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A special edition devoted to issues in

Criminal Justice in the 21st Century: Spirit, Form & Challenges

Guest Editors

Ida Madieha, A., Majdah, Z. & Sonny, Z.

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Journal of Social Sciences & Humanities

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A special edition devoted to issues in
Criminal Justice in the 21st Century: Spirit, Form & Challenges

Vol. 23 (S) Oct. 2015
(Special Edition)

Guest Editors
Ida Madieha, A., Majdah, Z., & Sonny, Z.

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Preface

Alhamdulillah, with the grace of Allah s.w.t., this Special Edition of the Pertanika Journal of Social Sciences and Humanities is finally complete. This Issue comprises of selected papers from the International Conference on Law, Order and Criminal Justice, which took place on 19th and 20th November 2014, at the beautiful ISTAC Campus. The Conference was hosted by the Ahmad Ibrahim Kulliyyah of Laws, IIUM, in collaboration with the Malaysian Judiciary, the Royal Malaysian Police, the Institute of Public Security Malaysia (IPSOM) and the National Council of Professors. The Conference focused on the modern criminal justice system with the aim of looking at the effectiveness of this existing system as a comprehensive system of controlling crimes and ensuring the safety of the public through various institutions, which are directed at maintaining social order and minimising crimes. In lieu of the challenges of the current criminal justice system, this Conference adopted the term "**Law, Order and Criminal Justice**" to cover all the different agencies and organisations involved in enforcing law and order, preventing crimes and meting out punishments, as well as how they work together in establishing the principles of equity, fairness and justice.

In this fast-changing world, these practices and institutions cannot remain static. They must change and evolve as criminals and syndicates also adopt sophisticated tactics to commit various types of crimes. On top of that, new technologies such as ICT and biotechnology further challenge the traditional notions and "forms" of crimes. As such, these have an impact to the collection of evidence as well as the need to revisit the appropriateness of the existing punishments. The forces of globalisation and international trade have also given rise to new commercial crimes across borders that require rethinking of traditional concepts such as criminality, evidence gathering and punishment.

The theme of the Conference, "Criminal Justice Systems in the 21st Century: Spirit, Forms and Challenges", reflects all the various tensions faced by the modern criminal justice system in all its five pillars, namely, the community, the law enforcement agencies and mechanisms, the prosecution, the court and the correctional system. Should we strive to achieve the main spirit behind criminal punishments alone? Do the forms of punishments matter? If so, what are the main challenges in meting out punishments?

In order to unearth the various issues surrounding criminal justice, the Conference organisers accepted papers based on eight broad themes, namely; crimes against the state; commerce and new forms of crimes; new technologies and the criminal justice system; punishment and reform; law enforcement; judiciary and administration of justice; criminal evidence and other related issues on criminal justice. The Conference also encouraged papers which offered Islamic perspectives on issues surrounding these themes.

During the Conference, a total of 51 papers were presented by participating speakers from Brunei, Maldives, Nigeria, Iran, Palestine, Singapore and Indonesia. On the local front, Malaysian law schools also participated with the presenters from the University of Malaya, National University of Malaysia, MARA University of Technology, Universiti Sains Islam Malaysia, Universiti Utara Malaysia, as well as the host institution, the International Islamic University Malaysia. A total of 18 papers were carefully chosen for this Special edition. In these papers, the authors have

rigorously examined and discussed recent developments on criminal justice in their national legal system. It is hoped that their academic endeavour will serve to initiate broader discussions on the effectiveness of the criminal justice system not only at the domestic front but also regionally and internationally.

The publication of these papers would not have been possible without the support of the Kulliyyah, and the Dean, Prof. Dr. Hunud Abia Kadouf, as well as the team of reviewers who carried out the review within such a short time frame. Without their tireless and selfless assistance, this edition would not have been a reality. For them and the Kulliyyah, we wish to express our sincerest gratitude and heartfelt appreciation.

Last but not least, this issue is a concerted effort made possible with the help of Dr. Nayan Kanwal, the Chief Executive Editor, and his dedicated Pertanika team at the Journal Division, UPM, who rendered us their generous guidance and commitment in bringing this edition to print.

It is our deepest hope and prayers that all these efforts will be rewarded with the choicest blessings from Allah s.w.t.

Jazakamullahu khairan kathira.

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Revisiting the Role of a *Muftī* in the Criminal Justice System in Africa: A Critical Appraisal of the Apostasy Case of *Mariam Yahia Ibrahim*

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ABSTRACT

The formal dispensation of criminal justice in pluralistic legal systems has continued to generate academic interest in the last few decades. This has always been influenced by the colonial and post-colonial historical legal reforms in the African continent. Islamic law has played a very significant role in the evolution of the modern nomenclature of legal systems of some of African countries, particularly the common law-based jurisdictions. The application of Islamic law, particularly its criminal justice component, was relegated to mere personal matters as part of the colonial baggage, and it has been a struggling to re-assert itself in some North, East and West African countries. This article therefore examines the dynamics of the application of the Islamic criminal justice system in Africa and the role of *mufti* based on a case study of a recent apostasy case in Sudan. While the case, as well as the decision of the court, cheated a maelstrom of controversy and rekindled the narratives of human rights activists globally on the sacrosanct nature of freedom of religion, Muslim jurists have argued that Islamic law provides punishments for specific offences such as *hudud*, *qisas* and *diyyah*; the rationale behind such punishments is not only to punish the offenders, but also to deter other people from committing the same offence. For apostasy issues, there is a kind of link established between this offence and treasonable felony in Islamic legal discourse, which might warrant capital punishment. Having reviewed these diverse positions, the article finds that Islamic legal principles and maxims contain numerous principles that should guide the judge in arriving at a decision, particularly when it relates to such a serious

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offence. This is where the *mufti* plays his role in advising the judge on core issues in a case while taking into consideration the context of each case. In the Sudanese case of *Mariam Yahia Ibrahim*, the trial judge should have looked beyond the content of the statute by seeking further clarifications from a learned *mufti* in order to ascertain the social and religious background of the parties involved.

Keywords: Islamic criminal justice system, role of a *Muftī*, apostasy, Mariam Yahia Ibrahim

INTRODUCTION

Since colonialism established its footprints on African soil with its attendant legal reforms to the existing legal orders, which were subjected to the English rules, there has been series of controversy on the nature of the Islamic criminal justice system. Even before the advent of the colonial overlords, the primitive African legal orders have been largely pluralised; hence, the plethora of legal orders introduced was a by-product of legal pluralism in most parts of the continent. This in turn has affected the form and practice of the Islamic legal system. The restrictions and limitations introduced during the colonial era, which assumed further legal acculturation in the post-colonial era, have re-shaped the nature of the Islamic criminal justice system (Olayanju *et al.*, 2013). Even the Sharī'ah Peal Codes introduced in some Northern states in Nigeria based on the earlier Sudanese experiment are also by-products of the modern legal system which is based on the colonial legacy. For instance, codification of the Sharī'ah penal laws was never known to classical Islamic legal philosophy (Suberu, 2009).

While one may argue that codifying certain laws might foreclose the opportunity for hermeneutical interpretation based on the views of learned jurists, it is necessary to revisit the role of a *mufti*, a qualified learned jurist who can give a non-binding ruling on an issue referred to him, in the dispensation of criminal justice system. Specifically, this article examines the role of a *mufti* in the criminal justice system in Africa, with an important case study of the Sudan apostasy case of *Mariam Yahia Ibrahim* [2014], which recently sparked international concern among human rights activists and conservative religious scholars.

Apostasy is one of the capital offences under Islamic criminal law, which attracts a death penalty after the accused person has been convicted, and after all the requirements of the law are satisfied. Nevertheless, a golden principle under Islamic criminal law provides that doubt of any kind should be avoided in deciding criminal cases, for it is not the pride or sole aim of the law to execute a sentence against the accused. However, the law is out to see that justice has been done to the accused persons. That is why Islamic law sets out some requirements and conditions, general principles and exceptions, as well as rules of procedure for dealing with each and every case. This is to ensure that justice has been done to all, and also to maintain the

position and objective of Islam towards the protection of innocent persons. The recent Sudanese case of *Mariam Ibrahim* on apostasy has again brought to the limelight some contentious legal issues within the Islamic criminal justice system.[1]

In line with the dynamism of Islamic law, qualified Muslim jurists might need to clarify jurisprudential issues in their advisory capacity to judges in the Sharī'ah court in order to enhance and improve the Islamic criminal justice system (Oseni, 2015). In view of these issues, the article examines the Mariam's case with a view to explore the role of *muftī*s (jurist-consults) in the administration of the criminal justice system. In doing so, the article first provides a background analysis on the Islamic concepts of judiciary and the criminal justice system, followed by a brief overview of the *Mariam Yahia Ibrahim*'s case. Furthermore, the article discusses the legal position of apostasy in Islamic law, its rules and limitations, with a view to understand the actual position of the Sharī'ah on the matter based on the most popular opinion of Muslim jurists. Similarly, in laying a proper foundation for the analysis, a brief background on the administration of *fatwā* and the role of *muftī* in some African states has been equally highlighted to provide the backbone of the study.

[1] The apostasy case of Mariam Ibrahim is not the first of its kind in Sudan to be determined by a court of law. A similar case of a Nuba Muslim school teacher named Al Faki Kuku Hassan who converted to Christianity in 1998 was also another example of an apostasy case (Kadouf, 2001, pp. 56-57).

JUDICIARY AND THE ISLAMIC CRIMINAL JUSTICE SYSTEM

In Islam, judiciary is an important sector in the administration of the criminal justice system, which plays a very significant role in the dispensation of justice. It adjudicates disputes between parties in accordance with the law, which is usually based on legal texts (*nusus*) and further extrapolated and expounded by Muslim jurists (Zaidan, 2006). Despite the role of the judiciary in adjudicating matters between disputing parties, one of the fundamental things to understand about the judiciary in relation to the criminal justice system is its role in ensuring that laws are applied properly in order to protect people's lives, honour and property. Hence, not an iota of doubt will be allowed to overshadow justice; parties are to be given equal treatment in accordance with the law; and *Maqāsid al-Sharī'ah* or the higher objectives of the law are expected to be upheld in criminal cases with a view to attaining justice (Mamman *et al.*, 2011). It is not the primary objective of the Sharī'ah to enforce punishments or execute sentences against offenders, but to ensure that justice, peace and tranquillity prevail in the society.

