beyond financial performance. The study uses personal interview with accounting personnel at community-interest corporations in Malaysia to solicit their views on the level of ulū al-albāb influence in the social accounting for their community interest corporations (CIC). The preliminary results suggest that the concern about social well-being motivates community interest corporations to employ accounting personnel with accounting for public sector of non-profit corporations to bring the CIC to the social responsibility and accountability to the stakeholders and beyond. The results of the study are based on personal interview that could not be easily generalized. Policy makers on community interest corporations will apply ulū al-albāb in the training of accounting personnel with ulū al-albāb characteristics.

Keywords: Ulū al-albāb, Social accounting, Community interest
INTRODUCTION

In the competitive world, anyone who could offer superior value that is accepted by the stakeholders would be able to out-compete rivals. Firms that can offer superior value can be in many forms, namely superior products and services, good image and reputation, collaboration with established firms, and so on. Good contact and networking with accumulated social capital can offer superior value too. The managers and the owners of firms keep thinking very hard on how to continue to offer superior value. Likewise, the practice of accounting is not only just financial and management accounting, but also social accounting. Accounting that considers the reporting of non financial and social elements. Ulū al-Albāb refers to men of understanding about life and the expectations in life that are guided by the Tawhidic paradigm.

This study aims to explore the influence of Ulū al-Albāb in practising social accounting for community-interest corporations. Ulū al-Albāb is distinctive term used in Islam to refer to individuals who are endowed with clear understanding about life and life is connected to the Hereafter world. The basis for Ulū al-Albāb is based on Tawhidic paradigm, a value that unifies the differences and diversity for the sake betterment for oneself and the community in this world and beyond. Accounting is about informing financial performance through a standard of book keeping, recording, and interpreting performance of corporations. Social accounting prepares and makes the reports financial standing with key stakeholders. This study argues that accounting personnel with Ulū al-Albāb characteristics enhances their roles to practice sustainability social accounting for the performance of community-interest corporations to service beyond financial performance.

Community Interest Corporation (CIC)

The model of CIC which this paper refer is the United Kingdom CIC. It is actually a business innovation to achieve benefit for the public via business entity and to ensure such benefit is sustainable. The UK CIC was introduced in 2005 to accommodate the lack of vehicle to carry out non-charitable social enterprises (Defourny, J., & Nyssens, M. (2008).
The range of businesses conducted by CICs is diverse which includes enterprises, social firms, co-operatives and large-scale organizations operating locally or internationally.

There is no single legal model for social enterprise. As such, CIC could be carried out via private companies limited by guarantee or by shares but registered as charities. In another format, a charity may set up a CIC, in which case the CIC would be permitted to pass assets to the charity. CICs are more lightly regulated than charities but do not have the benefit of charitable status, even if their objects are entirely charitable in nature.

When a CIC is registered, the CIC regulator considers whether applications meet the criteria to become a CIC. If satisfied, the regulator advises the registrar in Companies House who, providing all the documents are in order, will issue a certificate of incorporation as a CIC (CIC, Regulator 2006). People who set up a CIC are expected to be philanthropic entrepreneurs who want to do good in a form other than charity. This is because the CICs are specifically identified with social enterprises and members of the board of a charity may only be paid where the constitution contains such a power and it can be considered to be in the best interests of the charity. It means that, in general, the founder of a social enterprise who wishes to be paid cannot be on the board and must give up strategic control of the organization to a volunteer board, which is often unacceptable. This limitation does not apply to CICs. CICs allow the businessmen to work for community benefit with the relative freedom of the non-charitable company. Not only that, CICs is allowed to pay the dividends to their shareholders under capped conditions of maximum dividend per share 5% above the Bank of England base rate up to a maximum of 35% of their distribution profit. Besides that, as part of corporate governance practice, CICs are also required to make a community interest statement for public record (CIC Regulator, 2009).

In Malaysia, CIC is not yet available in the form of a specific business entity but rather via charitable corporations. This is due to the practice of social entrepreneurship in Malaysia which exist in all kinds of business entities and governed by various legal frameworks. Nonetheless, it is observed that in a general context, the Ulūl Al-Albāb model fit in the characteristics of CIC.
Ulū Al-Albāb Model

Ulū al-Albāb refers to men of understanding about life and the expectations in life that are guided by the the Tawhidic paradigm. The Ulū al-Albāb model in business refers to the men in business organizations that derive the understanding to conduct business activities with Tawhidic paradigm. According to Mohd Kamal Hassan (2010, p.187), Tawhidic paradigm reflects the Islamic monotheism thinking with a purpose, objective, and goal in life, which is to serve as true servants of Allah ("ibād al-Rahmān), vicegerents (khulafā’ī fī al-ard), and true believers (al-mu’minūn) for the betterment of mankind (khayra ummatin ukhrijat lil-Nās) [business stakeholders] (Qur’ān, 3:110) and ‘balanced community’ (ummatan wasatan li-takūnū shuhdā’ ‘alā al-nās) (Qur’ān, 2:143). In the same notion, Al-Faruqi (1992, p.5) explains that the understanding of men with Tawhidic paradigm always ready with knowledge and competencies and willingness (motivation) to fulfill the Divine trust (al amānah) and obligatory duties (al farā'id) that are prescribed by the revelation (Qur'an and Sunnah) and execute the duties with reasoning and human unique capability (Qur’ān, Surah Hud, 11: 6 and Sura Az Zumar 39: 41). Figure 1 depicts the concept of Ulū al-Albāb from Tawhidic paradigm.

Figure 1: The concept of Ulū al-Albāb from Tawhidic paradigm
Men of understanding always work diligently to achieve organizational goals within the individual roles as servants and vicegerents of Allah. They continue to merge faith (īmān) and knowledge (ʿīlm) to fulfill the trust (amānah) and roles (masʿūlīyyah). Zarkasyi (2010) argued that the orientation of men of understanding has to be guided with knowledge that is proper for vicegerent and servant of Allah. The knowledge orientation by Al-Ghazālī is proper for the development of men of understanding due to the nature of knowledge that is divided into religious (al-dinīyyah) and rational (al-ʿaqlīyyah) knowledge. Men of understanding gain religious knowledge through the understanding on the sciences of the practical religion (ʿilm al-muʿāmālah), God’s guided knowledge on how the religion can be executed (ʿilm al-sharʿīyy), and knowledge that derived from human intellect (ʿilm al-ʿaqlīyy). Understanding from the practical religion (ʿilm al-muʿāmālah) integrates the exoteric (zāhir) and esoteric (bātin) sciences. The exoteric (zāhir) sciences include the act of worship (iḥādat), social ethics (ʿādat), and matters pertaining to dangerous act (muhlikāt). As for esoteric (bātin) sciences, it is about spirituality dimension.

The second category of knowledge that reinforces the men of understanding is the rational knowledge (ʿulūm al-ʿaqlīyyah/ʿulūm ghayr sharʿīyyah). Under this category of knowledge, the men of understanding are exposed to fundamental (usūl) and subsidiary (furūʾ) knowledge about life. The fundamental knowledge includes mathematics/logic, natural science (observation and experiment), and investigation science of existence. As for the subsidiary (furūʾ) knowledge about life compliments the fundamental knowledge to be executed.

The men of understanding need both knowledge to equip them with soul and competencies as basis to manage organizations to ensure priorities, resources, and efforts to convert the knowledge into absorptive capability. Zarkasyi (2010, pp.162-164) argued that there are two ways knowledge can be acquired by individuals, namely through human teaching (al-taʿlim al insaniyy) and Divine teaching (al-taʿlim al rabbāniyy). People learn from other people via face-to-face and other instructional ways (Zabeda, 2004, 2008) with monetary or non monetary rewards (Zabeda, 2008). However, the Divine teaching is highly spiritual when the learners acquiring knowledge based on Divine revelation (al-wahy), inspiration (ilhām), reflection and contemplation (al-ishtīghal bi al-tafakkur). The absorptive capacity to acquire human and Divine teaching is through five capabilities
(power), namely common sense (al-hiss al-mushtarak), representative power (al-quwwah al-khayāliyyah), estimate power (al-quwwah al-wahmiyyah), retentive power (al-quwwah al-hāfidah wa al-dhakirah), imaginative power (al-quwwah al-mutakhayyilah/ al-quwwah al-mutafakirrah). Figure 2 illustrates the Ulū al-Albāb model in the presence of faith and knowledge to strengthen the men of understanding in executing obligatory duties, Divine roles and expectations. In the mean time, the men of understanding should be aware of the noises and disturbances that could undermine the motivation of the men of understanding in executing the tasks.

Figure 2: Merging faith and knowledge into the concept of Ulū al-Albāb

METHODOLOGY

The study uses personal interview with accounting personnel at community-interest corporations in Malaysia to solicit their views on the level of ulū al-albāb influence in the social accounting for their community interest corporations (CIC).

This study explores the development of the Ulū al-Albāb model for social well-being motivates community interest corporations to employ accounting personnel with accounting
for public sector of non-profit corporations to bring the CIC to the social responsibility and accountability to the stakeholders and beyond. The Ulū al-Albāb model refers to capitalizing wisdom with a soul through the focus of seeking the Pleasure of Allah (mardhat Allah) through the obligations as servant (‘ibād al-Rahmān) and vicegerent of Allah (khālifah Allah fī al-ard). The study integrates knowledge-based view (KBV) with the Ulū al-Albāb model basis to social well-being motivates community interest corporations to employ accounting personnel with accounting for public sector of non-profit corporations to bring the CIC to the social responsibility and accountability to the stakeholders and beyond. The study used qualitative method through personal interviews with 15 informants among two (2) policy makers, five (5) entrepreneurship trainers and eight (8) social entrepreneurs in Klang Valley for their views on the use of the Ulū al-Albāb model to explore social well-being motives for community interest corporations to employ accounting personnel with accounting for public sector of non-profit corporations to bring the CIC to the social responsibility and accountability to the stakeholders and beyond. The informants were asked between 45 to 60 minutes “Suggest in what ways the use of wisdom and Divine guidelines (i.e. men of understanding approach) in accounting personnel with accounting for public sector of non-profit corporations to bring the CIC to the social responsibility and accountability to the stakeholders and beyond?” The feedback of the informants was recorded by note taking because the informants were reluctant to allow audio or video tape recording. The interview results were analysed and the informants were contacted to verify the interview results.

This study uses qualitative research method through personal interview approach. The use of qualitative method allows the study to explore the opinions and views of informants deeply (Rauch, Frese and Utsch, 2005), interactive (Stuart & Abetti, 1990), and more reliable (Wu, 2007).

FINDINGS AND DISCUSSION
This part presents the interview results that were analyzed manually. However, the study did not specify the real name of the informants and their respective organizations due to confidentiality. The informants were asked to respond to suggest possible and practical ways the use of wisdom and Divine guidelines (i.e. men of understanding approach) in accounting personnel with accounting for public sector of non-profit corporations to bring the CIC to the social responsibility and accountability to the stakeholders and beyond?

Table 1: Informants’ Profile

<table>
<thead>
<tr>
<th>Code</th>
<th>Types of informants</th>
<th>No</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>PM1, PM2</td>
<td>Policy makers</td>
<td>2</td>
<td>Putrajaya</td>
</tr>
<tr>
<td>TE2, TE3, TE4, TE5</td>
<td>Trainers</td>
<td>5</td>
<td>Gombak, Shah Alam, Nilai, Petaling Jaya</td>
</tr>
<tr>
<td>SE2, SE3, SE4, SE5, SE6, SE7, SE8</td>
<td>Social entrepreneurs</td>
<td>8</td>
<td>Gombak, Shah Alam, Petaling Jaya, Putrajaya</td>
</tr>
<tr>
<td>AL</td>
<td>TOTAL</td>
<td>15</td>
<td></td>
</tr>
</tbody>
</table>

PM 1 argued that being religious and committed in the business and entrepreneurial activity has been the properties in the entrepreneurship. Entrepreneurs learnt quickly from the mistakes and rebuild their ventures after recovery. PM 2 however contended that in the era of materialism and intensive capitalism, integrity and ethics have been ignored by the entrepreneurs. PM 2 added that the short-term orientation in the entrepreneurship has reduced an entrepreneurial venture into a typical business activity. With regards to social entrepreneurship, PM 1 contended that the term has been misled by the social activists as a medium to encourage the public to give charity with some tangible return. Based on the feedback of PM1 and PM 2, the term social entrepreneurship is merely social marketing made by corporate entrepreneurs to give a fresh perspective to modern entrepreneurship.

Table 2: Policy Makers’ Feedback

<table>
<thead>
<tr>
<th>Feedback</th>
<th>Social</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ulul albab</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Entrepreneurship

PM1
Religious and committed
Spirituality imbued
Support the model
PM2
Integrity, long term and entrepreneurial
Social activism
Support the model with modern requirement

Note: Question - “Suggest in what ways the use of wisdom and Divine guidelines (i.e. men of understanding approach) in social entrepreneurship contribute to sustainable wealth and value creation?”