The judiciary from the Islamic perspective is defined as an official authoritative organ of the state, where disputing parties have their matters resolved and their rights and duties enforced in accordance with the clear-cut legal principles, which are basically based on the Qur'an and Sunnah. Historically, the concept of adjudication between

disputant parties is an old phenomenon. It has been known even before the advent of the Prophet Muhammad (s.a.w.). The Qur'an has confirmed that the system of adjudication has existed even during the reigns of the earlier Prophets and Messengers of Allah.[2] The legal basis of the Islamic judicial system or adjudication has been equally provided for in the Prophetic precedents. For instance, the Prophet once said, "If a judge gives a judgment using his best judgment and is correct, then he receives a double reward (from God). If he uses his best judgment but makes a mistake, then he receives a single reward." (*Sahih Bukhari*, Hadith No. 6919 and *Sahih Muslim*, Hadith No.1716).

The Prophet was the first person to act in the capacity of a judge in Islam while he was in Medina. He equally used to appoint people to serve as judges in other cities. Among his appointees were `Utab Ibn Asyad who was sent to Mecca, and Ali Ibn Abu Talib and Muadh Ibn Jabal, both of whom were sent to Yemen (Azad, 1994).

[2] For instance, Qur'an 21: 78-79 provides: "And remember David and Solomon, when they gave judgment concerning the field when people's sheep had browsed therein at night, and We were witnesses to their judgment. And We made Solomon to understand the case. And to each of them, We gave good judgment and knowledge." Also, Qur'an 38: 26 gives a similar insight into the adjudication process as practiced by previous prophets: "O David, verily we have placed you as a successor on Earth, so judge between people in truth, and do not follow your desires for it will mislead you from the path of God. Verily, those who stray from the path of God have a severe punishment because they forgot the day of reckoning."

Similarly, during the era of the *Khulafā'* (the Rightly Guided Caliphs: Abubakar Siddiq (r.a), Umar Ibn Alkhattab (r.a), Uthman Ibn Affan (r.a) and Ali Ibn Abi Talib (r.a)), the head of state continued to play such role of appointing judges to ensure effective dispensation of justice (Alqasimi, 2001). As a result, the judicial system continued to evolve in this manner throughout the early Islamic era, during the Umayyad and Abbasid eras. Later in the subsequent period (period of Tabi'un – the followers of the companions), the office of Chief Justice (*qādi al-qudāt*) came into being. The Chief Justice was responsible for supervising the judicial conduct and performance. The first person to be appointed to this position was a leading associate of Abu Hanifah, Imam Abu Yusuf, who took up the position upon the refusal of the former. Thereafter, the office of the Chief Justice became widespread throughout the Muslim world and it existed up to the eventual fall of the Ottoman Empire in the early decades of the 20th century (Alqasimi, 2001).

The judiciary is one of the vehicles to be used in attaining the proper and effective administration of criminal justice through the law. Thus, the Islamic criminal justice system is regulated by the principles of Islamic injunctions that are found in the Qur'an, Hadith, *ijma* (consensus of opinions of the Muslim jurists), *qiyas* (analogical deduction from the Qur'an, Hadith and *ijma*) and *ijtihad* (independent legal reasoning of a Muslim jurist) (Mammam *et al.*, 2001). This system of criminal justice has many features in

abundance that distinguish it from other systems. It provides for a criminal process, whereby all cases are justly examined and ascertained so that justice is meted to all the parties in a case (Zubair, 1994). In light of this, there is a popular principle under the Sharīʻah which provides that everybody shall be criminally responsible for his action or omission.[3] The lesson to be learned from this principle is that textual provisions of Sharīʻah have recognised the concept of criminal responsibility under the Islamic corpus juris; hence, it is not simply based on analogy. In fact, the concept of criminal responsibility under the Sharīʻah depends on the commission of an offence, and the age of the accused person; whether or not the accused person has attained the age of majority. That is, a person can only be criminally responsible for an offence only if he attains the age of majority. Thus, in a Hadith, the Prophet says:

"Do you know that no actions whether good or evil are recorded for the following: an insane person till he becomes sane; a child till he attains the age of puberty; and a sleeping person till he awakes. All are not responsible for what they do." (Sunan al–Tirmidhi 4/32 and Sunan Abu Dawūd 4/558)

Furthermore, another aspect that is very important to note under the Islamic criminal justice system is the concept of proof. Crimes under the Sharīʻah can be proven in any of the following methods: *bayyinah* (by adducing evidence), *shahādah* (witness) and/or *iqrar* (confession) (Zubair, 1994). The standard of proof is to prove the case beyond any shadow of a doubt, failure of which, it should be resolved in favour of the accused person. If the matter has been proven beyond any shadow of a doubt, the accused person, therefore, should be subjected to the punishment as prescribed by the law. In the Islamic criminal justice system, three categories of punishments are provided: *qisas* (retaliatory penalty), *hudud* (prescribed punishments) and *ta'zir* (discretionary punishments) (Zubair, 1994). In addition to the proof of guilty, the Islamic criminal justice system has put in place some rules upon which the administration of criminal justice should be based, namely: principle of legality (i.e., no law should be applied retrospectively) and every person should be treated equally before the law (Zubair, 1994).

THE *MARIAM YAHIA IBRAHIM*'S CASE

The accused person, Mariam Ibrahim, was born in 1987 to a Muslim Sudanese father and a Christian Ethiopian mother. She was brought up by her Christian mother after her parents were divorced. In December

[3] To this end, Qur'an 53: 38 provides: "That no burden person (with sin) shall bear the burden (sin) of another." In a similar verse, Qur'an 35: 18 reads, "And no bearer of burdens shall bear another's burden, and if one heavily laden calls another to bear his load, nothing of it will be lifted even though he be near of kin…" In yet another verse, Qur'an 17:15 provides: "Whoever goes right, then he goes right only for the benefit of his own self. And whoever goes astray, then he goes astray to his own loss. No one laden with burdens can bear another's burden. And we never punish until we have sent a messenger (to give warning)".

2011, Mariam married a Christian man in Khartoum, and ten months after, she gave birth to a son named Martin on 25th October 2012. Later, she was convicted by the Sudanese Sharīʻah Court, and subsequently imprisoned on the allegation that she committed *riddah* (conversion) and *zina* (fornication). While in the prison custody, she gave birth to a baby girl called Maya on 27th May 2014.

A brief background of the facts surrounding the conviction will shed more light on the issue. The underlying philosophy upon which the court's judgment was premised is summarised thus: by virtue of being a Muslim-born daughter whose father equally died as a Muslim, Mariam is presumed to be a Muslim under the Sharīʻah, since a child's religion depends on the religion of his/her paternal parent. On this basis, Mr. Alsmni Alhadi, one of her relatives, lodged a complaint against the accused person, alleging that she had abandoned her father's religion. This subsequently led to her arrest by the public order police on 15 September 2013. The complaint contained allegations, among other things, that the accused person by virtue of being born a Muslim should not have married a non-Muslim, therefore her purported marriage to a Christian man amounted to fornication; that the accused person who was born as a Muslim and of course, by a Muslim father, has committed *riddah* by denouncing her father's religion, thus, she should be punished according to the Sharīʻah (African Justice and Peace Studies, 2014). In the end, the court on 15th May 2014 found the accused person guilty of fornication and apostasy and accordingly convicted her.

Mariam was sentenced to 100 lashes and death penalty, respectively. Before the execution of the sentence, the court ordered the accused person to recant her faith within three days or face a possible death sentence by hanging. Dissatisfied with the judgement, on the 22nd day of May 2014, an appeal was filed before the Appeal Court. While waiting for the appeal, the news reached the public that the accused person had given birth to a baby in the Prison yard. As a result of that, the accused was transferred to the Prison clinic in order to have access to good medical care for medical facilities in Omdurman Women's Prison were insufficient to provide adequate post-natal care to the accused. In reaction to the current condition of the accused, many international non-governmental organisations began to condemn the entire incident and demanded the unconditional release of the accused person. They equally maintained that the arraignment, trial and conviction were clear violations of human rights provisions contained in the United Nations Charter, African Charter on Human and People's Rights, as well as the Sudan Constitution and Criminal laws (African Justice and Peace Studies, 2014). According to the Sudanese law:

"Every person shall have the right to the freedom of religious creed and worship, and to declare his/her religion or creed and manifest the same, by way of worship, education, practice or performance of rites

or ceremonies, subject to requirements of law and public order; no person shall be coerced to adopt such faith that he/she does not believe in, nor to practice rites or services to which he/she does not voluntarily consent." (Article 38 on the Freedom of Creed and Worship of Sudan's Bill of Rights)

Despite the issue of human rights raised by the international community in relation to the above matter, there are also certain legal and jurisprudential issues that are involved, which are pertinent to the criminal proceedings. The Sharī'ah judges themselves, or with the support of *muftī*s, are required to resolve them before determining the guilt or otherwise of the accused person. The issues include among other things the determination of who is an apostate? Does apostasy really have a nexus with one's parental background? What is the status of a Muslim born child who was brought up under the custody of a non-Muslim parent? Can it be considered as a *riddah* (apostasy) if his/her non-Muslim parent converted him/her during childhood? Can a child be responsible for criminal offence under the Sharī'ah? Can a female apostate be subjected to a death penalty? What is the *maqsad* (purpose) of punishing the offenders in Islamic law? In fact, all these issues are very important to the case in question. Hence, they would be considered in the relevant sections of this article. Meanwhile, it is argued that some modern Sharī'ah court judges may not have the requisite knowledge and expertise to address all the jurisprudential issues before arriving at a well-reasoned judgment; hence, the need to consider the views of learned *muftis* who might be able to advise such judges. The proto-jurists played this great role in advising judges on the best legal position on issues, particularly when one considers the specific context of a case and the prevailing social realities (Hallaq, 2005).