TE1 accepted the use of accounting men’s intellectual ability and personal experiences in giving accounting services to social enterprises. According to TE1, profitability is always the objective in any business. As for TE2, the digital age emphasized on creativity and innovation as basis to formulate and implement organizational strategies that can out-compete the competitors. TE 2 argued that reasoning with Divine guidance is unique because not everyone can get Divine guidance. TE3 contended that training for intellectual wisdom is time consuming task but many people are reluctant to do it. In a different perspective, TE4 argued that training module for social entrepreneurs should include the social motivation element due to the highly interactive nature of social entrepreneurship. As for TE5, social entrepreneurship is very close to the local issues and value system in which human welfare and social well being is highly appreciated. Everyone works on ‘social welfare’ and ‘social wellbeing’ in every economic sector.

Table 3: Trainers’ Feedback

<table>
<thead>
<tr>
<th>Code</th>
<th>Feedback Ulul albab</th>
<th>Social Entrepreneurship p</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>TE1</td>
<td>Intellectual ability &amp; experience</td>
<td>Support the model</td>
<td></td>
</tr>
<tr>
<td>TE2</td>
<td>Creativity &amp; innovation</td>
<td>Digital age related business venture</td>
<td>Support the model</td>
</tr>
</tbody>
</table>

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Social entrepreneurs argued that the use of wisdom and Divine guidelines for accounting professional is reasonable to create and sustain wealth and value creation. SE1 argued that social enterprises should prioritize the creation of value for the society before creating wealth. According to SE1, the real wealth is embedded in the value that the society is willing to give to the social entrepreneurs.

Table 3: Trainers’ Feedback

<table>
<thead>
<tr>
<th>Code</th>
<th>Feedback Ulul albab</th>
<th>Social Entrepreneurship</th>
</tr>
</thead>
<tbody>
<tr>
<td>SE1</td>
<td>Support the model</td>
<td></td>
</tr>
<tr>
<td>SE2</td>
<td>Support the model</td>
<td></td>
</tr>
<tr>
<td>SE3</td>
<td>Support the model</td>
<td></td>
</tr>
<tr>
<td>SE4</td>
<td>Support the model</td>
<td></td>
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<tr>
<td>SE5</td>
<td>Support the model</td>
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<tr>
<td>SE6</td>
<td>Support the model</td>
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<tr>
<td>SE7</td>
<td>Support the model</td>
<td></td>
</tr>
<tr>
<td>SE8</td>
<td>Support the model</td>
<td></td>
</tr>
</tbody>
</table>

Note: Question - “Suggest in what ways the use of wisdom and Divine guidelines (i.e. men of understanding approach) in accounting personnel with accounting for public sector of non-profit corporations to bring the CIC to the social responsibility and accountability to the stakeholders and beyond?”
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According to Dacin, Dacin and Matear (2010), social entrepreneurship has no distinctive feature that differentiated it from other types of entrepreneurship. In fact, it has been rebranded to impress the corporate social responsibility element into entrepreneurship (Moss, Short, Payne & Lumpkin, 2010). Schindehutte, Morris, & Kuratko (2000) emphasised that the survival of entrepreneurship remain on taking of competitive advantages through cross functional activities. However, Waddock & Steckler (2013) argued that when entrepreneurship is linked to social needs and ends, the whole idealism of entrepreneurship is changed with some wisdom and spirituality elements. Volkmann, Tokarski andErnts (2012) pointed that social entrepreneurship has its own uniqueness which may allow the social entrepreneurship to gain sustainability. Likewise, Santos (2009) contended that there is positive thinking and perspective in the social entrepreneurship.

CONCLUSION

This study argues that accounting personnel with ulū al-albāb characteristics enhances their roles to practice sustainability social accounting for the performance of community-interest corporations to service beyond financial performance. The study uses personal interview with accounting personnel at community-interest corporations in Malaysia to solicit their views on the level of ulū al-albāb influence in the social accounting for their community interest corporations (CIC). The results suggest that the concern about social well-being motivates community interest corporations to employ accounting personnel with accounting for public sector of non-profit corporations to bring the CIC to the social responsibility and accountability to the stakeholders and beyond. The results of the study are based on personal interview that could not be easily generalized. Policy makers on community interest corporations will apply ulū al-albāb in the training of accounting personnel with ulū al-albāb characteristics.
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Abstrak

Perbahasan mengenai kaedah pembayaran zakat sama ada dibayar secara langsung kepada asnaf atau dibayar melalui institusi, adalah permasalahan yang telah lama berlaku. Arus perdana terkini iaitu media sosial, sering mengetengahkan kisah-kisah asnaf yang sukar menda pat bantuan zakat, kerenah birokrasi, peruntukan bantuan zakat yang tidak mencukupi dan lain-lain laporan yang memberi gambaran serong terhadap institusi zakat. Artikel ini akan membicarakan beberapa unsur positif dan negatif terhadap praktis pembayaran secara individu dan institusi serta kesan perundangannya. Beberapa alternatif penyelesaian turut dibicarakan secara ringkas bagi mengurangkan persepsi negatif terhadap praktis kedua-dua cara pembayaran zakat.

Pendahuluan

Zakat merupakan proses penyucian harta yang hanya dikenakan setelah cukup segala syaratnya. Pembersihan harta bermaksud membuang sifat tamak haloba, kikir, sombong, angkuh dan bakhil dalam diri seseorang, manakala jika dilihat dari segi prespektif si miskin pula dapat menyucikan daripada sifat-sifat mazmumah seperti iri hati, dengki, atau menaruh

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1629 Author is lecturer at Law Department, Faculty of Law & International Relations, University of Sultan Zainal Abidin (UniSZA), Gong Badak Campus. Email aidakadir@unisza.edu.my
persaan dendam terhadap orang kaya. Membersihkan diri pula bermakna, mengembalikan hak-hak si miskin yang telah pun ditentukan dalam harta ataupun pendapatan seseorang.¹⁶³⁰

Zakat & Peruntukan Undang-Undang


Dari susunan peraturan zakat setiap negeri, boleh dikatakan zakat digubalkan dengan berpandukan format yang sama. Ianya berikut apabila mana-mana negeri ingin menggubal peraturan zakat, Badan Perundangan Negeri tersebut akan merujuk praktis atau peraturan negeri lain yang telah diluluskan sebelumnya. Antara peruntukan dimasukkan dalam peraturan tersebut ialah:

a) Tajuk ringkas
b) Tarikh ianya dikuatkuasakan
c) Tafsiran perkataan-perkataan
d) Perlantikan pegawai Jawatankuasa Zakat dan bidang kuasa mereka
e) Tugas pegawai-pagawai zakat / jawatankuasa zakat
f) Jenis-jenis zakat dan kadar bayarannya
g) Cara-cara punguta dan pembayaran zakat
h) Perlantikan amil dan tugas-tugasnya
i) Orang-orang yang berhak menerima zakat
j) Pelepasan pembayaran zakat dan
k) Hukuman ke atas mereka yang melanggar peraturan zakat

Dari keseluruhan peruntukan peraturan tersebut, adalah jelas menunjukkan bahawa hampir tiada peraturan berhubung kaedah bagaimana pengagihan zakat perlu dilakukan. Dengan kata lain, cara pengagihan zakat adalah terserah sepenuhnya ke atas budi bicara pegawai zakat sendiri untuk menentukannya. Natijahnya, cara pengagihan yang tidak seragam di antara satu negeri dengan negeri yang lain dan pindaan prosedur sentiasa berlaku pada setiap tahun.

Setiap peraturan zakat telah menggariskan hukuman maksimum ke atas mereka yang melanggar peraturan zakat. Sekalipun demikian tidaklah semua peraturan tersebut membuat peruntukan denda dan penjara ke atas semua penyelewengan, bahkan ada sesetengah peraturan tidak menyebut langsung perkara yang sama dinyatakan dalam peraturan zakat negeri yang lain.

Kesemua undang-undang zakat negeri memperuntukkan kuasa kepada Mahkamah Syariah bagi membicarakan kes-kes pelanggaran undang-undang zakat negeri berkenaan. Negeri Kedah dan Perlis adalah dua buah negeri yang berbeza dengan negeri-negeri lain sebelum ini kes tersebut dibicarakan di Mahkamah Majistret.\textsuperscript{1631}

**Prinsip-prinsip Pelaksanaan Zakat**

Pelaksanaan zakat melalui institusi lebih sistematik, terkini, kerana ia mempunyai prinsip yang selari dengan prinsip agihan zakat yang dilaksanakan di Selangor berdasarkan kepada prinsip berikut:\textsuperscript{1632}


1. *Istiʿab* (Agihan Menyeluruh)

a) Harta zakat wajib diagihkan kepada semua asnaf yang wujud iaitu fakir, miskin, amil dan muallaf secara *muqaddam* (terawal). Manakala *gharim*, *fisabilillah*, *riqab*, *ibnu sabil* diagihkan secara *muakhkhar* (kemudian).

b) Harta zakat wajib diagihkan kepada setiap asnaf mengikut keperluan asnaf tersebut. Walau bagaimanapun, keutamaan hendaklah diberi kepada 4 asnaf terawal iaitu fakir, miskin, amil dan muallaf.

c) Permindahan peruntukan dari satu asnaf kepada asnaf yang lain dibenarkan dan ia berdasarkan kepada keperluan dan lebihan yang ada. Harus diberi kepada tiga golongan jika pemberian dilakukan terus kepada asnaf.

2. *Ikhtisas* (Kriteria Profesional)

a) Harta zakat hanya boleh diagihkan kepada asnaf-asnaf yang disebut oleh Allah dalam surah al-Taubah ayat 60.

b) Tiada ijtihad lagi dalam masalah menetukan asnaf yang menerima zakat
kecuali pada perkara-perkara yang berkaitan dengan pelaksanaan agihan kepada asnaf.

c) Sebarang qias yang hendak dibuat mestilah tidak keluar daripada asnaf yang lapan.

d) Pengagihan yang dibuat kepada mereka yang menetap di Selangor dalam tempoh yang ditetapkan oleh Majlis Agama Islam Selangor (MAIS) (pengecualian kepada asnaf ibnu sabil dan fisabilillah).

3. Hak

a) Harta zakat yang terkumpul adalah hak asnaf yang mesti disalurkan kepada mereka sama ada dalam bentuk zat, (bantuan berbentuk kebendaan seperti wang tunai, bantuan modal, rumah dan sebagainya) atau manfaah (agihan berbentuk perkhidmatan dan faedah seperti program latihan sama ada kemahiran, atau pembangunan ilmu pengetahuan, motivasi diri, program perlindungan, rumah sementara, khidmat bimbingan / kaunseling dan lain-lain).

b) Kehilangan harta zakat yang disebabkan oleh kecuaian mestilah diganti semula.
c) Polisi pengagihan zakat wajar dilaksanakan demi untuk melicinkan proses pengagihan tetapi tidak boleh hingga menafikan ‘hak asnaf’.

d) Wang asnaf hendaklah dianggihkan segera mengikut keperluan semasa asnaf.

4. Muragobah (Pengawasan)

a) Semua agihan dan penyerahan harta zakat hendaklah dilakukan dengan pengawasan dan kawalan rapi.

b) Sebarang pengagihan zakat meragukan yang memerlukan qias dan ijtihad mestilah mendapat persetujuan daripada Mufti kerajaan negeri Selangor.

c) Setiap permohonan hendaklah disiasat dan disahkan sekurang-kurangnya dua orang.

d) Setiap peringkat kelulusan dan keputusan pengurusan hendaklah dibuat dengan sifat-sifat berikut iaitu takut kepada Allah, ikhlas, amanah dan bertanggungjawab.

e) Peringatan amanah terhadap penggunaan wang zakat hendaklah diberikan kepada penerima.

5. Kifayah (Mencukupi Had Pemberian)
a) Agihan zakat kepada asnaf dan individu fakir miskin hendaklah menepati keperluan asasi sebenar.

b) Zakat yang diberikan kepada asnaf adalah berdasarkan kepada hak yang ditetapkan oleh syarak kepada asnaf.

c) Pemohon diberi hak menerima zakat apabila tidak memenuhi had kifayah yang telah ditetapkan oleh MAIS (bagaimanapun penentuan asnaf lain tidak tertakluk kepada penggunaan had kifayah).

6. Fauran (Segera atau Secepat Mungkin)

a) Amil yang terlibat dalam memproses permohonan hendaklah menjalankan tugas dengan segera bersesuaian dengan konsep muraqobah.

b) Agihan hendaklah dilaksanakan dengan segera setelah dipastikan asnaf yang layak menerima sah menurut hukum syarak.\textsuperscript{1633}

Aplikasi Semasa

Isu utama pada masa kini ialah mengenai aplikasi zakat pendapatan yang boleh dirajaskan dengan kaedah apa yang lebih sesuai, relevan, adil, \textit{ihitiat} (cermat dan teliti) dan lebih mendekati tuntutan syarak. Zakat pendapatan ialah zakat gaji termasuklah segala jenis

pendapatan atau pulangan sebagai balasan perkhidmatan yang berupa gaji, upah, bonus, dividen, hasil sewaan, royalti, hibah, elaun, honorarium, pampasan, pencen, perniagaan bermusim, dan lain-lain bentuk perolehan semasa hidup, bersara atau mati, dan apa jua pendapatan berdasarkan kerjaya atau sebagai ahli profesional.