APOSTASY IN ISLAM: RULES AND LIMITATIONS

In Arabic language, the term *riddah* is often used to describe apostasy, which is defined as the conversion of a Muslim faithful to a religion other than Islam (Alalwani, 2012). The term 'apostasy', therefore, conveys the sense of turning away from Islam after one has previously professed the faith in accordance with what God has commanded (Alalwani, 2012). The word *riddah* is captured in the Qur'anic word "*yartaddah*", i.e., the act of turning away or apostatising from Islam. In the Qur'an, the Almighty Allah says: "…And whosoever of you turns from his own religion (Islam) and dies as a believer, then his deeds will be lost in this life and the Hereafter, and they will be dwellers of Fire. They will abide therein forever" (Qur'an 2:217). The term *irtaddah* in the verse seems to have been used for conversion from Islam into disbelief (*kufr*). Therefore, as *irtaddah* represents the process or conversion to another religion, the person (apostate) who has converted from Islam to another religion is referred to as "*murtadd*". This, according to some opinions, includes any

person born of Muslim parents who later rejects Islam. To this end, there are two types of apostate: *murtadd fitri* (inborn or natural, or instinctive apostate) and *murtadd milli* (one who converts to Islam and subsequently leaves it) (Council of Ex-Muslims of Britain 2013).

However, even though the Qur'an condemns the act of *riddah,* some Muslim jurists have argued that there is no divinely revealed punishment provided for such act in the divine book to the effect that everyone who reverts to *kufr* after having believed is to be put to death. Similarly, some scholars have criticised some of the *ahādith* (prophetic traditions), which other scholars have been relying on to decree the death penalty for apostasy. This is based on the reasons identified by the jurists, such as lack of clear indication from the action of the Prophet that an apostate who merely converts to another religion should be put to death. Had it been the actual intent of his traditions to decree a death penalty to apostasy *simpliciter* (without any connection with a treasonable act), he would not have hesitated to classify it under the specific crimes (*hudūd*). One of the most popular traditions widely cited among Muslim jurists regarding the death penalty against apostates is a *hadith* that says, "If anyone changes his religion, put him to death." Some jurists are of the view that the *hadith* was not about killing an apostate who converts to another religion, but it is connected with the case of Jewish leaders who were working to undermine the Prophet, his revelation and his mission in every way possible by spreading falsehood about Muslims in Madinah, plotting divisions and undermining the Muslim *Ummah* (community). Hence, it has been explained that the Prophet never executed any apostate on the ground that he/she converts to another religion (Alalwani, 2012). An additional instance that calls for some modicum of caution pertaining to death penalty against an apostate is the event that culminated into the "Treaty of *Hudaybiyyah*"; this involved a peace treaty between the Muslims and the Quraysh tribe in Makkah in 627 CE, in which the parties agreed to cease warfare for ten years. The Truce of *Hudaybiyyah* was to remain in effect for ten years but held only for two years as it was violated by the Quraysh. The Truce was a good indication of the Prophet never prescribed punishment for the act of committing apostasy because the key condition of the agreement would have forced him to ignore this principle, if it ever existed, and of course, he would never violate any directive of Allah whether for the sake of political expediency or any other reason. According to the treaty, anyone choosing to leave the Muslim camp would be allowed to return to the Quraysh, freely without reprisal. The treaty offered an important prospect for peace without violating any command of Allah. This fact cannot be ignored (Alalwani, 2012). Another important reason for debunking the death penalty against apostates by some Muslim jurists is the established fact that never in the entire life of the Prophet did he put an apostate to death. If he had known

that he had been commanded to do so by the Almighty Allah, he would not have hesitated to carry out Allah's command (Alalwani, 2012).

Even some of the Prophet's companions, as well as jurists of later centuries, had equally held the opinions that the apostate should not be killed as a result of his mere conversion. Among such Companions were Umar Ibn al-Khattab (d.644), Ibrahim al-Nakha'i (d.715) and Sufyan al-Thawri (d.778). Umar Ibn al-Kattab had even suggested that an apostate should better be casted into the prison and asked him to repent than terminating his life. Perhaps, he may repent and obey the commands of Allah. Meanwhile, later jurists such as Ibn Taymiyyah, Rashid Rida, Maududi and Faruqi were among those who disagreed on meting out punishment for a mere apostasy. However, they allowed the punishment to be executed only by the state in cases where conversion from Islam is associated with a threat to public order (treason) (El Fegiery, 2012).

Other modern scholars such as Mahmud Shaltut (former Grand Sheikh of Al-Azhar University, d.1963), Gamal al-Banna, Muhammad Abu Zahra (d.1974), Fathi Osman (d.2010), Mohammed Hashim Kamali and Muhammad Shahrur are of the opinion that if the punishment is upheld, there will certainly be a clear contravention of many verses of the Qur'an that promote freedom of belief and religion. Though modern human rights movement might have largely influenced the views of these modern scholars, their argument cannot be totally discountenanced. More so, no reports can be found in the corpus of authentic *hadith* where the Prophet had supposedly killed apostates. To this effect, Imam al-Shafi'i says, "During his [Muhammad's] time, there were some among the believers who became apostates, and then returned to Islam; the Prophet did not kill them." (El Fegiery, 2012).

Lack of explicit provision in the Qur'an regarding the punishment of apostasy does not stop some modern Muslim countries from criminalising the act. They have prescribed various punishments for the offence such as fines, imprisonment, flogging and exclusion from civil and family rights. Countries that adopted this system include Malaysia, Morocco, Jordan, Oman, etc. However, some countries like Iran, Sudan, Saudi Arabia, Somalia, former Islamic state of Afghanistan, Qatar, Yemen and Mauritania upheld the punishment of death penalty for apostasy (El Fegiery, 2012). In Sudan, for instance, the Criminal Code provides that, "Whoever propagates the renunciation of Islam or publicly renounces it by explicit words or an act of definitive indication is said to commit the offence of *Riddah* (apostasy)." (Article 126 of the Sudan's Criminal Code 1991)

Furthermore, Imam Al-Ghazali was also of the view that the death penalty should not be the appropriate punishment for the apostate for it is not the *maqsad* (purpose) of the Sharī'ah. He reiterates that Islam is a dynamic religion, thus, the Islamic law could not remain on the same level as it was in the early period

of Islam. However, this position of Al-Gazali has contravened the position of some Muslim jurists of his School of thought (Shafi'i School), which confirmed the death penalty against an apostate. All the Sunni Schools of thought, except the Hanafis, agreed that apostates of whatever gender should be put to death. According to Hanafi jurists, a female apostate should not be sentenced to death, but she should rather be imprisoned (Afshar, 2006). These diverse juristic views re-emphasise the role of Muslim jurists in understanding the reason behind every ruling in the Islamic law and contextualising such rulings within the society within which they live in line with the realities of time. Hence, in issuing rulings applicable to the issues that relate to one's life, modern jurists might need to go an extra mile to understand the earlier rulings of the previous jurists and apply them to modern events in accordance with the higher objectives of the law (*maqasid al-Sharī'ah*).

ADMINISTRATION OF FATWA AND THE ROLE OF *MUFTĪ* IN SOME AFRICAN STATES

A significant number of Muslims have lived in Africa since the early days of Islam. Most of this population largely resides in the Northern, Western and Eastern parts of the continent. The advent of Islam in the different parts of the continent also brought about many issues such as the application of the Sharī'ah and institutionalisation of some religious agencies like fatwa and the Sharī'ah Courts. For the purpose of this article, this study highlights the administration of fatwa and the role of *mufti* in the following selected countries: Egypt, Sudan and Nigeria.

In Egypt, matters related to fatwa and the roles of muftis are as old as the application of Islamic law in the country. However, the formal institutionalisation of fatwa began towards the twilight of the 19th century. In the year 1895, a fatwa institution called *Dar al Ifta al-Misriyyah* (The Fatwa Institution of Egypt) was established by the high command of Khedive Abbas Hilmi. This institution was later affiliated to the Ministry of Justice on 21st November 1895 by Decree No. 10 of the then Egyptian laws (Dar Al-Ifta Al-Misriyyah). One of its civil roles is to keep the contemporary Muslim *ummah* (community) in touch with religious principles, clarify the right way, remove doubts relating to religious and worldly life, and apply religious laws to new issues of contemporary life (Dar Al-Ifta Al-Misriyyah). More importantly, the institution plays a significant role in giving rulings to issues referred to it by people and serves as a counsellor and consultant to the Egyptian Judiciary. In fact, it is considered as one of the divisions of the Egyptian Ministry of Justice. To this effect, all capital punishments, especially those involving death penalties among others, are referred to it in order to seek for the opinion of the Grand Mufti concerning these punishments (Article (2/381) of criminal procedural law of Egypt). The recent example is the referral of the case of the former Egyptian President, Mohammad Morsi, to the Grand

Mufti of Egypt, Shawky Allam; in order to examine the death sentence pronounced by the court against him on 16th May 2015, and 100 others in relation to the allegation of a mass prison break in 2011 (BBC News, 2015). It is the responsibility of the Grand *Mufti* to review any case referred to him by the criminal court and examine all the evidence administered in the case before issuing his legal opinion. This practice minimises, if not prevents, the erroneous sentencing and execution of the accused persons. This also implies that it is not the aim of the Sharī'ah to hurriedly execute offenders just to suffer the consequence of their acts or omissions, but to make sure that things are done in accordance with the Sharī'ah.

In Sudan, fatwa and the role of mufti is not a new thing, especially in relation to the judiciary. Previously, during the pre-colonial era, the provisions of Qur'an and Sunnah were applied in the Sudan Sharī'ah courts. These provisions were further interpreted and complemented by the legal opinion of the supreme Islamic Ruler called the Mahdi, and later, the Khalifa (Medani, 2010). This role of interpretation is likened to the role played by the present day *mufti*s. In the pre-colonial era, supervision and control of judiciary were solely in the hands of the Islamic Ruler. Cases were heard and determined by the Sharī'ah judges (*qudāt*) who were learned in Islamic law and trained under any of the Sunni schools of Islamic jurisprudence. However, any legal action instituted against the government was to be determined and decided by the Ruler, with the advice of the grand *mufti* who served as his legal adviser. This implies that the role of *mufti* in the pre-colonial Sudan, as the leading expert in Islamic law, was duly recognised. However, when the colonial administrators came, some of the Islamic values and institutions, including the institution of fatwa, were tempered with to the extent of abolishing some of them. The position of the Grand Mufti of Sudan, however, still exists up till today, although it appears the nomenclature is rather different from the pre-colonial era. In the case of Nigeria, *muftī*s, prior to the advent of colonial administration, were used as assessors (court officials) who are responsible for assisting the courts in the dispensation of Sharī'ah justice (Oba, 2007). When the colonial administrators came, however, they introduced the English-styled legal system, which indeed led to a gradual decline of some aspects of the Islamic legal system (including the *muftīship*) in the country (Oba, 2007). Currently, fatwa committees in countries like Sudan and Nigeria have not been fully institutionalised as it is in Egypt.