Menurut pendapat ulama iaitu Professor Dr. Yusof Al-Qaradhawi dan Dr. Hussein Shahatah, zakat dan pendapatan diistilahkan sebagai zakat *al-Mal al-Mustafad* iaitu zakat yang bersumberkan pendapatan seperti yang diterangkan pada sebelum ini.

Oleh itu, para fuqaha telah berkhilaf, berselisih pendapat dalam menentukan serta menyamakan dengan kaedah yang lebih menepati kehendak syarak. Berdasarkan sejarah pada zaman Khalifah Umar Al-Khattab yang pernah menyamakan madu lebih hasil daripada pertanian, kadar zakatnya sebanyak 10% (setiap sepuluh qirbah zakatnya satu qirbah). Melalui perbincangan sebelum ini yang dapat dikaitkan dengan pendapatan bebas, dapat difahami bahawa zakat daripada pendapatan bebas merangkumi pelbagai pendapatan daripada pelbagai pekerjaan dan perusahaan bebas yang bukan perniagaan.

Seperti situasi yang boleh dibandingkan dengan dengan contoh pendapatan madu lebih dengan telur penyu yang juga dalam kategori hasil dapan dari segi perusahaan bebas, maka wajib zakatnya juga boleh disamakan dengan hasil pertanian kerana dapat diqiaskan dari lima aspek iaitu salah satu daripadanya, tempat yang boleh diperolehi, madu di dalam hutan manakala telur penyu dapat diperolehi di tepi pantai. Ringkasnya, apabila madu lebih disamakan dengan hasil pertanian dan kadar dikenakan zakat yang sama iaitu 10%, begitu juga, kadar bayaran adalah sama, iaitu mengikut peringkat kesukaran yang dihadapi atau kos yang digunakan sepertimana yang terdapat pada zakat pertanian. Bagaimanapun, ada pendapat lain yang menamakan dari sudut tanpa syarat dan haul sahaja, tidak dari sudut nisab dan kadar bayaran yang disamakan dengan kadar bayaran zakat emas dan perak iaitu 2.5%.

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**Kebaikan Pelaksanaan Zakat Melalui Institusi**

1. **Lebih sistematik**


Bilangan fakir dan miskin pada tahun 2007 adalah seramai 9,452 orang. Daripada jumlah tersebut seramai 672 daripada golongan fakir dan 8,780 orang daripada kalangan asnaf miskin. Seiring dengan peningkatan zakat yang menjadi subur sebanyak RM202 juta maka pengagihan zakat pada tahun 2008 dapat dipertingkatkan khususnya untuk asnaf fakir, miskin, lantaran nilai hidup yang semakin tinggi sama ada di luar bandar mahupun dalam bandar. Bantuan yang diberikan melalui lima program utama akan terus dimanfaatkan...

2. Mekanisme Kutipan Zakat Lebih Tersusun


3. Program Pembangunan Ummah


Selain itu, LZS (MAIS) menggunakan wang hasil kutipan zakat dengan membelanjakan ke arah Pembangunan Sosial seperti aspek perlindungan dengan mengadakan perlindungan wanita dengan membina Baitul Ehsan, membiayai skim perlindungan takaful terhadap golongan yang lemah dan memerlukan seperti juga Pusat Perlindungan Darul Salamah yang menempatkan golongan minoriti iaitu warga emas.
Sebenarnya pada zaman Rasulullah lagi pelaksanaan zakat diwujudkan melalui sesuatu badan yang mengendalikan pengurusan zakat agar keberkesanan terhadap maqasid pensyariatan zakat tercapai dan sekaligus kekuatan ekonomi umat Islam terbina dengan kukuh ketika umat Islam mula-mula untuk berkembang dan zaman penghijrah dari zaman Jahiliyah ke zaman yang bertauhidkan Allah s.w.t. 1640


Aspek Kontra Pelaksanaan Zakat Melalui Institusi

Masyarakat pada hari ini berasa sangsi untuk membayar zakat melalui institusi kerana kurang yakin dengan pentadbiran pejabat zakat sendiri. Hasil kajian yang dibuat ke atas pihak pengurus, kutipan zakat yang menjadi masalah untuk orang ramai lebih

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Selain itu, tidak puas hati dengan pengagihan zakat kepada mereka yang lebih berhak terutama sekali kepada fakir dan miskin. Setiap negeri mengeluarkan sejumlah tertentu dari kutipan zakat untuk fakir dan miskin sama ada hanya sekali setahun atau dua kali setahun atau secara tetap setiap bulan.\[^{1642}\] Juga zakat yang diberi kepada golongan fakir dan miskin berbeza-beza di antara satu negeri dengan negeri yang lain.

Kebanyakkan negeri jumlah zakat yang diberi kepada golongan fakir dan miskin telah timbul rasa tidak puas hati kepada pemberi zakat. Mereka merasakan jumlah yang diberikan terlalu kecil dibandingkan dengan jumlah kutipan wang zakat yang dipungut. Keadaan ini akhirnya membawa kepada fitnah dan tuduhan penyalah gunaan wang zakat oleh kaitangan pejabat zakat.

Di samping itu juga, masyarakat tidak berpuas hati terhadap kriteria pemilihan golongan yang layak menerima zakat atas tiket fakir dan miskin, kerana ada yang dapat bantuan zakat pada orang yang tidak sepatutnya dan sebaliknya layak menerima tidak diberi bantuan. Tidak dapat dinefsikan bahawa pengaruh politik memainkan peranan kuat, pilih kasih, mementingkan keluarga sendiri telah berlaku di kawasan-kawasan tertentu dalam menentukan kelayakan golongan yang menerima zakat.\[^{1643}\]

Kebaikan Pelaksanaan Zakat Melalui Individu

Pembayaran zakat melalui lebih mudah dan cepat tanpa memerlukan prosedur yang rumit serta kerenah untuk berurusan dengan pegawai zakat. Disebabkan tidak percaya kepada kejujuran dan ketelusan amil yang bekerja di institusi zakat maka ada sesetengah individu yang lebih selesa untuk memilih jalan pengeluaran zakat secara individu. Hanya asnaf tertentu, bertuah mendapatkan bantuan dengan cepat dan mudah tanpa terlebih dahulu membuat permohonan prosedur di pejabat-pejabat zakat.

Malahan, sikap sesetengah pengeluar zakat yang lebih selesa merasakan rendah diri, tawaduk untuk membayar zakat secara sendiri dan mengandaikan pembayaran zakat melalui individu sama sahaja, tiada apa-apa yang terjejas, yang penting tanggungjawab sebagai orang Islam dalam menunaikan Rukun Islam tersebut telah pun terlaksana.

Kontra pelaksanaan zakat secara individu

Seperti yang kita ketahui bahawa pada zaman Rasulullah sendiri tidak melaksanakan zakat secara individu kerana segala urusan yang berkait untuk pembangunan ummah dilakukan secara syura dan ada badan dalam kegiatan ekonomi sesuatu negara Islam yang telah dilakukan pada zaman Rasulullah. Bermakna pembayaran zakat secara individu tidak mengikut sunnah Rasulullah yang mana ‘role model’ umat Islam dan manusia sejagat.\textsuperscript{1644}

Selain itu, pelaksanaan zakat secara individu tidak dapat mencapai maqasid pensyariatan zakat itu sendiri iaitu untuk mengembangkan harta lebih luas, subur serta berkembang. Sekiranya pembayaran zakat dilakukan secara individu, ia tidak dapat

\textsuperscript{1644} Dr. Yusuf al-Qardhawi. Opcit.
diagihkan kepada asnaf-asnaf lain yang lebih memerlukan pelbagai keadaan, keperluan kerana ia tidak dapat berkembang hanya tertumpu kepada sesuatu golongan sahaja dan golongan setempat sahaja. Inilah yang dikatakan tidak mencapai maksud sebenar tujuan pensyariatan zakat itu sendiri.\textsuperscript{1645}

**Kesimpulan**


Ketidakberkesanan pungutan tersebut sedikit sebanyaknya ada kaitan dengan kelemahan undang-undang zakat itu sendiri. Di samping itu juga, mungkin disebabkan oleh beberapa faktor lain seperti mekanisme pungutan zakat yang kurang mantap dan berkesan, atau kurangnya kefahaman serta kesedaran orang ramai terhadap hukum zakat Islam itu.

sendiri, atau kurangnya keyakinan dengan pentadbiran institusi zakat. Justeru itu, untuk menjamin pungutan zakat yang berkesan maka keempat-empat aspek tersebut iaitu undang-undang, mekanisme pungutan zakat, kefahaman orang ramai terhadap hukum zakat dalam Islam dan keyakinan terhadap pentadbiran pejabat zakat perlu ditekankan.

Bibliografi


Shari‘ah Issues in *Al-Ijarah Thumma Al-Bay‘* (AITAB) Car Financing as Practiced in Malaysia

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Abstract

*Al-Ijarah Thumma Al-Bay‘* (AITAB) car financing that refers to Islamic hire purchase car financing is a popular car financing product offered by the majority of Islamic banks in Malaysia which is an alternative to conventional hire purchase. However, despite being the popular product for car financing, AITAB is criticized by many people in and outside the Islamic banking sector, due to the existence of many Shari‘ah issues. Thus, the purposes of this paper are to elucidate Shari‘ah issues on AITAB car financing and to provide detailed explanation and solutions on such issues. The method adopted in the research involves library based research and interview conducted on certain target audience. It is hoped that through this paper, Shari‘ah issues on AITAB car financing are resolved accordingly.

Keywords: *Al-Ijarah Thumma Al-Bay‘* (AITAB), car financing, Shari‘ah issues

1.0 INTRODUCTION

*Al-Ijarah Thumma Al-Bay‘* (AITAB) means literally to lease, hire, or rent ending with purchase. It is a hybrid of two Shari‘ah contracts, *al-ijarah* (hire) and *al-bay‘* (sale) (Gupta and

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Shanmugam, 1998). In AITAB, the contract of *al-ijarah* runs separately from the contract of *al-bay‘*. It starts with the first contract where the customer leases the goods from owner at an agreed rental over a specified period. Upon expiry of the leasing or rental period, the customer enters into a second contract to purchase the goods from the owner at an agreed price.

For AITAB car financing in Malaysia, it operates in the following sequences:

a) Islamic bank buys the car from a car dealer, to the order of its customer.

b) Islamic bank hires the car to the customer at a rate agreed upon for a specified period of time whereby the customer agrees to be responsible for payment of road tax takaful coverage and maintenance.

c) Islamic bank at the end of the rental period signs with the customer the sale and purchase agreement for the transfer of car’s ownership to the customer (Nurdianawati and Asyraf, 2006).

AITAB is one of the popular car financing products that many Islamic banks in Malaysia offer. The banks include the Maybank Islamic Berhad, Public Bank Islamic Berhad, Affin Islamic Bank Berhad and CIMB Islamic Berhad. The product provides a vast number of opportunities to the customers, whereby it enables them to own the car they could not have both on cash basis but can do so on the future date when payments are periodically made on a lease basis. They do not need to give a mortgage to the bank because the ownership of the asset remains with the bank until the end of the period. Therefore, in case of any default by the customers the bank can easily recover the asset (al-Qaradaghi, 2000). However, despite being the popular product for car financing, AITAB has been criticized by many people in and outside the Islamic banking sector, due to the existence of many Shari‘ah issues. Thus, this paper aims to address the Shari‘ah issues on AITAB car financing that are divided into i) major Shari‘ah issues and ii) subsidiary Shari‘ah issues by examining the views of the Muslim jurists on such issues and to come out with a reasonable solution in ensuring the AITAB car financing is in conformity with the Shari‘ah.
2.0 MAJOR SHARI‘AH ISSUES IN AITAB CAR FINANCING

There are various major Shari‘ah issues relating to AITAB transaction itself. They include (a) AITAB involves a combination of two transactions in one, (b) AITAB is similar to a sale with condition, (c) AITAB is an innovative new contract, and (d) AITAB involves uncertainty of status of promise.

2.1 AITAB involves a combination of two transactions in one

AITAB is not allowed as it involves a combination of two transactions in one that is known as safqatayn fi safqah or al-bay‘atan fi al-bay‘ah. Thus, AITAB is prohibited by the Shari‘ah on the basis of the Hadiths of the Prophet s.a.w., “The Prophet s.a.w. has prohibited two transactions in one bargain” and “The Prophet s.a.w. has prohibited two sales combined in one bargain.”

To settle this issue, the analysis on interpretation of both Hadiths is necessary. According to Ibn Mas‘ud, by virtue of the first Hadith, two transactions in one dealing are not permissible. Such dealing happens when one say: “I sold to you for cash for this price but for deferred payment for that price.” There are two prices here that is the spot price and the deferred price which will be higher than the spot price. Thus, the contract contains two prices in one offer which are not separated from one another (al-Qaradaghi, 2001). Based on the Ibn Mas‘ud’s view, according to many of the Muslim jurists such as Sammak, Abdul Wahhab bin ‘Ata’, Abu ‘Ubayd, Ibn Sirin, Nasa‘i and Ibn Hibban, this kind of contract is not valid. On the other hand, some of them considered the contract is valid and the seller deserves only the lower price as Tawas says: if you said to the buyer, I sold to you this for cash for that price and for deferment for that price and the contract executed on that offer, the seller deserves the lower price for the longer period. Imam Awza‘i and some others agreed with Tawas (al-Qaradaghi, 2001).

Regarding the second Hadith, most of the Muslim jurists have the same interpretation as for the first Hadith. Hence, the two Hadiths have the same meaning that is a contract with different prices; for cash at the market price and for deferred payment with a higher price. However, if they bargain and agree on a price, the contract will be valid (al-Qaradaghi, 2001).
The issue now is whether AITAB transaction is fallen under the prohibition of the Hadiths as interpreted before. According to some Muslim jurists, AITAB is considered two transactions in one as prohibited by the Hadiths but others consider AITAB does not cover by such prohibition which is considered as a preferable view. This is because the contract of hire and sale that form an AITAB agreement are not concurrent but successive. The first contract is the contract of *ijarah*, whether the rental was for market price or higher, it should be governed by the requirements of an *ijarah* contract (al-Zuhayli, 2000). The second contract is the contract of *bay’a* resulting in transferring the ownership of the asset. The passing of the ownership is done for a nominal price. This is because the lessee has fulfilled all the payments and the lessor is free to grant the asset to the lessee as there no objection to this in Shari‘ah. Furthermore, this happens also as the result of a promise that has been undertaken by the lessor (al-Zuhayli, 2000).

Furthermore, it is argued that AITAB does not involve two transactions in one due to the usage of the conjunctive word "ثامن" or “then” in the sentence of *Al-Ijarah Thumma Al-Bay’a*. Majority of jurists including Ibn Malik in his book known as Alfiyah pointed out that the word “then” in Arabic language means order and lax. Besides, it is highlighted in the book of Sheikh Khalid Al-Azhari, "The Statement on Clarification" and the book of Ashmouni, "Explanation of Ashmouni" Volume II that the word “then” in Arabic means “order and inaction”. The example of that is illustrated from the words of the poet said:

إن من ساد ثم ساد أبوه.

One of his father prevailed then prevailed then has prevailed before that his grandfather.

In this regard, the *Shari‘ah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) has resolved that the application of the AITAB concept in car financing is permissible, subject to the following conditions:

a) The modus operandi of AITAB shall consist of two independent contracts, namely *ijarah* contract and *bay’a* contract;

b) The sale price upon expiry of the lease period may be equivalent to the last rental amount of *ijarah*;

c) An agency letter to appoint the customer as an agent for the Islamic financial institution shall be introduced in the modus operandi of AITAB;
d) The AITAB agreement shall include a clause that specifies “will purchase the vehicle” at the end of the lease period, as well as a clause on early redemption by the lessee;

e) The deposit paid to the vehicle dealer does not form a sale contract since it is deemed as a deposit that has to be paid by the Islamic financial institution;

f) In line with the principles of *ijarah*, the Islamic financial institution as the owner of the asset shall bear all reasonable risks relating to the ownership; and

g) For cases relating to refinancing with a new financier, the lessee shall firstly terminate the existing AITAB contract before entering into a new AITAB agreement (Resolutions, 2010).

### 2.2 AITAB is similar to a sale with condition

Furthermore, AITAB is not allowed as it is similar to a sale with a condition that is known as *al-bay’ ma’a al-shart* that is prohibited by virtue of the *Hadiths* of the Prophet s.a.w., “The Prophet s.a.w. has prohibited a sale with a condition.” And “The Prophet s.a.w. has prohibited two conditions in one sale.”(al-Tirmidhi, 1999).

To deal with the abovementioned issue, the abovementioned two *Hadiths* of the Prophet s.a.w. are evaluated accordingly. For the first *Hadith* of the Prophet s.a.w., it is said that the *Hadith* cannot be considered as the main evidence of invalidating condition in a sale contract as it is not an authentic one. Thus, it cannot be a ground of an argument like this (al-Tirmidhi, 1999). As regards to the second *Hadith* of the Prophet s.a.w., the actual meaning of the *Hadith* is not the prohibition of two conditions in one but it is more on the prohibition of two transactions is one.

To have a clear understanding on the condition in the agreement including AITAB with a condition or conditions, the view of Ibn Taymiyyah is analysed as he opined that any condition which does not contradict with the principles of the *Shari’ah* is valid. This view is based on the *Quranic* texts and Prophetic sayings that generally enjoin Muslim to keep their promises and pledges. For example, the Prophet s.a.w. said: “people are bound by their condition as long as it conforms to the *Shari’ah*.”(Ibn Taymiyyah, 2001) Ibn Taymiyyah supports his opinion that the contract and stipulations in principle are allowed when he said: “And this notion is proved by al-Qur’an and *sunnah* and it’s the right opinion of the Hanbalis. Therefore, no one can allow what Allah has prohibited and vice-versa…but the stipulator can impose something which was not obligatory before.” (Ibn Taymiyyah, 2001).
Also stipulating in a sale contract, a quality or a mortgage, and extra dowry in marriage over normal case, these can impose obligations or deprive what was allowed before. And this (imposing obligations and depriving what was allowed ) made some jurists confused to state that stipulation is not allowed, because it obligates and forbids what was not… but the truth is what was forbidden can cannot allowed by stipulation (Ibn Taymiyyah, 2001). Moreover, imposing obligations by mutual consent in favor of the imposer is to protect his rights.

2.3 AITAB is an innovative new contract

Furthermore, AITAB is not permitted as it is an innovative new contract that never be mentioned by Al-Qur’an and the Hadith of the Prophet s.a.w. Hence, it is not allowed to be practiced.

To resolve such issue, it is necessary to look into the view of Imam Shafi‘i, Zayla‘i from the Hanafi school, Shatibi from the Maliki school and Ibn Taymiyyah and Ibn Qayyim from the Hanbali school. According to them, contracts in principle are allowed, except if there is a proof states otherwise (Ibn Taymiyyah, 2001). This is based on the various injunctions from al-Qur’an such as Allah says; “O you who believe! fulfill (all) obligations.”(al-Maidah, 5:1) And “And fulfill every engagement for every engagement will be inquired into.”(al-Isra’, 17:34)

The two Arabic words that are ‘aqd, ‘ahd in the abovementioned verses are general and applicable to all kind of agreements and contracts between people, except those that contradict with the Shari‘ah.

Furthermore, contracts are ordinary actions and they are in principle allowed. Ibn Taymiyyah said; “if we ban contracts between people, we are prohibiting something that Allah did not prohibit. Conversely, agreement or actions that are related to worshipping can be banned, except with Shari‘ah’s approval. Moreover, contracts are ordinary doings done by Muslims and non-Muslims and do not need a statement from Shari‘ah to approve them”(Ibn Taymiyyah, 2001). Thus, any contract which does not contradict with Islamic law is allowed.
2.4 AITAB involves uncertainty of status of promise

Additional, in AITAB agreement, there is element of promise on the part of the bank that there will be a transfer of ownership of the car to the customer upon payment of the last monthly rental. Since, there is an element of uncertainty to the status of the promise whether it has legal binding effect or not that would lead to the invalidity of the AITAB transaction itself.

To address this issue, the views of Muslim jurists on the status of unilateral promise needs to be analysed and discussed. According to the majority of Muslim jurists, a promise is binding religiously but not legally. This means that the promisor is bound by the Shari‘ah to honor his promise, but his promise is not subject to enforcement before the court of law. However, the Hanafis are of the view that the effect of promise is suspended upon the completion of the payment of the monthly rental as per agreed by the contracting parties (Ibn Taymiyyah, 2001). The Malikis on the other hand say that the parties are legally bound if the promised party spent some money because of that promise (al-Zuhayli, 2000).

In the case of AITAB, the lessee is paying a rental higher than the normal rent because he has been promised ownership of the asset. The statement of the Islamic fiqh Academy in its fifth session in Kuwait regarding promises supports the Malikis view, which is promise is unilaterally given by one of the parties. The promisor is bound religiously even if there is no reason to make the promise legally binding on him. However, he is bound legally if the promise suspended on something or the promised party spent some money because of the promise. The promisor either honors his promise or he should compensate the promised party for any loss incurred because of the promise (Majma‘). It is worth mentioning that some jurists such as Samura Ibn Jundub, Ibn Shibrima, Sa‘id Ibn Ashwa‘ al-Kufi and Ishaq Ibn Rahawayhi are of the view that a promise is binding generally, and this view is supported by the statement of the first conference of the Islamic Banks in 1399H as well as the second conference in 1403H (al-Zuhayli, 2000). The Malikis’ view which is supported by the academy’s statement can be considered as a moderate view and suitable for the case of such a contract.
3.0 SUBSIDIARY ISSUES IN AITAB CAR FINANCING.

Other than the major issues in AITAB, there are other subsidiary issues relating to the transaction. Some of these issues are, (a) ownership, (b) transfer of ownership, (c) maintenance, (d) takaful, (e) deposit payment, (f) penalty in case of default, (g) legal treatment, (h) taking the value and the counter value as well, (i) contract favors the rich, (j) nominal price and (k) lease before ownership.

3.1 Ownership

Having a self ownership of the asset before renting it out to the customer represents the extent of rights and liabilities of the parties involved in the AITAB agreement. The time or stage in which original ownership is transferred to the lessee should be carefully examined, as this would result in the owner’s exemption from being held responsible for matters attaching to the asset. Thus, as a consequence of holding ownership of the asset, leasing and leasing-based financing would require a bank to deviate from its basic nature as financial intermediary (Khan, 1995). To be an owner, the bank will have to become involved in purchasing the asset, which requires certain marketing expertise, maintaining the asset and bearing all costs associated therewith, and disposing of it when the asset is no longer needed. Any leasing contract that absolves the bank from all these activities will violate the Shari’ah principle of leasing and thus should be avoided. As a consequence of holding ownership, the bank will assume some rights, liabilities, and risks associated with the asset. These include the right to repossess the asset upon customer’s default, maintenance responsibility, and liability to taxes (Weist, 2000). In other words, ownership results in more risks, liabilities, and responsibilities that most banks would attempt to avoid as much as possible.

In the Malaysian practice, the bank holds beneficial ownership (milkiyyah nafdiyyah) of the car, while the customer, having his name in the document of title, becomes the legal owner. The bank will usually have to register its ownership claim over the title of the asset and have it endorsed on the registration car. This practice is slightly modified from conventional hire purchase, whereby the bank holds the document of title as security for the hire-purchase loan. Upon satisfying all due payments, the bank will remove its claim, resulting in the customer becoming the absolute owner. There are only two different aspects
in both transactions. Firstly, the parties’ intention and understanding when executing AITAB is to have the asset leased and then sold in which the bank will have a beneficial right over the asset throughout the transaction, until complete transfer of ownership takes effect (Davies, 1995).

Secondly, the bank’s beneficial ownership is released by executing a sale/transfer of ownership contract. This signifies a complete transfer of ownership to the customer. However, unless these two points are made clear to the customer and bank officer in charge of the transaction, there will be virtually no difference between AITAB and conventional hire purchase regarding the ownership issue. By holding a beneficial ownership and having an ownership claim over the asset, the bank has a right to repossess the asset if the customer violates the contract. The registration of the ownership claim is an industry practice, which is not provided in the Hire-Purchase Act 1967 (Seif and Nurdiana, 2007).

3.2 Transfer of ownership

In a situation whereby the lessor leased asset, there should a mutually ascertained documentation for the transaction ownership. AITAB transaction involves two separate contracts:

a) A contract of ijarah from the beginning of the transaction and

b) A contract completing the transfer of ownership from the lessor to lessee either by way of sale or gift (hibah) (Al-Nashmi, 2003).

Affirming the two manners of executing the second contract, the Shariah Legal Opinions (Fatawa Shar’iyyah) of the Kuwait Finance House explain that the ownership can be transferred to the lessee either by means of giving the asset as a gift (hibah) or selling it when the lease period has expired, provided that all payments are made in entirety (DeLorenzo, 2002). In addition to the above, there are some jurists who argue that the second contract should grant a call option to the lessee to eventually acquire the asset after completing the ijarah contract (Ghuddah, 2001). As to procedural matters, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) Shariah Rules for Ijarah and Ijarah Muntahia Bittamleek (2000) provides that the method of transferring the title of the leased asset must be evidenced in a document separate from the ijarah contract, using one of the following methods:
i. The first is by means of a promise to sell for a token or other consideration, or by accelerating the payment of the remaining installments, or by paying the market value of the leased asset.

ii. The second is a promise to give it as a gift (for no consideration).

iii. The third is a promise to give it as a gift, contingent upon the payment of the remaining installments. Similarly, the operation of Islamic AITAB in Malaysia undertakes two separate contracts. One is a leasing (ijarah) contract, which refers to an AITAB agreement. The content is similar to the conventional hire purchase, except with the insertion of an Islamic contractual (aqad) letter.

iv. The fourth is a contract to purchase, which is executed either upon early settlement or at maturity of the AITAB agreement. For practical purposes, the contracts are signed up front by the parties.

v. The fifth except for the second contract, which the bank will only sign after the first one has elapsed. However, the signing of the second contract does not make the contract automatically effective. There is a stipulation in the contract stating the manner in which the transfer of ownership must take place. For example, paying the last installment will be considered as exercising an option to purchase the asset. When the bank accepts it and gives a release letter against the ownership claim, the contract is deemed to be executed by way of conduct.

vi. The sixth when transfer of ownership is affected by sale, the asset is purchased at a nominal amount, which is mutually agreed upon by both parties. The price need not necessarily be based on the market condition and the real value of the property. In common practice, final payment or last installment is considered as purchase price. When a customer has paid this last installment, he is automatically exercising an option to purchase. In this situation, the valid intention of the parties at a practical level is a problem. The issue is whether they (bank and customer) are aware and understand that they are executing a sale contract when the customer completes his final payment (Rosly and Sanusi, 2004).