THE ROLE OF A *MUFTĪ:* MAKING RECOURSE TO *MAQĀSID AL-SHARĪ'AH* IN THE DISPENSATION OF CRIMINAL JUSTICE

A *muftī* is an Islamic law expert who issues Islamic legal verdicts on matters relating to Islam and Muslim's affairs (Gelani, 2011). The role of a *muftī* has become manifestly important in the contemporary society as

solutions to new issues and developments could be provided. The role of a *mufti* is to issue verdicts and make clarifications based on the points of law and principles of Islamic jurisprudence, with a view to reiterating the dynamism of Islamic law. This role played by *muftī*s is significant in enhancing the application of the Sharī'ah, especially in the modern Muslim societies that had suffered series of traumatic colonial subjugation. Most of the Muslim-majority countries were once subjected to colonial incursions, which resulted in legal pluralism (Taib, 2011).

Based on the pre-colonial practice, which mirrored the age-long relationship between the *mufti* and the judge as practiced during the early centuries of Islam, it is thus clear that *muftī*s have a role to play in the dispensation of the Sharī'ah criminal justice. Considering the recent apostasy case of Mariam Ibrahim from that perspective, one will again acknowledge the role of *muftī*s in guiding the court to establish who is an apostate under Islamic law, with a view to ascertaining the status of the accused person. By so doing, the court will be well informed on how to apply the relevant laws to the facts in issue. In Islamic legal parlance, it seems that "who is an apostate" may take different meanings and legal implications (Alalwani, 2012). It is not simply limited to a mere "conversion of a Muslim faithful to another religion" but it also involves other considerations such as avoidance of doubt as to the legal status of the accused person before his/her conversion. That is, the court should be convinced that the convert was truly a Muslim before his/her conversion; otherwise his/her act will not amount to *riddah* (conversion). Like in Mariam's case, the accused person testified that never a time did she practice Islam (which is the religion of her late father). This is based on the fact that she was brought up by her Christian mother since her childhood. Of course, this equally raises a doubt as to whether the accused ever acted as a Muslim. Hence, in this regard, it is the duty of *muftī*s to guide and advise the court on which type of apostasy attracts the capital punishment and which one does not.

Another important issue which a *muftī* can assist the court with in determining the guilt of the accused, especially with reference to the case in question, is to examine whether or not a Muslim-born child, who was brought up under his/her non-Muslim mother, can be declared to have committed a *riddah* if he/she abandoned his/her father's religion. It is a general principle of the Islamic law that children's religion must follow the religion of their Muslim father. However, if a child happens to be under the custody his/her non-Muslim mother and is brought up in accordance with the latter's belief or conviction, it is difficult to safeguard and retain the *status quo ante*. This also raises a doubt as to whether Mariam Ibrahim can be considered a "convert" (*murtadd*) despite her confession of non-participation in all Islamic activities since childhood; coupled also with the fact that she became accustomed with Christianity right from

her childhood. More so, it is a rule under the Islamic law that Islam is not a religion that one can access through name or lineage. It should be by the concurrence of the statement and action (*qawl wa al-ʹamal*) altogether (Badi, 2002). Thus, one may conclude that the legal position of Mariam's conversion is indeed doubtful. Hence, judges are therefore warned not to apply punishments in cases of doubt. This is because, according to Islamic principles, doubts are always to be resolved in favour of the accused persons (Zayd, 2005). To this end, the Prophet was reported to have said, "Ward off the *hudūd* punishments from the Muslims as much as you can. If there is any possible way for the accused, let him go. For a judge to err in pardon is better than his erring in punishment" (Sunan Tirmidhi, Hadith, No. 1344). In a related Hadith, the Prophet says, "Ward off the *hudūd* with the doubts (*shubuhāt*)." (Sunan al Tirmidhi, Hadith, No. 1344).

Going by the above traditions, it is confirmed that infliction of punishments under Islamic law of crime requires absolute certainty of the accused guilt; otherwise, the matter is said to have been resolved in favour of the accused person. A *muftī* also clarifies the position of the law at the request of the court regarding the issue whether or not a child can be responsible for a criminal offence under the Sharī'ah. It is a general principle of the Sharī'ah that a minor or a child is not responsible for any offence committed by him during the period of childhood (Sunan al –Tirmidhi 4/32 and Sunan Abu Dawūd 4/558). In relation to Mariam's case, the relevant facts showed that she was under the custody of her Christian mother throughout her childhood, and thus, she became acculturated with Christianity. Therefore, this also implies that her conversion to Christianity was made during the childhood period, which exonerates her from the criminal responsibility for the offence of *riddah*, as contained in the Sharī'ah.

Another important issue that needs the opinion of a *muftī* in the dispensation of criminal justice, especially regarding the apostasy case of Mariam Ibrahim, is to determine whether or not an apostasy *per se* is a capital offence, which absolutely attracts death penalty under the Sharī'ah. Some scholars have argued that although apostasy is an offence under the Sharī'ah, its punishment has not been explicitly provided for in the Qur'an, and therefore, it becomes subjective and controversial (Alaalwani 2013). Unlike other *hudūd* cases whose punishments are prescribed in the Qur'an and Hadith, the apostasy punishment was reported only in the *ahādith* (traditions) of the Prophet. Notwithstanding, some jurists have still maintained that such punishments as contained in the authentic traditions of the Prophet should not be interpreted strictly as death penalty. More so, Islam does not encourage execution of death penalty, for it is a capital punishment prescribed only for murderers and those who spread mischief on earth. In fact, Islam wishes people to act with mercy and does not allow people to be exposed by their evils; instead, they

should ask for forgiveness from Allah at all times, and Allah is the Most Merciful (Zayd, 2005). This is a remarkable attribute of Allah as well as a fundamental feature of Islam. The Almighty Allah deliberately ignores His servants, for it is a mercy from him, and at the same time, He promotes and encourages His servants to seek forgiveness and compassion. To this end, the Almighty Allah says, “Hold on to forgiveness” (Qur’an 7: 199). In yet another verse, “Those who love to see scandal broadcast among the believers will have a grievous penalty in this life and in the Hereafter. Certainly Allah knows and you do not.” (Qur’an 24:19). Similarly, the Prophet was reported to have said, “Whoever conceals [the faults, offenses] of a Muslim, Allah will conceal his in this world and the Hereafter” (Sahih Muslim Hadith No. 4867).

Furthermore, in respect of whether or not a female apostate can be subjected to a death penalty by the court is a question of law and jurisprudence. This could be resolved by the intervention of experts who are learned in Sharī‘ah. Muslim jurists have not unanimously agreed on this issue. While the Shafi’i, Maliki and Hanbali jurists maintained that apostates should be killed regardless of their sex, the Hanafi jurists are of the view that a female apostate should not be sentenced to death (Council of Ex-Muslims of Britain 2013). This implies that even if the punishment of an apostate is settled as death sentence, it should not be executed against the female apostates according to the Hanafi jurists. After all, it is not the *maqsad* (purpose) of the Sharī‘ah to merely punish the offenders. This can be understood from the various traditions of the Prophet, in which, it was reported that he used to ignore the offences committed by some offenders; sometimes even to the extent of ignoring their confessions, provided they do not reach him. Thus, the Prophet says, “Forgive the *hudūd* among you. But should a *hadd* case reaches me, punishment is certain” (Sunan Abu Dawūd, Hadith No. 3804). In yet another hadith, the Prophet was reiterating the importance and preference of seeking forgiveness over and above execution of punishment, in which he lamented over the attitude of one of his companion (Hazzal al-Aslamy) for encouraging his friend (Māiz Ibn Malik) to expose his guilt over adultery. He then said, “Woe to you, O Hazzal. If you had veiled him with your mantle, it would have been better for you.” (Sunan Ahmad, Hadith No. 20890). All of the above prophetic precedents imply that it is not the aim and objective of the Sharī‘ah to punish offenders, but to minimise if not to prevent the commission of the offence. Therefore, the Sharī‘ah does not encourage unnecessary executions in the name of penalty, let alone execution of the penalties in doubtful cases such as apostasy. The basis upon which the apostasy penalty was premised in pre-modern Islamic time by the classical jurists was surrounded by controversies, and it does not suit the contemporary situation, taking into cognisance the dynamism of the Islamic law and the need to exhibit such dynamism

as contained in the Qur'an and Sunnah. This is of course, what prompted some modern jurists to emphasise on the need to rethink about the apostasy laws in this contemporary society thereby resorting to *maqasid al- Sharī'ah* (objectives of Sharī'ah) (Abdullah & Hassan, 2004).