Based on the issue above, it is suggested that transfer of ownership would spell out the intention in the agreement—for instance, an intention to lease during the first period is included in the ijarah contract, and then an intention to buy is put in a separate contract of sale in the latter
period, in order to avoid the combination of two sales in a single contract as that is forbidding by the Prophet s.a.w. when he was quoted to have forbidding combination of two deals in a single contract (al-Tirmidhi, 1999). It is therefore important to stipulate in clear terms how transfer of ownership takes place, and such terms must be understood and agreed upon by both parties. In deciding the terms and conditions in the contract, consideration must be made in terms of Shariah compliancy, practicality, and convenience of the contracting parties.

3.3 Maintenance
The issue of maintenance in the ijarah is important, as it signifies the extent of the owner’s responsibilities toward the leased asset. In an ijarah contract, the owner leases his property to the lessee for a specified period against a determined consideration. The lessor in this situation still holds the ownership of the leased asset, and is fully responsible toward it. On the other hand, the lessee is granted full possession of the asset, so that he can ultimately use it according to the purpose specified in the contract within the agreed-upon period of time. During the ijarah contract, both lessor and lessee bear distinct responsibilities of maintaining the leased asset. The lessor is responsible to ensure that the leased property is always fit to render intended benefit to the lessee, while the lessee, who is entrusted with safekeeping the asset, shall be accountable for its proper and continuous use on regular basis. Such responsibilities can be categorized into two types:

a) Basic or Structural Maintenance: The lessor shall bear all costs of major breakdown and basic liabilities attached to the leased asset. For example, in the case of renting a car, the lessor is responsible for the repair of the car engine because this is a basic feature of the car. He is also bound to pay the insurance and road tax annually by the government because he is a legal owner of the car. This is because maintenance is the owner’s responsibility, and entitlement to the rental is a consideration to the maintenance responsibility.

b) Routine or Operational Maintenance: The lessor will bear all costs of routine maintenance of the leased property. This includes keeping the property in a good condition for a proper use—for example, in renting a car, he must keep it clean and tidy. In addition, he shall bear the cost of car petrol, engine oil, and other ordinary car maintenance in order to keep the car functioning well (Ahmed, 1993).
Hence, the lessor must remain liable for basic maintenance, although this term is often difficult to differentiate with clarity from operational maintenance, which is the responsibility of the lessee.

In the practice in AITAB transactions in Malaysia, maintenance responsibility is undertaken solely by the customer, while the bank only acts as a financier, and thus will not assume any responsibility to the asset being leased and to be purchased by the customer. The bank argues that their customers’ ultimate objective of engaging in hire purchase is to own an asset, particularly a motor vehicle, not merely to lease it for a certain period of time. In fact, the customer is acknowledged in the document of title as a legal owner of the asset. The bank only acts as a beneficial owner that has an ownership claim over the asset until full payment has been made. Therefore, it is reasonable to require the lessee to maintain the asset since he is the one who uses and utilizes it. Yet, the lessee has a right to sue the bank if he finds that the asset is defective, which results in failure of rendering intended benefits to him. If the lessee repairs the defective asset, he is entitled to claim the cost of repair from the bank. The situation would be different if the defect were caused by the lessee’s negligence (Belder, 2004). In this case, he will bear the cost of repairing the asset. The above illustrated practice in Malaysia does not seem to be 100% Shariah-compliant, because in Shariah, the owner is responsible for maintaining the leased asset. In practice, all responsibilities are passed to the hirer. Some Shariah jurists held that this condition does not nullify the contract because the practice is based on ‘uruf (local custom) and market practice in Malaysia (Seif and Nurdiana, 2007). To resolve the above conflict of interest, Shariah advisors and jurists in Malaysia have ruled that the duty to maintain the leased property must be made clear to the contracting parties and put in clear terms in the agreement.

4.4 Takaful responsibility

The general principle enunciates that takaful of an asset is the responsibility of the lessor. This is contrary to the established practice in conventional hire purchase, where it is the hirer’s responsibility. The issue of takaful responsibility has been discussed by many Islamic economists and legal practitioners, who often seem to be caught in a dilemma between the conflicting principles. Many of them think that it is necessary for the Islamic insurance of
the leased assets to be the responsibility of the lessor instead of the lessee as is practiced nowadays (Clode, 1996) observed that in a total economic loss, the owner must pay the insurance. But in the case of partial loss, the matter is unclear. If the owner is required to bear the *takaful*, the amount shall be added to the cost price (Shirazi, 1993). If an asset is insured under *takaful*, it should be at the expense of the hirer. Nowadays, *takaful* responsibility is usually assumed by the lessee or bank customer. Some experts in Malaysia say that risks and liabilities that are not detrimental and harmless, which include insurance and maintenance, can be transferred to the lessee. *Shariah* Legal Opinions (*Fatawa* Shar‘iyyah) of the Kuwait Finance House affirm that it is lawful to make the lessee responsible for insurance, if the amount is known, because it may then become a part of the lease payment (Shirazi, 1993). Perhaps a measure concerning insurance approved by the Board of Executive Directors of the Islamic Development Bank (IDB) to promote *ijarah* can shed a light on this important issue (Parker and Dawood, 1993).

In this regard, the *takaful* may be shared with the lessee. The IDB should bear the cost of insuring risks incidental to ownership, such as total damage, loss, and third-party liability exposure, while the lessee will bear the cost of insuring the risks incidental to use, such as operational hazards, accidents, and negligence. This mechanism exemplifies a balanced sharing of responsibility between the bank and customer in insuring internal and external risks associated with the use of a particular asset. The practice in Malaysia shows that *takaful* is borne by the lessor during the first year of transaction, where the cost is included in the rental payments. In the subsequent years, the lessee will undertake to pay the cost of *takaful*. This rule has been agreed upon by most Muslim jurists in Malaysia. Their main argument is that the purpose of taking insurance coverage is to protect oneself from any risk related to being a user of the asset. Any damages to the asset or injury to the third party caused by one’s own negligence shall necessarily be his responsibility. Therefore, it is reasonable enough for the lessee to take insurance (*takaful*) coverage for the above purposes (Parker and Dawood, 1993).
3.5 Deposit payment

It has been a common commercial practice to pay a deposit before starting to use any newly acquired asset. The deposit serves as security against future loss or misconduct caused by the lessee. The payment of deposit is not a big issue because this has been an accepted practice, and most parties involved in the transaction agree to perform this obligation (Shirazi, 1993). However, in an Islamic transaction, the intention and purpose of the payment must be made clearer, especially to the customer. This is to ensure that he fully understands the purpose of deposit payment and the function it serves. The Accounting and Auditing Organization for Islamic Financial Institutions (AAIOFI) Shariah Rules for Ijarah and ijarah Muntahia Bittamleek (2000) regards a deposit made by the lessee to secure the rental payments or security against loss of a leased asset caused by the misuse or negligence of the lessee (AAIOFI, 2000).

3.6 Penalty in case of default

To be more explicit, in order to signify a breach contract, an act of default in due payment need to be taken in to account. When two parties or more enter into a valid contract, they will be bound by terms and conditions in the contract. Breaching any of these terms will cause the innocent party to suffer a loss that needs to be compensated (Baharum, 2004). The question is whether the default has caused actual loss or damages to the bank and, if yes, whether the bank can be compensated? In the case of default in payment of installments, there are mixed reactions from the jurists. Some of them give a very strict rule that penalty for late payment of rentals is not permissible. Their arguments are based on the following points:

a. Rentals, once due, become a debt obligation payable by the hirer and are subject to all the rules prescribed for a debt.

b. This penalty, if meant to add to the income or generate profit for the owner, is not warranted by the Shari’ah.

c. A monetary charge from a debtor for his late payment is exactly the riba prohibited by the Holy Qur’an. Therefore, the lessor cannot charge an additional amount if the lessee delays payment of the rent. Unfortunately, this situation has been exploited by unscrupulous customers (Hairetdinov, 1998).
In order to avoid the adverse consequences resulting from the misuse of this prohibition, another alternative may be resorted to. In such circumstances, contemporary jurists have provided a solution whereby a penalty can be charged to the customer for delayed payment, though the amount recovered is only to be used for charitable purposes by the bank (Hairetdinov, 1998). In other words, late penalty charges cannot be taken as income by the bank. In support of the above propositions views that the lessee may be asked to undertake that if he fails to pay rent on its due date, he will pay a certain amount to a charity. For this purpose, the bank or lessor may maintain a charity fund where such amounts may be credited and disbursed for charitable purposes, including advancing interest-free loans to the needy persons. The amount payable for charitable purposes by the lessee may vary according to the period of default and may be calculated at a percent, per annum basis. This arrangement, though, does not compensate the lessor for his opportunity cost of the period of default, yet it may serve as a strong deterrent for the lessee to pay the rent promptly (Usmani, 2002; Meezan Bank, 2004). Allowing the above propositions, the AAOIFI Shari’ah Rules for Ijarah and Ijarah Muntahia Bittamleek (2000) state that a lessee who delays payment for no good reason shall undertake to donate a certain amount or percentage of the rental due in the case of late payment. Such donation should be paid to charitable causes under the coordination of the Institution’s Shari’ah supervisory board. On the other hand, Wohabe has a different view. According to him, it is possible to compensate the lessor for any default by the lessee through increased lease payments, which represent a reassessment of the risk involved in the transaction itself (Wohabe, 1997). This is due to the fact that the bank does suffer loss if its customer defaulted, since regular payments constitute one of a bank’s receivables and income. Hence, the default would necessarily expose the bank to a risk of potential loss in the secondary markets and inability to pay the shareholders and investors. In the Malaysian context, the SAC has ruled that the customer shall pay to the bank the sum equivalent to the costs incurred by the bank in the maintenance on such default amounts or such rate as prescribed by the BNM. The sum is calculated in the manner prescribed by the SAC and duly endorsed by the BNM. The mechanisms of imposing the penalty are outlined as follows:

a) If the default happens before the maturity period, a penalty of 1% per annum will be imposed on the overdue installments.
b) If the default is caused after the maturity period, the rate of penalty must be based on the Islamic money market rate.

c) The maximum penalty amount for late payment cannot exceed 100% of the outstanding balance of the purchase price. For example, if the balance purchase price is RM 50,000, the amount of the penalty cannot exceed RM 50,000.

d) Penalty for late payment must be put into a bank account as profit and divided between the bank and investors according to the agreed-upon profit ratio. The penalty will commence from the date of the first default until the date of actual receipt of payment by the bank. However, the bank must consider some special cases and problems suffered by the defaulters, for example, unavoidable financial difficulty, or having not misused any of the financing amount for other purposes not provided by the Letter of Offer, or any case on merit disqualified from paying the costs to the bank, at the absolute discretion of the bank (Shariah Resolution, 2010).

3.7 Legal treatment
Initially, the conventional hire purchase regulation has been a central focus of AITAB in Malaysia context. Despite being one of the most demanding facilities of an Islamic bank, AITAB is unfortunately lacking in an explicit Shari‘ah regulatory framework. Any dispute arising from the transaction of AITAB will be referred to the conventional regulation (Ismail, 1999), as there is no written Shari‘ah law that specifically regulates the operation of AITAB. The only existing regulatory Shari‘ah rules on the facility can be found in Shari‘ah Rules for Investment and Financing Instruments, In the Malaysian context, a hire-purchase transaction is jointly governed by the Finance Ministry, Ministry of Domestic Trade, Ministry of Road Transport Department, and Ministry of Internal Affairs. Currently, there is no specific regulation governing this AITAB; thus, any institution undertaking to offer this facility tends to impose its own rules, which are said to follow the Shari‘ah principle and in the spirit of the Hire Purchase Act 1967 and Contract Act 1950. Although there is no specific regulatory law on AITAB transactions, this facility has been offered successfully by some banks. At the moment, the main reference to this practice is still the Hire Purchase Act 1967. This Act covers all consumer goods as well as motor vehicles (Seif and Nurdiana,
2007). It is important to note that the hire-purchase scheme regulated by the Hire-Purchase Act 1967 is “not entirely contradicted” by Shari‘ah principles (Muhamed Aslam, 1997).