Recourse to *maqasid al-Sharī'ah* (objectives of Sharī'ah) is a fundamental concept to be recognised by the courts in the dispensation of criminal justice. The concept preserves public interest *masālih* or *al-daruriyyāt* (essential necessities) such as preservations of religion (*hifz al-din*) and that of life (*hifz al-nafs*), as well as blocking the means to evil (*sadd al-dhari'ah*) (Baharuddin *et al.*, 2015). Evidence (*al-bayyinah*) is one of the means of proof in deciding any criminal matter before the court. This can assist the court to discharge its role effectively. Thus, it is also in line with the *maqāsid al-Sharī'ah* to apply in some cases the corroboration of *qarinah* (circumstantial evidence) to direct evidences. No one shall be punished unless he/she is proven guilty beyond any shadow of doubt, which of course, in most cases, is very difficult to prove. Hence, it is not just the aim (*maqsad*) of Sharī'ah to punish but to deter other people from committing offences (Baharuddin *et al.*, 2015). In light of the said objective, it is therefore a duty incumbent on the court to always emphasise and focus on the intent of the law rather than its form. To this end, the courts are advised to use the *qawā'id* (Islamic legal maxims) in determining or interpreting any evidence or matter that can be presented, as it depicts *maqāsid al- Sharī'ah* (Baharuddin *et al.*, 2015). For instance, the maxim *al-umūru bi maqāsidiha* (matters are determined by intention) (Tyser *et al.*, 1980) focuses on the significance and implications of intention to all actions. This maxim originated from the Hadith of the Prophet that says, *innama al-'āmālu bi al-niyyāt:* "action must be judged according to the intention" (Badi, 2002). Thus, in criminal cases, the mental element (*mens rea*) of an accused person is a determinant factor for his conviction or refusal of mitigation. In addition, for an accused person to be convicted for any offence, the *mens rea* must concur with the *actus reus* (wrongful act), otherwise he/she will be given the benefit of a doubt. Another maxim to be reckoned with in the dispensation of criminal justice is *al-yaqīn lā yazūl bi al-shakk* (certainty is not dispelled by doubt) (Tyser *et al.*, 1980). The maxim has gotten the basis from the provisions of Quran and Sunnah of the Prophet. In the Qur'an the Almighty Allah says, "O you who believe! Avoid much suspicion; indeed some suspicions are sins…" (Qur'an 49: 12). Similarly in a Hadith, the Prophet was reported to have said, "*da' ma yurībuk ilā mā lā yurībuk* - Leave that about which you are in doubt for" (Badi, 2002). The application of this maxim therefore provides an avenue to the courts to desist from passing erroneous decisions or executing punishments based on doubts. This has also brought about a similar maxim that says, *al-hudūd tudra'u bi al-shubuhāt* - punishments shall be averted by doubtful matters. The genesis of this maxim

is the Hadith of the Prophet related in the *Sunan of Al-Tirmidhī* on the authority of ʻAisha who said, the Messenger of Allah said "Avert punishments from Muslims as far as you can, and if you find a way out release the Muslim" (Sunan Tirmidhi, Hadith, No. 1344).

There is a need to utilise or explore the legal maxims so as to ensure that the purposes of Islamic criminal law are comprehended by establishing justice in Islamic legal procedure. There are also some issues in criminal proceedings that need to be considered by the courts, namely criminal intention of the accused person and certainty of the matter, because should there any *shubha* (doubt) involved, the accused persons will be given the benefit of the doubt, as required by law. In fact, most of these issues will be answered through some relevant basic legal maxims of the Islamic law (Zakariyah, 2014).

CONCLUSION

Though apostasy remains one of the most heinous and abominable acts in Islam, it does not trump the fundamental right to the freedom of religion recognised in the Islamic law. The criminality of apostasy stems from the concept of treason and rebellion against the state and the potential impact such act will have on the Islamic State. Thus, apostasy in Islam has not been strictly defined as a mere conversion of Muslim to a religion other than Islam. It can therefore be understood in two perspectives, namely: apostasy as a mere conversion of a Muslim to religion other than Islam; and apostasy (conversion) of a Muslim with a view to causing public disorder (rebellion) within the Islamic state such as treason and treasonable felony. The Glorious Qur'an does not explicitly provide for the punishment of apostasy of whatever kind. However, death penalty against apostates has been provided for in the traditions of the Prophet (s.a.w.), which has been attributed only to the latter category of apostasy, according to the modern Muslim jurists. In view of the apostasy case of Mariam Ibrahim, this study has raised some fundamental questions to be examined by the court while determining the guilt of an accused person. These questions include: who is an apostate? Can a Muslim-born child who was brought up by a non-Muslim mother be said to have committed a *riddah* (apostasy) if such an individual abandons the father's religion? Can a child be responsible for criminal offence under the Sharīʻah? Is apostasy really a capital offence that can absolutely attract death penalty under the Sharīʻah? Can a female apostate be subjected to death penalty? What is the *maqsad* (purpose) of punishing the offenders in the Islamic law? All these are jurisprudential issues which require the intervention of Muslim jurists. Thus, the study concludes that *muftīs have* a role to play in the dispensation of criminal justice. Finally, one may conclude that in criminal cases, generally, recourse should always be made to *maqāsid al-Sharīʻah* (the higher objectives of Sharīʻah), thereby resorting to the principles of *qawāʻid, masālih al-mursalah* and *sadd al-dharaiʼ*. Meanwhile,

in apostasy cases, the court might need to distinguish between who is an apostate and who is an infidel; the court should always be cautious about erroneous execution of those who are not criminally responsible for an offence, or who are sometimes exempted from the capital punishment such as children and women; the court should therefore avoid anything doubtful and treat any case based on its merit (Rabb, 2010). After all, a fundamental legal maxim which derives its source from a prophetic precedent is, "Avoid (imposing) fixed criminal sentences in cases of doubt" (*idraʾu̅ ʾl-ḥudūd biʾl-shubahāt*) (Al-Shantarini 1979).

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Alternatives to Custodial Sentences: A *Maqasidi* Approach

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ABSTRACT

This article discusses issues related to custodial sentences. It addresses jurists' arguments against these sentences on the ground of their inconsistency with the aim of criminal justice. The article is more concerned with the Muslim jurists' position; hence, it focuses on examining the consistency of custodial sentences with *maqasid al-Shariah* to determine their appropriateness to the enforcement of criminal justice and the safeguard of public interest. It also assesses the consistency of this concept with the philosophy of Islamic criminal law and the viability of its application in light of the concept of crime and punishment. For this purpose, the article defines custodial sentences in contemporary legislations. It then analyses the concept of imprisonment in the Quran and the Sunnah, and the practices of the Companions. It also assesses the impacts of custodial sentences in modern practices with the aim to identify the conditions and parameters for alternatives to these custodial sentences within the framework of *maqasid al-Shariah* in general, and the *maqasid* of punishments in particular. The article found that although considered as necessary to establish justice and protect society, custodial sentences are not in line with the Shariah principals and objectives. It also proposes a number of *Maqasidi*-driven parameters that serve as building blocks for the implementation of alternative custodial sentences.

Keywords: Islamic law, criminal justice, custodial sentences, *Maqasid al-Shariah* and freedom

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INTRODUCTION

One of the ultimate aims of the criminal justice, as propagated in criminal justice legislation and legal literatures, is to deter criminals from causing harm to public. The sentences available to the courts are considered necessary measures that ensure public protection. These sentences range

from low to severe sentences. Among the severe sentences are custodial sentences, which are defined as, "Sentences imposed by a court in a criminal case. They require mandatory custody of the convict, either in prison (incarceration) or in some other closed therapeutic and/or (re)educational institution such as a reformatory, psychiatric counselling or drug treatment programmes. This is opposed to a deterrent sentence, which does not impose confinement, but serves as a warning through alternate punishment such as community service or a fine" (definitions, US Legal). The justification for these reserved offences is that they are "so serious that neither a fine alone nor a community sentence can be justified for the offence" (UK Legislation, n.d.). Despite all the justifications presented for these custodial sentences, they have been challenged by many contemporary legal experts, criminologists and sociologists in the conventional arena, indicating the overwhelming negative end results of these sentences. They have also been criticised by many Muslim Jurists on the ground that such sentences are inconsistent with the concept of imprisonment in Islam and do not serve the higher objectives of the Islamic law (*maqasid al-Shariah*). This paper is more concerned with the Muslim jurists' position; hence, it focuses on examining the consistency of custodial sentences with *maqasid al-Shariah* to determine their appropriateness to the enforcement of criminal justice and the safeguard of public interest.

In the first part, the article examines the higher objectives of the Shariah with special focus on freedom – as opposed to custody – as one of the fundamentals related to the *maqasid al-Shariah*. The second part highlights the concept of custody in the Islamic law as compared to that applied at present. It presents the contextual implementation of custodial sentences in the traditional Islamic law. The third part examines major impacts of the presently applied custodial sentences on the convicted, his family, the government and the general public. This part paves the way for the proposition of alternatives to the currently practiced custodial sentences. The final part proposes some *maqasidi*-driven parameters for these alternatives. It sets a framework for future exploration of the detailed alternatives.

Custodial Sentences in Light of the Higher Objectives of the Shariah (Maqasid al-Shariah)

Definition of Maqasid al-Shariah

Maqasid al-Shariah is an independent discipline that addresses aspects of Islamic law from a macro perspective. The *maqasid* approach to law is a combination of an epistemological and legal framework that sets the philosophy of the Islamic law to ensure a holistic approach to its aspects.

The ultimate objective of *maqasid al-shari'ah* as established in the Quran and the Sunnah is to serve the interests (*jalb al-masalih*) of all human beings and to save them from harm (*daf' al-mafasid*), they choose to define *maqasid al-shari'ah* from

a different perspective (Chapra, 1992). Abu Hamid al-Ghazali (d.111) defined *maqasid* by stressing the Shariah concerned with safeguarding five objectives by stating that:

"The very objective of the Shari'ah is to promote the well-being of the people, which lies in safeguarding their faith (*diin)*, their lives (*nafs*), their intellect *('aql*), their posterity (*nasl*), and their wealth (*maal*). Whatever ensures the safeguarding of these five serves public interest and is desirable, and whatever hurts them is against public interest and its removal is desirable." (Al-Ghazali, 1973)

The same has been highlighted by al-Iz Ibn Abdessalam and al-Shatibi with regards to serving the interests of all human beings and to save them from harm by preserving five essentials ('Izz al-Din 'Abd al-Salam, 1999; al-Shatibi, 1975).

Ibn 'Ashur (1973), on the other hand, defines *Maqasid* from a broader dimension. He stated that:

"The all-purpose principle (*maqsad 'amm*) of Islamic legislation is to preserve the social order or the community and insure its healthy progress by promoting the well-being and righteousness (*salah*) of the human being. The well-being and virtue of human beings consist of the soundness of their intellects and the righteousness of their deeds, as well as the goodness of the things of the world where they live that are put at their disposal" (Muhammad El-Tahir Al-Misawi, 2006).

The same approach has been adopted by 'Allal al-Fassi (d.1974) as he stressed that the uppermost objectives of Shari'ah rest within the concept of compassion and guidance that seeks to establish justice, eliminate prejudice and alleviate hardship. He stated that:

"The overall objective of Islamic Law is to populate and civilize the earth and preserve the order of peaceful coexistence therein; to ensure the earth's ongoing well-being and usefulness through the piety of those who have been placed there as God's vicegerents; to ensure that people conduct themselves justly, with moral probity and with integrity in thought and action, and that they reform that which needs reform on earth, tap its resources, and plan for the good of all" (Alaal Al-Fasi, 1993).

Freedom and Maqasid Al-Shariah

Freedom is a core fundamental of the *maqasid al-Shariah* and among its essential aspects. It is strongly related to custodial sentences, which is the issue of concern in this paper, therefore, necessitates to be elucidated in order to acquire a better understanding of the issue in relation to the concept of *maqasid al-Shariah* to mean many things.

The word "Freedom" is used in the Arabic literature such as "original or authentic; Arabs say a free horse (*farasun hurrun*) to mean a thoroughbred horse. They say a free clay (*Teenun Hurun*) to mean a clay pure and without sand in it. They also say a "free boy" (*waladun muhararun*) – as mentioned by the wife of *Imraan* – to mean a boy consecrated for the service of Allah" (Ibn Manthour, 1993). However, the usage of the concept as an attribute of a person has two meanings:

The first meaning: Freedom is used as the opposite of the word "slavery". It refers to the original ability of all rational and mature people to handle their affairs themselves without depending on the consent of someone else.

The second meaning: It is derived from the first by metaphorical usage. It denotes one's ability to act freely and handle one's affairs as one likes, without opposition from anyone (Ibn Ashour, 2006).

The Protection of Freedom as a Fundamental Part of the Maqasid al-Shariah

Though the vast majority of Muslim jurists did not consider freedom as a stand-alone objective of Shari'ah, as opposed to the five necessities (*ad-daruriyyat al-khamsah*), yet, freedom is considered as part and parcel of these five necessities and a prerequisite for their establishment and existence. This is because the objective of the Shari'ah, as stated in Islamic jurisprudential literatures, is to serve the interests (*jalb al-masalih*) of all human beings that include the protection of their faith (*diin*), their lives (*nafs*), their intellect (*'aql*), their posterity (*nasl*) and their wealth (*maal*) (Al-Ghazaali, 1973; 'Izz al-Din 'Abd al-Salam, 1999; al-Shaatibi, 1975; Ibn Ashour, 2006).

Since freedom is a human instinct that is paramount to the meaningfulness and validity of actions, the manifestation of freedom in the five necessities is evident as:

- The basis for the protection of faith promoted by Shari'ah is to avoid coercion in one's belief as "there is no compulsion in religion" (Surah Al-Baqarah: 256). Hence, belief cannot be achieved unless there is freedom of embracing it.
- The preservation of life has similar interrelation with freedom as it cannot be achieved unless the person has the freedom of action in all his personal affairs, independent of any types of coercion and enslavement.
- This preservation of intellect cannot be achieved unless the person has the freedom of choice, as intellectual competence is the cornerstone of responsibility and the core condition for the validity of actions.
- The protection of posterity cannot be achieved unless the person has the freedom to choose a partner who shares with him/her the responsibility of building a family and raising kids to ensure the continuation of mankind.
- Wealth protection, which is the fifth of the Muslim jurist classification of necessities, enjoys the same consideration with regards to freedom as wealth protection cannot be achieved unless a person has the right on his ownership and has full freedom of access on his wealth and property. This is of course within the parameters of Shariah. Al-Shafii, in elucidating this meaning, says, *"People are given power over their wealth; no one has the right over it except where they are commanded to do so [Zakat]"* (al-Shafi'i, 1973).

Thus, we can conclude that the preservation of freedom is considered as the basis for all the five necessities representing

the core of the Shari'ah objectives since one of the major objectives of the Shari'ah is to put an end to slavery and establish permanent freedom. Allah established the objective of freedom in terms of establishing its requisites and eliminating its obstacles (Ibn Ashour, 2006).

In establishing the requisites of freedom, Allah has created human beings with free will. The Shari'ah then prescribed a number of rules to ensure the sustainability of freedom in all stages of human life. Among these rulings are:

- Considering any assault on freedom as a grave act of injustice and a harm that should be eliminated. The verse related to freedom of belief says, "There is no compulsion in religion" (Surah Al-Baqarah: 256) and the statement of Umar Ibn Al-Khatab that says, "*When did you start turning people into slaves when their mothers gave birth to them as free human beings?*", (Al-Kandahlawi, 2003) are clear manifestation of these facts.
- Putting in place rulings and procedures that would abolish the practice of slavery. Numerous texts recommending the freeing of slaves and prescribing the freeing of slaves as a condition to correct some breaches. For instance, compensation of the family of the victim in an accidental homicide (*Al-qatl –al-khataa*) in the verse that says: *"It is not for a believer to kill a believer unless [it be] by mistake. He who has killed a believer by mistake must set free a believing slave, and pay the blood-money to the family of the slain, unless they remit it as a charity"* (Surah Al-Nisa': 92), the expiation from a deliberate oath (*kafarat al-yamin*) in the verse that says: "Allah will not take you to task for what is unintentional in your oaths, but He will take you to task for the oaths which you swear in earnest. The expiation thereof is to feed ten of the needy with the average of that with which you feed your own people, or to clothe them, or to free a slave, and for him who finds not [the wherewithal to do so] then a three days' fast" (Surah Al-Ma'idah: 89). Sexual intercourse in the fasting month, in the verse that says: "Those who put away their wives [by saying they are as their mothers] and afterward would go back on what they have said, [the penalty] in that case [is] the freeing of a slave before they touch one another. To this, you are exhorted; and Allah is Informed of what you do" (Surah Al-Mujadalah: 3], etc.

In terms of eliminating any obstacles to the establishment of freedom, the Shari'ah sets provisions to preserve the objective of freedom. Among these provisions are:

- Prohibiting all forms of coercion, either in belief, marriage, or business transaction, unless it is a legitimate coercion that serves the whole community.

- Putting in place special provisions for the coerced such as nullifying transactions made under such coercion.
- Prohibiting the wrongful restriction of people's freedoms (Abu Zaid, 2014).
- Occasional restriction of the freedom of individuals to avoid harming public interest as a whole and maintaining the right to freedom for everyone such as the restriction imposed on the weak-minded (*safih*) in using his property (Ibn Ashour*,* 2006).

Hence, we can conclude that freedom is a discernment bestowed by Allah to mankind from the first day of their birth. It is also the core fundamental of legislation, and one of the objectives of the Shari'ah.

Based on the above premises promoting freedom, the questions to be answered are:

- What is the position of imprisonment in Islam?
- Is it an original punishment or a precautionary measure prior to the decided punishment?
- And to what extent is it considered to be valid to punish the offender by depriving him of his liberty?

The Concept of Custodial Sentences in the Islamic Law

The issue of custodial sentences is well-addressed in classical Muslim Jurists' writings. They refer the concept of custodial sentencing to the following three major meanings:

First: To impede a person to act upon himself by placing him in a house or in a mosque or in a place dedicated to detention (prison).

Second: To not allow a person to leave his house (house arrest) or prohibit him from travelling outside his city, or to assign a security guard to accompany him whenever he wants to go out. It is termed in classical Jurisprudence writing (*al-tarsiim*) that refers to House arrest.

Third: To inhere the debtor to the creditor until he pays his debt, and the inherence here should be a result of a legal judgement (*Al-Ahmad*, 2011).

The above types, as discussed by Muslim jurists, mean that custodial sentences in the Islamic law are broader in meaning than the currently applied. This view is supported by Ibn Hazm and some Hanbali jurists including Ibn Taimiyyah. Ibn Hazm says, "with regards to prison no one disagreed that the prophet (Peace be upon him) had never had a prison" (Ibn Hazm. N.d). Ibn Taimiyyah, for instance, in explaining this broader meaning says, "Prison in Shari'ah is not confined to the placement of a person in a narrow place; it is rather restricting a person by forbidding him to act in his affairs, either by restricting him to his house, the mosque or to give the power of attorney to the debtor or his agent to do so, and that is why the Prophet, peace be upon him, called him a captive". He evidenced his opinion by the hadith reported by Abu Daud and Ibn Majah that the grandfather of Hirmas ibn Habib said, "I brought my debtor to the Holy Prophet (peace be upon him). He said to me, Stick to him. He again said to me: O brother of Banu Tamim, what do you want to do with your prisoner". He concluded his view

by saying, “This is the prison in the time of the prophet, and there was no specific dedicated place used for imprisonment in the time of the prophet and the time of Abu Bakar. However, when there was a disperse of citizen in the time of Umar, he bought a house in Mecca and used it as a prison. He also said, “Imprisonment does not mean keeping him in a jail; it is rather preventing him from his normal activities” (Fatawa Ibn Taimiyyah, 1985).

Causes of Custodial Sentences in the Islamic law

Classical Islamic criminal law literature highlighted many causes for custodial sentences. Among them are:

1. Failure to pay off a debt: Muslim jurists when discussing custodial sentences, often refer to the failure of paying debts. So the debtor will be detained until he pays off his debt. In this respect, Muslim jurists differ on the conditions and the period of this imprisonment. As they differentiate between the person known to be of good character, the person known to have prior criminal history and the person who is unknown as he may be a foreigner. They also differ on the maximum period of imprisonment to determine his status (Al-Mawardi, n.d.).
2. Investigating an accusation: In this regard, Muslim jurists confine the accusation that necessitates a temporary imprisonment to serious accusations such as a murder or a robbery. Hence, when the investigation is completed, the accused will either be released or executed. This is clearly narrated in *hadith* Bahz bin Hakim that “the Prophet (peace be upon him) imprisoned a man for an accusation, and then let him go” (Ibn Al-Qayyim*,* 2008). Imprisonment here is restricted to necessity (*darurah*) that is to be terminated by the result of the investigation. Ahmad Ibn Hanbal in commenting on the *hadith* of Bahz said, “These custodial sentences are temporary procedures until the ruler receives full information on his case” (Ibn Al-Qayyim*,* 2008).
3. To use the prison as a means to assist the prisoner to repent from his sins or to return the rights of others. Thus, if he repents or returns the rights of others, he should be released.
4. To prevent the person who has been sentenced from escaping so that the punishment of *hadd* or *qisas* may be executed.
5. To restrict the person who presents a threat to people’s lives and property so that he will be placed in a prison to prevent his threat (Al-Ahmad, 2011).

It is noteworthy that these reasons are not a matter of agreement among Muslim jurists. It is rather a compilation of what has been highlighted in Islamic jurisprudential books.