The implementation of AITAB should be properly done based on Shari‘ah principles, without any legal impediments. Accounting and Auditing Organization for Islamic Financial Institutions of Bahrain (AAOIFI, 2000) said that the permissible ijarah muntahia bi tamlik which is known by AITAB in Malaysia, is different from hire purchase as commonly practiced by conventional financial institutions certain respects. This Shari‘ah Rules governing the operation of the Bank of Bahrain, is said to be the first written and codified rule, which becomes a main reference to other Islamic banks.

4.8 Taking the value and the countervalue

According to some jurists, the practice of some Islamic banks regarding AITAB in the case of default by the customer is not in conformity with the Shari‘ah. The issue is that the bank in the case of repossession, takes the asset back and the counter value as well, which is the rental that is not allowed in Shari‘ah to take the asset together with the counter value at the time of executing the contract. However, if this happened due to repudiation of the contract, this rule does not apply. Nevertheless, if the rental is higher than the market price, the lessor cannot take the entire rental together with the asset. At the same time, the lessor has right to demand compensation for any loss he incurred because of the lessee’s default.

3.9 Nominal price

Another issue in AITAB is selling the asset at the end of the lease period to the lessee for a nominal price, or to give it to him as a gift (hibah). According to the fundamental rules of contract in Islam, there is no objection to this practice. The owner of an asset is free to sell his property for less than the market price or for a nominal price or give it as a gift, unless there is a reason to deprive him of that right, such as the person is in the death illness (marad al-mawt) which prevents him to donate more than a third of his property. According to the view of some contemporary Muslim jurists, such as al-Zuhayli, the bank may also need the

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1646 Refer to guarantee in leasing, for Imam Ahmad view, at 18.
consent of the shareholders for such a practice, or it should be stated in its charter that such a practice is at its discretion.\footnote{Ibid., 404-405.}

One can say that the consent of the shareholders is not necessary. This is because the bank has considered the asset value in the monthly rental, meaning that the rental has already covered the value of the asset, otherwise the customer would not have agreed to pay a rental higher than the market value.

### 4.0 CONCLUSION

The major issues in AITAB have been discussed. The issue of application of AITAB car financing has been explained that the SAC on its first meeting dated 8 July 1997 and 36\textsuperscript{th} meeting dated 26 June 2003, resolved that the application of the AITAB concept in vehicle financing is permissible, subject to certain conditions. Regarding the issue of two contracts in one has been explained also and the most of the forms of AITAB do not fall under the scope of that prohibition. Nevertheless, Malikis allow the combination of \textit{ijarah} and \textit{bay‘}. In the issue of conditions in sale, the stronger view is that of Ibn Taymiyyah that allow sale with conditions. In the case of a promise from the lessor, he is bound by his promise religiously and legally. Other issues are: ownership, transfer of ownership, maintenance, \textit{takaful}, deposit payment, penalty in case of default, legal treatment, taking the value and the countervalue, the contract favors rich, nominal price and entering into the contract before having the asset. As for the application of AITAB in the aforesaid vehicle financing, the SAC of BNM on its first meeting dated 8 July 1997 and meeting dated 26 June 2003, resolved that the application of the AITAB concept in vehicle financing is permissible, subject to certain conditions that has been mentioned above.

Also SAC of BNM has ruled that the duty to maintain the leased property must be made clear to the contracting parties and put in clear terms in the agreement. For the issue of \textit{takaful}, the practice in Malaysia shows that insurance coverage or \textit{takaful} is borne by the owner during the first year of transaction, where the cost is included in the rental payments. In the subsequent years, the lessee will undertake to pay the cost of \textit{takaful}. This rule has been agreed upon by most Islamic jurists in Malaysia. In lieu of the deposit payment, the deposit serves as security against future loss or misconduct caused by the lessee. The intention and purpose of the payment must be made clearer, especially to the customer. This
is to ensure that he fully understands the purpose of deposit payment and the function it serves.

Accordingly, the AAOFII Shari‘ah rules for *ijarah and ijarah muntahia bittamleek* (2000) regards a deposit made by the lessee to secure the rental payments or security against loss of a leased asset caused by the misuse or negligence of the lessee. For the penalty in case of default, in the Malaysian context, the National Shari‘ah Advisory Council created a rule that the customer shall pay to the bank an equivalent sum to the cost incurred in the maintenance on such default amount or such rate as prescribed by the Bank Negara Malaysia. The sum is calculated in the manner prescribed by the National Shari‘ah Advisory Council and duly endorsed by the Bank Negara. On the other hand for the issue of legal treatment, the implementation of AITAB in vehicle financing should be properly done based on Shari‘ah principles, without any legal impediment.

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Application of Tawarruq in Islamic Personal Financing: Shari‘ah Issues

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Abstract
Tawarruq was first introduced by Islamic finance institutions in Saudi Arabia in the year of 1412 H. Since that time, tawarruq has been one of the most widely used sale-based contracts by different Islamic banks around the world up to date. It was introduced mainly to dominate the structuring of personal financing product, and also to address the liquidity shortages and to structure risk management tools. However, the modern application of tawarruq which is differed from the classical form of tawarruq as approved by most of the classical scholars, has been criticized by most of the contemporary scholars including the Shari‘ah Boards of international standard-setting bodies such as International Fiqh Academy of the Organization of Islamic Conference (OIC Fiqh Academy) as well as Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). Thus, this paper examines the drawbacks in the present personal financing and at last to propose viable solutions to rectify the issues. In order to reach the said objectives, it attempts to determine tawarruq concept, forms, legitimacy, modus operandi and their salient features. It also looks into the scope and nature of personal financing. The paper also attempts to analyze the Shari‘ah compliant issues that are divided into fundamental issues and operational issues relating to the modern application of tawarruq contract on personal financing and finally to

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provide suggestions on alternative mechanisms that can be used to meet customers’ cash requirement.

**Keywords:** *Tawarruq, Shari’ah issues, personal financing, Muslim scholars.*

### 1.0 INTRODUCTION

One of the extensively used sale-based contracts to dominate the structuring of personal financing product is *tawarruq*. However, *tawarruq* which is not a new phenomenon was invented on 1421 H, by several banks in Saudi Arabia followed by other banks in United Arab Emirates, Qatar, Kuwait and Bahrain, mainly to address the liquidity shortages and to structure risk management tools. Nevertheless, criticisms from contemporary scholars, OIC Fiqh Academy, Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) on *tawarruq* as well as mechanisms used to structure personal financing, pose a question as to whether the product really meets the *Shari’ah* requirements thereby safeguarding the Muslim communities and societies from forbidden activities.

Therefore, this paper attempts to look at the drawbacks of Islamic personal financing and at last to propose viable solutions to rectify the issues. In order to reach the said objectives, this paper looks into the scope and nature of personal financing. Subsequently, since *tawarruq* is our main subject, this paper attempts to determine *tawarruq* concept, forms, legitimacy, modus operandi and their salient features. This paper also analyzes the *Shari’ah* compliant issues that are divided into fundamental issues and operational issues concerning to the modern application of *tawarruq* contract on personal financing and finally to provide suggestions on alternative mechanisms that can be used to meet customers’ cash requirement.

### 2.0 MEANING AND DEFINITIONS OF *TAWARRUQ*

The term *tawarruq* is derived from the Arabic root (*masdar*) *warq, wariq* or *waraqa*, which is basically denotes minted silver (*dirham*). It refers to the operation used by one who wants to acquire *waraqa maliiyah* [money] (Uthmani, 2009). The word “*tawarruq*” and its verb are not directly traceable in *fiqh* terminology except in Hanbali school of thought (Asyraf,
2013). It should be noted that the term tawarruq was used during the era of the companions, when Sayyidina Ali Ibn Abi Talib said:

"I would not abandon Haj (pilgrimage) even if I had to do it through tawarruq." (Aleshaikh, 2011)

In addition to that, the word wariq was used by means of silver coin in Surah Al-Kahfi to mean money:

“So send one of you with this wariq (silverly coin) of yours to the town…”

The OIC Fiqh Academy defines tawarruq technically as: “a person (mustawriq) who buys merchandise at a deferred price, in order to sell it in cash at a lower price. Usually, he sells the merchandise to a third party, with the aim to obtain cash.” In order to add clarity to the technical meaning of tawarruq, the Islamic Fiqh Academy of Muslim World League (IFA-OMWL) defined it as: “a contract to purchase a commodity from a seller on terms of spot delivery and deferred settlement and then the buyer sells the same commodity to a third party other than the original seller on terms of spot deliver and spot settlements.” (Shariah Standard, 2008)

The AAOIFI Shariah standard, defines tawarruq as: “the purchase of a commodity (i.e. subject matter of tawarruq) on deferred payment basis by way of either direct sale or murabahah. The commodity is then sold for cash to a party other than the original sellers.” (Shariah Standard, 2008). The Fiqh Encyclopedia of Kuwait gave a concise definition of tawarruq as: “buying a commodity with deferred payment and selling it to a person other than the buyer for a lower price with immediate payment.” (Fiqh Encyclopedia, 2015)

According to the Maliki school of thought tawarruq means selling something on deferred basis and then buying it back in cash, albeit at a lower price than the deferred price (see Illias and Ismah, 2012). For example, someone sells his commodity at a price that is already known to be paid by the deferred payment. He then buys it at a lesser price than the deferred price. It is known because of obtaining the money for sahib al-‘inah. This is because al-‘ayn is the present property from the money. This is one of the practices of the Hanafis (see Illias and Ismah, 2012). On the other hand, tawarruq according to the Shafi‘i school of thought is selling something on deferred payment, and then buy it back in cash,
albeit at a lower price than the deferred price. Hanbali argued that the practice of *tawarruq* in the Shafi‘i school is clear *bay‘ al-‘inah* which is forbidden by the *Hadith* reported by the *Hadith* narrated by Ibn Umar (see Asyraf, 2013) which will be explained later.

### 3.0 Legitimacy of *Tawarruq*

#### 3.1. The PropONENTS’ ARGUMENTS

The majority of jurists, including Shafi‘i, Hanafi and Hanbali, approve *tawarruq* and deem it permissible (al-Rashidi, 2005). Their views are substantiated by evidence from the *Qur‘an*, the *Sunnah* and legal maxims (see al-Zuhayli), which are discussed as follows:

(a) *Qur‘an*:

> “Allah has permitted trade and prohibited *riba*.” (Al-Qur‘an, 2:257)

According to the proponents of *tawarruq*, the word *bay‘* denotes the general legitimacy of trade, unless evidence is provided to prove otherwise, since the generality of the term encompasses all forms of sale transactions, including *tawarruq*. *Tawarruq* is comprised of two permissible sale contracts in succession, and there is no clear prohibition of it in the texts; hence it is permissible (see Asyraf, 2013).

However, the opponents dispute the relevance of the above verse, arguing that there is a prohibition of *tawarruq* in the *Sunnah*. The *Hadith* narrated by Ibn Umar clearly indicate the prohibition of *‘inah*. Moreover, two contracts may have a different ruling when considered separately than when considered in aggregate. For example, a sale and a loan are both legitimate contracts that may be separately applied in financial transactions; however, the *Shari‘ah* prohibits combining them in one deal due to their contradictory natures. Scholars said that, the ruling of the aggregate differs from the ruling of each contract by its own. The proponents responded that the object of prohibition in the *Hadith* is *‘inah* not *tawarruq*. They see a substantive difference between *‘inah* and *tawarruq*, for the intention to circumvent the prohibition *riba* in *tawarruq* is remote due to its tripartite nature. The proponents also argue that the prohibition of a hybrid (sale + loan) does not apply to *tawarruq*. It is true that *tawarruq* involves two contracts in succession, but the two contracts in *tawarruq* are executed separately and unconditionally. By contrast, the two contracts are interdependent in the case of the prohibited sale and loan: the effectiveness of the loan
depends upon sale contract (al-Rashidi, 2005) because the two contracts in tawarruq are executed separately; the seller may consider discounting the price in favor of the lender due to the loan facility, leading to a loan from which the lender acquires added benefit (Arbouna, 2007).

(b) Sunnah:
The proponents of tawarruq also substantiate their arguments by quoting the following Hadith:

"إن رسول الله استعمل رجلاً علي خيره، فجاءهما بتمر جنبه، فقال: أكل تمر خيره هكذا؟ قال: انا لنا خصص من هذا بالصابعين، والصابعين بالثلاثة. فقال: التفاعل بجمع التوبر، ثم اتبع بالدراهم.

“The Prophet (peace be upon him) appointed a person as a governor of Khayber, who [later] presented him with an excellent type of dates [janib]. The Prophet asked: “Are all the dates of Khayber like this?” He replied: [No, But] we barter on Sa’ of this (Excellent type) for two Sa’s of ours.” The Prophet said: “Do not do that (as it is a kind of usury), instead sell the mixed dates (of inferior quality) for money and then buy excellent dates with the money.” (al-Bukhari, 1422H)

The proponents argue that this Hadith differs from the Hadith that prohibits ‘inah. Obviously, the transaction recommended by the Prophet s.a.w involves two separate contracts. However, the second sale was not transacted with the first seller, and therefore the intention was not to commit usury.