Temporary Custodial Sentences as Ijtihadi Measures (ta'ziri)

Based on the established premise that freedom is the basis for the five necessities of the Shari'ah, considered a stand-alone Shari'ah objective, and based on the above stated meaning and causes of custodial sentences in the Islamic law that is used in general as a precautionary and temporary measure, we can say that it is difficult to justify the contemporary conceptualised and implemented custodial sentences from the text of the Quran and the Sunnah, and in the judicial rulings of the Prophet's Companions and their successors. Thus, it can be said that the custodial sentences currently practised in Muslim countries applying the Shari'ah law were adopted from the conventional laws as some of them have their effective acts dated before independence. Consequently, they were developed to be an integral part of Muslim law under the concept of *ta'zir*, where the ruler or judge has the discretion to apply his *ijtihad* in introducing punishment even if it is not stated in the Quran and the Sunnah with the condition that they do not contradict the general fundamentals of the Shari'ah.

One may agree that the ruling of imposing a punishment that is not stated in the Quran and the Sunnah based on the judge's personal qualified discretion and personal reasoning (*ijtihad*) is a valid one. However, the question that needs to be posed is: Does the application of the punishment of custodial sentences, as it is excessively applied currently, fulfil the general fundamentals of the Shari'ah or the *Maqasid* of Shari'ah?

Custodial Punishments: Proponents versus Opponents

It is an established fundamental in *Usul al-Fiqh and* Maqasid *al-Shariah* that in the case of an *ijtihadi* matter that has no explicit and definitive ruling in the *Quran*, *Sunnah* and *Ijmaa*. The ruler has to apply *ijtihad* on the issue based on the calculus between benefits and harms of the subject matter at hand. Hence, by examining the benefits promoted by the proponents of custodial sentences and the harms promoted by the opponents, we will be able to make our preference based on the calculus between harms and benefits.

Proponents of Custodial Sentences

The proponents of the custodial sentences agree that on the one hand, "The custodial punishment is reserved to crimes so serious that neither a fine alone nor a community sentence can be justified for the offence" (UK Legislation, n.d.). However, they stress that a custodial punishment plays an important role in reducing crime and protecting the people. Their arguments can be summarised in the following:

- Surveys indicate that both the public and offenders consider prison to be the most severe or effective punisher of criminal behaviour.
- The expectations of the public and policymakers are that incarceration has powerful deterrent effect.
- Individuals experiencing a more severe sanction are more likely to reduce their criminal activities in the future.

- Incarceration imposes direct and indirect costs on inmates, thus, faced with the prospect of going to prison or after having experienced prison life, a rational individual would choose not to engage in further criminal activities.
- Studies support the prison as punishment. An ecological study by Fabelo in 1995, where the results are based on rates or averages (aggregate data), reported a 30% increase in the incarceration rates across 50 U.S. states, corresponding to a decrease of 5% in the crime rate for a five-year period (Gendreau & Goggin, 1999).

The Opponents of Custodial Punishments

Custodial punishments though promoted as a measure to protect people by preventing criminals from causing harm to them, the reality of this measure on the ground as promoted by the opponents and the facts and numbers regarding its negative impact on the prisoner, his family, the government and society at large, refute the arguments upheld by the proponents. For instance, the negative impacts on prisoner can be seen as follows:

- The prisoner will experience damaging exposure as each prisoner will convey his experience in crimes to other prisoners. This means that the prisoner, instead of correcting his behaviour, will be exposed to new criminal ideas and experiences. Therefore, he will be released from jail with additional criminal experiences. That is why the opponents call prisons as “schools of crime”. Bentham, De Beaumont and de Tocqueville, Lombroso and Shaw for instance, suggested that prisons were breeding grounds for crime. It also reinforces the notion that prisons are mechanistic, brutal environments that would likely increase criminality (Mason, 1998).
- Prisons have shown a poor record for reducing the number of prisoners reoffending. For instance in the UK, 46% of UK adults are reconvicted within one year of release. Those serving sentences of less than 12 months increased to 58%. Over two-thirds (67%) of the prisoners under 18 year-olds are reconvicted within a year of release (Prison Reform Trust, 2014).
- Furthermore, some studies have shown that what is called “coincidence crimes” turn in to professional crimes, as it has been noted that 29% of those committing ethical crimes turn to theft crimes and some of them turn to drug crimes. The study advocates these developments to prison environment and its negative consequences on personal ethics and conduct that create additional criminal and crime expertise (Ahmad, 2012).
- Prison disables prisoners from engaging in their normal occupation to earn his living.
- It prevents him from developing his skills and deprives the society from benefiting from his area of expertise.

- The prisoner usually faces health problems due to the large number of prisoners who are usually put in one cell in addition to the deterioration of health services.

As for the negative impacts on the family, a custodial punishment deprives the prisoner's family of financial income in the case where the prisoner is the family's breadwinner. For instance, approximately 200,000 children in England and Wales had a parent in prison at some point in 2009. This is more than double the number of children affected in the same year by divorce in the family. This usually leads family members to deviation (Prison Reform Trust*,* 2014).

The impact on the state is as negative as other impacts; this is because it burdens the government with extra budget that yields no revenue. For instance, reoffending by all recent ex-prisoners in 2007-08 cost the economy between £9.5 and £13 billion. This is in addition to the disruption of the productivity of this segment of the workforce (Prison Reform Trust*,* 2014).

With regards to the negative impact on the society, it is because the prisoner thinks that the society has expelled him. For such a reason, he turns against the society in all of his conducts. Therefore, he turns from being a useful member of society to a harmful one.

In short, the view of the opponents is that custodial punishments do not solve the problem of crimes nor contribute in their prevention. This is evidenced by the constant increase in the number of prisoners and the high percentage of them returning to crime after their release from prison. This is in addition to the high negative impacts on the prisoner, his family, state and society. There is no guarantee to the limits of the damage which could be inflicted on him. These include health problems, possible dismissal from work, emotional damage caused to the prisoner's spouse, parents and children from being deprived of their legitimate rights of maintenance, and damage to the community with the increase in the number of crimes caused by the custodial punishment.

The Preferred Opinion

In view of the two opinions above, with regards to custodial sentences and based on the established fundamental Shari'ah principles, we can conclude that the current custodial sentences as they are applied clash in principle with the concept of freedom that is considered a basis for the five necessities of the Shari'ah. It also contravenes the most basic objectives of punishment in Islam, that is, to deter criminals from repeating their crimes, to reform them, to compensate for the crime caused and to serve the interest of the whole society. Hence, alternatives should be considered in minimising custodial sentences. In fact, a few of them have already been already proposed in the conventional arena such as Correctional supervision and community service orders implemented in South Africa (Lukas *et al.*, 2005). However, since this paper is not concerned with proposing a detailed number of alternatives to custodial sentences, this needs another independent research. Instead, it concerned

with setting parameters for the alternatives as they are crucial to ensure a correct and comprehensive execution of these alternatives.

Parameters for the Alternatives of Custodial Sentences

Among the parameters that can be proposed for the alternatives of custodial sentences are:

- The alternatives should not contravene the higher objectives of the *Shariah* (*Maqasid al- Shariah*) in general and the objectives of punishments in Islam in particular. Freedom and extending punishment to family are instances of this contravention.
- It should be allowed by the *Shariah* as it should not contradict texts of the Quran and the Sunnah.
- It should not cause harm to the offender sentenced as that contradicts the nature and objective of the punishment.
- It should not violate his dignity as a human being or cause harm to the offender, nor should it aim to defame the offender by portraying him as a deviant person.
- It should be a supportive element that creates a balanced adaptation of the offender psychologically and socially.
- It should facilitate the development of his educational and professional levels and help him to continue his social and family role and gain income for him and his family in a dignified way.
- It should take into consideration the consequences of its application, so that if it is found that it is not appropriate and has negative consequences, it should be revised and replaced by a more appropriate alternative.
- It should be reciprocal to the type of crime committed as this is part of the fundamental of justice and fairness commanded by Allah.
- It should be appropriate with the crime so that the circumstances of the crime should be taken into consideration.
- It should consider both the personal and social circumstances of the criminals as they are not of the same personality and thus, the effect of punishment on them is not the same.

CONCLUSION

There is no doubt that sentencing the offender is essential to establish justice and protect society. However, opting for custodial sentences as a mean to sentencing the offender is not the right approach, as justified by Shari'ah principals and objectives mentioned above and the established negative facts of these sentences, especially with the clear facts that show the mega spending on prisons and prisoners' maintenances that burdens governments' budget in addition to the reverse impacts on prisoners, their families and society. Therefore, it is time to explore better alternatives that protect society in a comprehensive and balanced manner. In doing so, this article sets a number of *Maqasidi*-driven parameters that serve as

building blocks for the implementation of alternative custodial sentences. It also recommends to governments to benefit from some implemented alternatives to custodial sentences and explore new innovative alternatives that serve the society as a whole. In short, if it is considered impossible to put an end to custodial sentences, it is very possible to reduce it to the minimum, so all related parties to the prisoners including the governments will benefit in the long run.

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Challenges in the Enforcement of Shari'ah Criminal Offences in Selangor: Between Perception and Reality

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ABSTRACT

The enforcement of Shari'ah criminal offences in Selangor has always been subjected to public scrutiny. The commission of selected Shari'ah criminal offences has been rigorously enforced against by the Religious Enforcement Division of the Department of Islamic Affairs. Alas, there are times that the manner in which the enforcement has been carried out has led to public criticism. This article studies the power of the enforcement officers, the modus operandi of enforcement and the challenges faced by the Selangor Religious Enforcement Division. Using a mixed mode of content analysis and personal observation, the article argues that there is still much that needs to be done to improve the image and modus operandi of the enforcement of Shari'ah criminal offences in Selangor specifically and in Malaysia generally.

Keywords: Shari'ah criminal offences, Enforcement, Selangor, Religious Enforcement Officer

INTRODUCTION

Armed with the power to enforce Shari'ah criminal offences, the Islamic Religious Divisions have acquired a rather hostile and negative perception among the public. Some of their actions have been the subjects of public scrutiny and heavy criticism. Many quarters question the necessity of having moral policing as it gives the idea of encroachment on the personal liberty of individuals by the state, which is frowned against in modern liberal democracy. The state may only encroach into the private lives of individuals if it can be shown

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that such act can cause harm to others. The polemic here in Malaysia is "what constitutes harm to others?"