(c) Legal Maxims:
In rationalizing the permissibility of tawarruq, the proponents also use the following legal maxims to further support their argument:

"الإصل في المعاملات الإباحة"

“The original ruling for mu’amalah transactions is permissibility.” (Uthman, 1422H)

Based on the above legal maxim, the original ruling of any transaction is that it is permissible as long as there is no clear evidence that indicates otherwise. The Quranic command to fulfill contracts (al-Qur’an, 5:1) substantiates the legitimacy of every contract that the lawgiver has no specifically banned, including the tawarruq contracts (see Asyraf, 2013). However, the above legal maxim may not be applicable in the case of ‘inah tawarruq. For the reason that in the case of ‘inah and tawarruq, there are specific and explicit evidences from the Sunnah that prohibit such transactions (al-Zuhayli).
Nevertheless, the second legal maxim that proponents used to support their arguments is that:

"حاجة تتنزل منزلة الضرورة عامة كانت ام خاصة"

"Need, whether of general or specific nature, is treated like necessity"

_Tawarruq_ is also rationally justified in that it satisfied people needs and achieve their interests and that of the _Shari‘ah_, particularly removing difficulty. This is particularly true when many people today are facing liquidity problems. In order to overcome them without indulging in prohibited usury, _tawarruq_ may serve the purpose (see Asyraf, 2013).

### 3.2. THE CRITICS ARGUMENTS

Maliki, Umar ibn Abd al-A`aziz, some scholars from the Hanafi school like Muhammad ibn Al-Hassan al-Shaibani and later generation of Hanbali school namely, Ibnu Taymiyyah and his disciple, ibn Al-Qayyim al-Jawzi, they rejected _tawarruq_ and deem it impermissible. Their argument mainly based on the _Hadith_ of the Prophet s.a.w, statements of the Companions and the prohibition of legal tricks to commit _riba_ (see Asyraf, 2013).

1. **Sunnah:**

   Ibn Umar reported that the prophet (peace be upon him) said:
   
   "إذا ضن الناس بالدينار والدرهم، وتتبايعوا بالعينة، واتتبعوا أذناب القدر، وتركوا الجهاد في سبيل الله، أنزل الله بهم بلاء فلا يرفعه حتى يرجعوا دينهم"

   "If people hoard gold (dinars) and silver (dirham), deal with _'inah_, focus on agriculture, and leave _jihad_, Allah shall send an ordeal upon them, and he will not remove it until they return to their religion" (see al-Zuhayli)

   According to them, the word _'inah_ in the _Hadith_ covers every form of sale contracts that are designed for the purpose of attaining liquidity (cash) (see Asyraf, 2013). Specifically, the majority of jurists include _tawarruq_ within the implied meaning of _'inah_ in the above _Hadith_ (see Asyraf, 2013). The proponents however argued that there are substantial differences between _tawarruq_ and _'inah_. While, the structure of _'inah_ is clearly designed as a ‘back door to _riba_’, the _tawarruq_ is not.

2. **Statements of the Companions:**

   (b) Statements of the Companions:
The opponents also invoke the famous tradition of A’ishah collected by al-Daraqutni:

"قالت أم ولد زيد ابن أرقم لعائشة: "أني بعت من زيد غلماً" إلى العفاء بثمانية، وابتغته بثمانية ثقة" فقالت لها عائشة: "أني مشربتي وبيسماً! أخبري زيداً! إنه قد أبطل جهاده مع رسول الله إلا أن ينوب".

"The umm walad of Zayed bin Arqam said to A’ishah, “I bought from Zayed a slave for 800 on deferred payment, and then I sold him to Zayed for 600 in cash.” A’ishah said to her what a detestable sale and purchase you have made! Tell Zayed that he has spoiled his jihad with the Messenger of Allah unless he repents” (al-Daruqutni, 2004).

The opponents relied on the above statement and prohibit tawarruq based on the above statement. As it is clearly indicates the prohibition of such transaction.

(c) Forced Sale (Bay‘ al-Mudtar):

This can also be considered as one of the Shari’ah issues that associated the practices of tawarruq in the modern form. However, the opponents of tawarruq also supported their views based on the similarities of tawarruq to the prohibited forced sale (bay‘ al-mudtar) (see Asyraf, 2013). This type of sale is prohibited by Shari’ah due to its exploitative nature; a person is forced to enter into the sale due to circumstances that have left him with no choice; for instance when a person is forced to sale his house due to his fear of the ruler. Ibn Al-Qayyim associates bay‘ al-mudtar with both ‘inah and tawarruq (see Asyraf, 2013). The Hanafi school deems the contract as voidable (fasid), based on the following Hadith:

"لا يعوض في بيع المسترض، ومن بيع المسترض، ومن بيع المجاورة، ومن بيع الغير للثمر قبل أن يطعم".

"The Prophet (peace be upon him) prohibited forced sales, sale with uncertainty and the sale of fruit before they ripen (see al-Zuhayli).

(d) Legal stratagem (Hilah):

The jurists who disallowed tawarruq argued that it is a legal stratagem (hilah) to circumvent riba based transaction; as such it opens a back door to riba. Imam al-Shatibi in defining legal stratagem said: “It is generally held that their true nature is to present a deed that is apparently lawful, in order to circumvent a Shari’ah ruling and transform it on the surface to a different ruling.” (see Asyraf, 2013). The majority of scholars are against the use of (hilah) to circumvent Shari’ah prohibition (see Asyraf, 2013). Ibn al-Qayyim and his teacher, Shaykh al-Islam Ibn Taymiyyah are among the prominent scholars who argued that tawarruq is a form of prohibited hilah (Ibn Qayyin, 1973). Nevertheless, there have been different approaches by the four school of Islamic law on the issue of hilah on tawarruq.
The Hanafis and Shafi’is generally take a positive view on *hiyal* while the Malikis and Hanbalis generally take a negative view. This situation is comparable with our current situation nowadays whereby there are some scholars see it as an acceptable device to avoid from interest-based loan while others consider it as a back door to legalize *riba*-bearing transaction.

### 3.3. THE PREFERRED VIEW

The preferred view according to Al-Rashidi is that legitimizing *tawarruq* in its genuine form (*tawarruq al-haqiqi*). This view is adopted by most contemporary scholars as well as the Islamic Fiqh Academy of Muslim World League, in its 15th meeting held in Makkah in 1998 (al-Rashidi, 2005). The arguments of the majority of jurists are as followed:

The Quranic text which states “when you contract a debt for a fixed period, write it down (al-Qura’an, 2:282), indicates the general permissibility of deferred payment sales, which also includes *tawarruq*. The opponents of *tawarruq* demonstrate inconsistency regarding the interpretation of this verse, i.e., they agree with the general ruling of the verse but they exclude *tawarruq* even though it is a form of sale contract with deferred payment. Nevertheless, there is no clear and explicit text prohibiting *tawarruq* in either the Qur’an or the Sunnah, and therefore it is permissible. Moreover, the legal maxim “the original ruling of any financial transaction is permissibility” use to justify the permissibility of *tawarruq* is supported by various verses of the Qur’an and Hadiths of the Prophet s.a.w as illustrated earlier. Besides that, every financial transaction is established on the notion of reason (*‘ilah*) and public interest (*maslahah*). Therefore, the *Shari‘ah* does not prohibit any form of sale contract and other financial transactions unless its proven to result in injustice, which is the basis of the prohibition of *riba*, hoarding and manipulation, or causes disputes, which is the wisdom behind the prohibition of zero-sum games and excessive uncertainty. Finally, the *tawarruq* concept is legitimated based on the reason (*‘ilah*) of facilitating peoples meeting of their liquidity needs; it corresponds with the *Shari‘ah* objective of realizing hardship and complexity.

### 4.0 FORMS OF *TAWARRUQ*

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According to most modern scholars, *tawarruq* is of three types, the first kind is known as classical *tawarruq* or (*al-tawarruq al-fardi*) which is also known as (*al-tawarruq al-fiqhi*). The second type of *tawarruq* is known as organized *tawarruq* or (*al-tawarruq al-munazzam*). The third kind of *tawarruq* is known as reversed *tawarruq* (*al-tawarruq al-aksi*) (Fiqh Academy).

Classical *tawarruq* has been defined by the OIC Fiqh Academy as: “the purchase of a commodity possessed and owned by a seller on a deferred payment basis, whereupon the buyer then resell the commodity for cash to other than the original seller in order to acquire cash (*al-wariq*).” Whereas, organized *tawarruq* is “when a person (*mustawriq*) / [*mutawarriq*] buys merchandise from a local or international market on deferred price basis. The financier arranges the sale agreement either himself or through his agent. Simultaneously, the *mutawarriq* and the financier execute the transactions, usually at a lower spot price.” Reverse *tawarruq* is similar to organized *tawarruq*, but in this case, the *mutawarriq* (seeker of liquidity) is the financial institution, and it acts as a customer seeking liquidity (Fiqh Academy).

Organized *tawarruq* and classical *tawarruq* are similar on the basis that in both cases the initial buyer of the commodity had no intention to use or utilize the commodity purchased but rather he/she was actually seeking liquidity (cash) (Fatwa, 2013). They are also both based on a tripartite contract, although in some organized *tawarruq* contract the seller of the commodity (*muwarriq*) and the end buyer are the same entity. However there are some distinctions between both types of *tawarruq*. In classical *tawarruq*, *muwarriq* (seller of the commodity) plays no role in the resale of the commodity. Whereas, in organized *tawarruq*, for the resale of the commodity, the *muwarriq* (seller/creditor) acts as an agent on behalf of *mutawarriq* (seeker of liquidity) to resell the commodity. Moreover, in classical *tawarruq* *mutawarriq* receives cash directly from the end buyer. While, in organized *tawarruq* *mutawarriq* receives cash from the original seller (*muwarriq*), to whom he/she is indebted to on deferred payment. Furthermore, in classical *tawarruq* there should be no pre-arrangement made between the original seller of the commodity (*muwarriq*) and the end buyer. While, in organized *tawarruq* there is a possibility that the original seller of the commodity and the end buyer have a pre-arrangement made between them (Fiqh Academy).
5.0 MODUS OPERANDI OF TAWARRUQ

5.1. Modus operandi of classical tawarruq

The diagram below shows the modus operandi of classical tawarruq.

Figure 1: Classical Tawarruq

The practice of tawarruq in the classical form (tawarruq al-fardi) is done by individuals, without any involvement of Islamic Bank Institution or any prearrangement between the parties.

However, the process as followed:

1. An individual purchases a good on credit to be paid on deferred basis, then;
2. Sells the good to End buyer at spot price, hence;
3. Obtain cash and pay the original seller on deferred basis
4. It should be noted that there is no relationship between the original seller and end buyer.

5.2. Modus Operandi of organized tawarruq
Since SAC of BNM has approved the application of *tawarruq* in structuring both financing and deposit product during its 51st meeting held on 28th July 2005, many local banks have gradually phased out *bay’ al-‘inah* and replaced it with *tawarruq* especially for personal financing products. Example of modus operandi of personal financing based on *tawarruq* structure can be seen as per the diagram below (Illias and Ismah, (2012).

**Figure 2: Organized *tawarruq***

From the above structure, it can be seen that other than the bank and the customer, there are additional parties to the transaction i.e. the traders. The role of the traders is basically to supply the underlying asset to facilitate sale transaction which varies from one bank to another depending on the traders involved. It should be noted that most of the assets involved are in the form of commodities. Some IFIs use crude-palm oil and crude palm oil-based commodities as the underlying asset (Illias and Ismah, (2012).
5.3. Modus Operandi of Reversed *tawarruq*

The diagram below shows the modus operandi of reversed *tawarruq*.

1. Customer buys commodity on spot basis from broker A
2. Customer sells the commodity to Islamic bank using *murabahah* on deferred basis (cost + profit).
3. Islamic bank sells the commodity to Broker B on spot basis and obtains cash.
4. Islamic bank makes payment of the selling price upon maturity.
6. APPLICATION AND PROCESS FLOW OF TAWARRUQ IN PERSONAL FINANCING

The application and process flow of tawarruq as illustrated by Bank Islam as follow

Figure 3: Process flow of tawarruq
a) The customer applies financing product based on *tawarruq* concept from the Bank. Bank obtains *tawarruq* transaction documents from the customer.

b) Bank will buy the commodity through Broker A.

c) Under the *murabahah* contract, bank then sells the commodity to the customer at

d) Bank’s Selling Price (Principle + Profit) on deferred payment term.

e) Under the *wakalah* contract, customer requests Bank to sell the commodity in the market.

f) Acting as the appointed sale agent for the customer, Bank sells the commodity to Broker B.

g) Bank then credits the *wariq* (proceed) from the sale of commodity to the customer’s account.

h) Finally, customer pays amount due to the Bank (Principal + Profit) by way of agreed installment method.

7.0. THE FUNDAMENTAL ISSUES OF *TAWARRUQ* IN *SHARI‘AH*

There are four fundamentals issues that eventually led to the resolutions of the Fiqh academy of the OIC and the Muslim World League disapproving organized *tawarruq* for personal financing. These issues are as followed:

7.1. *Shari‘ah* issues regarding commodities

One of the most fundamental conditions for the validity of a sale contract in *Shari‘ah* is that the subject matter of the contract must meet all the specifications and conditions of commodities. Commodities are valuable if they have legitimate uses. In other words, a sale contract will be deemed invalid if the object of the sale is something which has no value or is used for an illegitimate purpose (al-Zuhayli, 1989). However, it was observed that many commodities used in the practice of modern organized *tawarruq* are spoiled commodities (Asyraf, 2013). Shaykh Ali Al-Qarahdaghi revealed that he encountered one *tawarruq* transaction using the International commodity market in which the underlying commodity was actually junk i.e., defective aluminum which had been in storage for more than ten years. In fact, the broker chose to use the commodity because it could not be sold (see Asyraf, 2013).

The existence of the commodity at the time when the contract is concluded is one of the issues that surrounded the practice of *tawarruq munazzum* for personal financing. The commodity as the subject matter of the *tawarruq* contract must be known and identifiable
by the customer (mustawriq) or his appointed agent which is the financial institution itself. As mentioned above, most of the commodities have no value and some of them are not really peculiar to the customer. Furthermore the exchanges are quite a cabal. This will attract the issue of gharar on the subject matter which will render the contract void.

Moreover, some scholars also raised concerns about the lack of proper monitoring of the practice by certain segments in the market. That state of affairs could lead to the same commodity being the object of multiple transactions (see Asyraf, 2013). There is no assurance that the same commodities would not be sold to more than one buyer. This raises Shari’ah issues about how genuine the contract is. These inter-related issues are fundamental in determining the validity or otherwise of the tawarruq transaction.

7.2 Shari’ah issues regarding to possession and delivery

Another crucial condition of a sale contract in Shari’ah is that the object of sale - which is known in Arabic as (mahal al-‘aqad or ma’qud ‘alayhi) - must exist and be owned by the seller at the time of the contract is concluded. This important because the purpose of a sale contract (muqtada al-‘aqd) is to transfer ownership of the object of the sale to the buyer and ownership of the price to the seller. If this condition is not fulfilled, the sale contract deemed to be invalid (batil).

Jurists since early time have discussed at great length the issue of qabd (possession) for purchase and sale contracts in particular, as well as other contracts in general. According to them it is necessary in sale contract that the goods be accepted by the buyer’s hand (qabd) and for the seller to grant the buyer access to the goods without restriction (al-tamkin wa al-takhliyah). However, the modern application of organized tawarruq raises doubts whether possession and delivery ever takes place. The issue of non-delivery becomes more apparent in some applications, especially when a legal document is embedded with clauses indicating that there shall be no intention by the buyer to take delivery (Asyraf, 2013).

In another case, the buyer is restricted from taken any delivery, either explicitly or implicitly by a standard operating procedure in the market. This is particularly true in the case of transactions done on the London Metal Exchange (LME) (Asyraf, 2013). It has been established that LME is a derivatives platform for transactions involving futures, options,
traded average-prices options and LME swaps. It is not real trading, which requires physical delivery, since most transactions are done for hedging purposes (lme.com, 2015).

7.3 *Shari'ah* issues regarding prearrangement (*tawatu*)

Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), states in its *Shari'ah* standard No. 30, Article 4/5 that: “The commodity (object of *tawarruq*) must be sold to a party other than the one from whom it was purchased on a deferred payment basis, so as to avoid ‘*inah*, which is strictly prohibited. Moreover, the commodity should not return back to the seller by virtue of prior agreement or collusion between the two parties or according to tradition.” (AAIOFI, 2008)

This standard implies that *tawarruq* cannot be fictitiously transacted with the cosmetic involvement of a third party (Trader B). It should be real; that is the metal or whatever commodity being traded should genuinely move from seller (Trader A) to buyer. If there is any ‘trick’ or prior arrangement involved then the transaction will be deemed as a trick (*hilah*) to circumvent the prohibition of *riba*, which resembles the characteristics of *bay’ al-‘inah*. However, when the transacting parties operates a netting arrangement (*tawtu*) between their different storage facilities, in reality, the commodity rarely gets physically transferred from seller to buyer as it should by the requirements of the *Shari’ah*.

7.4 *Shari'ah* issues regarding Agency (*tawkil*)

In article 4/7 to 4/10 of its guideline on *tawarruq* transactions, Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), further stresses the following requirements: “The Bank or its agent should not sell the commodity on the customers’ behalf if the customer initially bought the commodity from the Bank; either should the Bank arrange a proxy third party to sell this commodity. Instead, the customer should sell the commodity, either himself or through his own agent. At most the Bank should provide the customer the information needed to sell the commodity.” (AAOIFI, 2008)

The above requirements are in conflict with the current practice of organized *tawarruq* for personal financing (Asyraf, 2013). In modern practice of organized *tawarruq*, the *mustawriq* will not buy the commodity himself. He will authorize the agent, who is the Bank, to buy it from the market on the *mustawriq*’s behalf. Then the *mustawriq* then the
mustawriq will buy it from the Bank at a delayed price. He will later sell it to a third party (Trader B). However, the tradition followed by many Banks is that the Bank will not pay the price to the original seller (Trader A) but, rather, to the mustawriq as he is an agent for him in buying and selling the commodity. In other words, the Bank plays its classical role as financial intermediary, arranging the deferred payment purchase of the commodity from an exchange on behalf of the mustawriq. Then, by a condition either stipulated in the contract or known by the tradition, the Bank proceeds to act as the mustawriq’s agent to sell the commodity from another party for cash.

The addition of this tawkil (agency) to the tawarruq contract for personal financing is that authorizing the bank to buy the commodity on behalf of the mustawriq and arrange to sell the commodity to himself, renders the contract similar to the prohibited ‘inah (al-Zuhayli). However, this accentuates the issue of transferring ownership or taking possession, which is required to be effected as one of the pillars of a valid contract from Shari‘ah perspective. Therefore, this practice again bears resemblance to the practice of ‘inah, which is frowned upon by some of the classical jurists as a legal trick (hilah) and does not represent the true tawarruq (tawarruq haqiqi). Some scholars even go further to argue that the inclusion of tawkil in the tawarruq contract for personal financing make it similar to usurious finance because the mustawriq will take the smaller amount from the bank, while the higher amount will be paid by him when the fixed time lapses. This issue of tawkil (agency) may turn the tawarruq contract to either makruh (disliked) or mahzur (prohibited) (Uthmani, 2009).

8.0 THE OPERATIONAL ISSUES OF TAWARRUQ IN SHARI‘AH
The proceeding section have delineated the fundamental Shari‘ah issues in the current application of tawarruq for personal financing that eventually led OIC Fiqh Academy and (AAOIFI) to disapproving organized tawarruq. Besides that, there are some operational issues surrounding the practice of tawarruq in personal financing. These issues are explained in detail below.

8.1. Early settlement – Ibra’ (Rebate)
While conventional banks allow customers to pay the principal and accrued interests up to the date of early settlement only. Some Islamic banks, in order to remain competitive with conventional banks, may grant *ibra*’ to their customers (*mustawriqs*) of personal financing who settled their debt prior to the agreed settlement period as stipulated in the *tawarruq* agreement concluded by both parties.

Nevertheless, there have been different approaches by the four school of Islamic law pertaining *ibra*’. The Shafi’is, Hanbalis and Ibn Taymiyyah generally take a positive view on *ibra*’, and deemed it permissible under the circumstance that *ibra*’ should not be linked with any condition in the contract. The majority of scholars (*Jumhur*) generally take a negative view and consider *ibra*’ as *riba* hence disallowed it. This situation is comparable with our current situation nowadays whereby there are some scholars see it as an acceptable device can be given by the IFIs to the *mustawriqs*. It is the IFIs right and they are free to waive their right on the debt.

However, the *Shari’ah* Advisory Council of Bank Negara Malaysia (SAC) has issued several resolutions on *ibra*’ from 2000 to 2010 (BNM, 2013). In its 13th Meeting on 10 April 2000, the SAC issued a resolution where Islamic Banks may incorporate a clause on the contract to provide *ibra*’ to mustawriq who make early settlement in the financing agreement on the basis of public interest (*maslahah*). The inclusion of an *ibra*’ clause in the financing agreement would require the Islamic Banks to honour the undertaking or promise to grant *ibra*’ to its customers. However, in its 101st Meeting on 20th of May 2010, the SAC issued a subsequent resolution to further safeguard public interest (*maslahah*) and to ensure that customer protection is carried out consistently. Therefore, bank Negara Malaysia (the bank) as the authority may require the IFIs to accord *ibra*’ to their customers who settled their debt obligation arising from sale-based contract prior to the agreed settlement period; However, the bank may also require the terms and conditions on *ibra*’ to be incorporated in the financing agreement to eliminate any uncertainty with respect to the customer’s entitlement to receive *ibra*’ from the IFIs; and it should be noted that *ibra*’ formula will be standardized by the Bank.

8.2. **The implementation system of tawarruq**
The criticism on organized *tawarruq* for personal financing extensively lies on the implementation side of it. During the 28th Symposium of *Nadwatu al-Barakah* for Islamic Economics, Dr. *Husain Hamid Hassan* mentioned that, as reported by *Asmah bt Hassan*, “the reason for the prohibition of *tawarruq* is that in its system of implementation, the contracting parties are not exposed to losses and risk, which is the pillar of Islamic economics.” (see Illias and Ismah, 2012). For example in respect of market risk, one of the conditions of a valid *tawarruq* contract is that the bank must not guarantee the *mustawriq* a specified price in the market but sell the goods at the best price in accordance with the forces of supply and demand at the time of sale (ISRA, 2010).

Nevertheless, it is submitted that being a banker, this should be avoided as it will expose the bank to market risk. Certain banks even make it a condition in the agreement with the traders that if the goods are not being able to be sold to the second trader on the same day, the first trader need to undertake to buy it back at the original price sold to the customer. The banks themselves are not generally equipped to take delivery of tons of palladium or gold; rather, they use the services of brokers and custodians. These same custodians can potentially make all necessary changes of title in milliseconds before the price of the underlying can actually change, and before either the bank or customer might take much in the way of market risk (Khnifer, 2010).

**9. CONCLUSION**

Although the OIC Fiqh Academy in its 2009 resolution deemed organized *tawarruq* as impermissible, some IFIs are still using it in structuring their personal financing product. This might also be seen on the basis that AAOIFI in its *Shari’ah Standard No. 30, 2008* permits *tawarruq* provided that it’s according to the guidelines and parameters; however as showed earlier, the current application of *tawarruq* for personal financing in IFIs do not comply with all these parameters. Considering that *tawarruq* is a means for customers to attain cash (personal financing) and for banks for fulfill their liquidity needs (reserved *tawarruq*), than its far fetch that the IFIs would move away from this structure anytime soon. The banning of the OIC Fiqh Academy of *tawarruq* was perhaps to encourage the Islamic banking and financial institutions to adopt a better investment and financing technique that will help enhance the socio-economic objective of the *Shari’ah (maqasid al-
Shari’ah), and to encourage them to provide benevolent loans (qard hasan) instead of relying on tawarruq (Aziz, 2013).

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Http://www.lme.com/warehousing.asap, retrieved 30th March 2015


Endnote

i. Activism can be conducted via direct dialogue with corporate management or the board, during open sessions in corporate general meetings, writing open letters or by filing formal shareholder proposals: Sjöström, Emma. 2008. Shareholder activism for corporate social responsibility: what do we know? Sustainable Development. 16(3):141-154.


iii. In this case, the purpose of the meeting was to instruct the board of directors to conduct the election of directors in a particular way. Under the company’s constitution, the decision as to the manner in which the elections should be held was one that belonged to the directors.


vi. Para 4 of the judgment: “In the calendar year of 2015 three E.G.Ms. have taken place due to the requisition of the defendant company in addition to an A.G.M.”

vii. Model Articles for Private Companies and Model Articles for Public companies under The Companies (Model Articles) Regulations 2008

viii. Model articles under Hong Kong Companies 2014:

Division 1—Directors’ Powers and Responsibilities

2. Directors’ general authority

(1) Subject to the Ordinance and these articles, the business and affairs of the company are managed by the directors, who may exercise all the powers of the company.

(2) An alteration of these articles does not invalidate any prior act of the directors that would have been valid if the alteration had not been made.

(3) The powers given by this article are not limited by any other power given to the directors by these articles.

(4) A directors’ meeting at which a quorum is present may exercise all powers exercisable by the directors.

3. Members’ reserve power

(1) The members may, by special resolution, direct the directors to take, or refrain from taking, specified action.

(2) The special resolution does not invalidate anything that the directors have done before the passing of the resolution.

ix. In contrast, shareholders in North American jurisdictions do not have similar wide powers to appoint and remove directors as that in other common law countries. For the difference between the US and the UK

* Article 73 of the articles of association provides that

73.—(1) The business of a company shall be managed by or under the direction of the directors.
(2) The directors may exercise all the powers of a company except any power that this Act or the memorandum and articles of the company require the company to exercise in general meeting.