While modern liberals tend to look at individuals' rights as the right to be left alone and the right to privacy, as well as personal space to do what ever one wishes, the Islamic position has a slight twist. Although the Shari'ah respects the privacy of individuals, there is also the responsibility of every Muslim to enjoin others to do good and forbid anyone from committing evil. Therefore, in certain circumstances, some personal acts may be "curtailed" in order to ensure that these acts do not harm the public and are not taken as a norm as they are prohibited in Islam.

It is at this juncture that the need for enforcing the Shari'ah becomes a necessity. However, due to the lack of understanding amongst the public and the existence of executive intervention, this has led to some 'highly' publicised and criticised enforcement actions taken by the Department. This includes the raid on popular night clubs like The Ship in Subang Jaya, Selangor, in 1997 and the Zouk in Kuala Lumpur in January 2005[1] to pre-empt Muslim women from participating in beauty contests[2]; the issuance of an investigation order against a well-known and respected Muslim cleric, Dr. Mohd Asri Zainal Abidin, the then Mufti of Perlis, for conducting unlicensed religious sermons in 2009[3]; the mass arrest of the Shi'ite faith followers among the Malays in Gombak, Selangor, and [4]the detention of Al-Arqam sect leaders in 2012.[5]

Due to the negative image portrayed by the media on the enforcement of Shari'ah criminal offences in Malaysia by the Religious Enforcement Division, an elucidation on the 'make up', 'legal basis', 'powers', as well as 'challenges' of the Division is therefore crucial. This article begins with an introduction of Shari'ah criminal offences in Malaysia. The article then moves into the historical setup of the Religious Enforcement Division, a look into its inherent power, as well as laying out the challenges it faces in the actual execution and implementation of the Shari'ah Enactment.

SHARI'AH CRIMINAL SYSTEM IN MALAYSIA

Despite the negative media reports that highlight the encroachment of personal rights and liberties by enforcement officers of the Selangor Islamic Religious Department, in reality, only a limited number of acts are categorised as Shari'ah offences in Malaysia. This is because the Federal Constitution vests the power to regulate criminal offences under the civil courts [Federal Constitution, Schedule 9, List I (Federal List), item 1]. The state is given a limited power to regulate "offences by persons professing the religion of Islam

[1] http://news.bbc.co.uk/2/hi/asia-pacific/4276077.stm

[2] News Straits Times, 15th July 1997.

[3] http://www.malaysiaharmoni.com/v2/index.php/nasional/3603-dr-maza-bebas-tuduhan-mengajar-agama-tanpa-tauliah

[4] The Straits Time, Singapore, 5th January 2011

[5] New Straits Times Malaysia, 5th November 2012

against precepts of that religion-except in regard to matters in the Federal List (Farid Suffian, 2012). The state's power to enact laws to regulate criminal matters is further delineated by the Syariah Courts (Criminal Jurisdiction Act) Act 1965, as amended in 1984, which practically limits the maximum sentences imposed to three years imprisonment, or a fine of 5,000 ringgit and six strokes of the cane 2 of the Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984. Hence, the power of sentencing is lower than the magistrate courts and the range of criminal offences that can be potentially regulated by the Shari'ah criminal system is very much restricted (Abdul Monir, 2009).

For example, the crimes of theft, robbery, false accusation of adultery, fornication, *riddah* and *al-baghyu* (which are also known as hudud crimes) can no longer be based on the Shari'ah. These also include *qisas* crimes such as causing death or bodily injury to others. These crimes, except for taking intoxicants, fornication and *qazaf*, are now governed by the Penal Code and fall squarely under the jurisdiction of the civil courts. Meanwhile, the crimes involving consumption of intoxicants, fornication and *qazaf* no longer maintain the original punishments due to the curtailing of the power of the Shari'ah Courts in all states in Malaysia. Crimes that have been included in the Enactments such as gambling, eating during the month of Ramadhan are regarded as *ta'zir* crimes which aim to protect the public and individuals from harm. This is the justification for criminalising such acts.

These offences are tried under the Shari'ah courts. Unfortunately, unlike the Shari'ah courts that underwent major changes with the establishment of the Department of Syari'ah Judiciary in 1998, the enforcement divisions have been neglected (Ramizah, 2011).

Shari'ah criminal offences are part and parcel of the Islamic legal system in Malaysia. It is therefore imperative that they are properly administered so that the negative image attached to them can be reduced, if not eliminated all together (Lindsey & Steiner, 2013).

RELIGIOUS ENFORCEMENT DIVISION

Enforcement of Shari'ah criminal offences is conducted by the state religious departments. In Selangor, the body that is responsible for these offences is the Selangor Islamic Religious Department, a division under the Selangor Islamic Religious Office. Selangor is one of the pioneering states that introduced the administration of Islamic laws in Malaysia in 1952 (Abdul Monir, 1998), By way of comparison, the prosecution and enforcement department in Kelantan which existed during the reign of Sultan Muhammad 1 (1800-1837) is among the oldest department in that state (Abdullah Alwi, 1996).

From its birth, the Selangor Islamic Religious Department has metamorphosed from a department initially set up to stem the spread of communist ideology to a full-fledged enforcement agency. During its hey days, the Department was birthed

from the vision of the by the late Sultan Hishamuddin Alam Shah Al Haj due to the concern over the fact that the Muslim faith might be corrupted by 'Zeitgeist' influence.

At the time of its inception, i.e. on 1st October, 1945, Yang Mulia Raja Nong bin Raja Hussin was appointed as the Secretary. As the Department was visualised by the Sultan, naturally the whole operation of the office was directly under His Highness's purview. Its temporary administrative office was located at the Sultan's office adjacent to Istana Kota in Klang, and was fully financed by the Royal Highness.

The broad objectives of the Department were to strengthen and defend the Islamic faith and Muslims in totality through research, monitoring and enforcement. With this noble objective, the Religious Department is tasked with the 'moral policing' of the Muslims by taking pre-emptive measures against 'immoral action' which have been made triable offences under the Shari'ah Enactments. In delivering this task, the Department is capable of receiving reports and complaints, and conducting thorough investigations which will result in the preparation of complete investigation papers (IP) for purposes of prosecution.

The legitimacy to enforce Shari'ah criminal offences in Selangor is derived from a number of State Enactments, which include the Syariah Criminal Procedure (State of Selangor) Enactment, 2003, the Syariah Criminal Offences (State of Selangor) Enactment, 1995, the Administration of the Religion of Islam (State of Selangor) Enactment, 2003, the Islamic Family Law (State of Selangor) Enactment 2003, the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 and the Non-Muslim Religious (Development Control among Muslims) Enactment, State of Selangor, 1988. A broad range of Shari'ah criminal offences fall within this purview, from matters pertaining to faith, sanctity of Islam, drinking, gambling, sexual offences, as well as offences under relating to family matters (Zulkifli Hasan, 2007). Only criminal offences specified under these enactments will fall under the jurisdiction of the religious enforcement division as the broad power to regulate criminal offences falls under the civil court, as specified under List 2 of the Ninth Schedule of the Federal Constitution (Siti Zubaidah Ismail, 2013; Farid Suffian, 2012).

In the execution of its powers, the religious enforcement officers face public opposition who view their action as a gross interference into the personal affairs of an individual (Ahmad Azam, 2007). For that reason, the religious enforcement officers have been labelled as 'moral policemen', 'spies' or even 'Peeping Toms' for performing their duties (Siti Zubaidah & Muhammad Zahiri, 2007).

On the other hand, there are others who viewed that the Religious Department should have been more proactive in their enforcement. Azizah and Noradha (2014) lamented that more needs to be done to stem the declining moral standards among the Muslims in Malaysia and blamed the inefficiency of the religious enforcement department. Inordinate delays and simply

lack of enforcement could have resulted from the lack of understanding of the various constraints faced by them. As a result, the enforcement officers have been labelled as ineffectual, harsh, unprofessional, and the like. The article continues with a deliberation on the various constraints faced by the religious enforcement authorities.

CHALLENGES FACED BY THE RELIGIOUS ENFORCEMENT DIVISION

Enforcement of Shari'ah criminal offences has never been an easy task. The division faces a number of problems ranging from non-uniformity of the Shari'ah laws to more practical issues relating to lack of manpower and resources.

Non-uniformity of the Shari'ah laws

As Shari'ah falls within the jurisdiction of the states, the list of Shari'ah offences varies from one state to another. This leads to a non-uniformity of laws among states in Malaysia (Zulkifli Hassan, 2007). The non-uniformity of laws gives rise to conflicts of laws between one state to another in Malaysia (Abdul Hamid, 2002). These offences range from conducts deem to be offending Islam to offences against persons or immoral behaviour (Farid Suffian, 2012).

Acute shortage of manpower

The dearth of quality religious enforcement officers poses a major constraint towards the effectiveness of the Islamic law enforcement in Malaysia. The root of such weakness lies in the poor planning and coordination of the enforcement process prior to its full execution. From the data given by the Enforcement Division, JAIS, in 2011, there is a gross lack of enforcement officers in comparison to the total number of Muslim population (see Table 1).

TABLE 1
The number of Muslim population and religious enforcement officers in Selangor by district[6]

District	**Muslim Population**	**Religious Enforcement Officers**
HQ/ Shah Alam/ Petaling	830,125	30
Klang	369,059	9
Sepang	124,449	8
Kuala Langat	132,053	8
Hulu Langat	565,618	9
Gombak	382,774	8
Hulu Selangor	127,783	8
Kuala Selangor	146, 113	8
Sabak Bernam	76,852	9
TOTAL	**2,754,826**	**97**
RATIO	**28,400**	**1**

[6] State of Religious Department (2012), unpublished. Data obtained from personal interview with the religious enforcement agency.

Table 1 illustrates that the total number of the religious enforcement officers is highly disproportionate to the total number of the Muslim population. In particular, the per head ratio in Selangor stands at 1:28,400. If we were to draw a comparison to the ideal ratio of policeman to citizens by INTERPOL, i.e. one policeman to two hundred and fifty citizens, there is a serious discrepancy in the number of religious enforcement officers compared to the Muslim population in the country. In Malaysia, the current number of police officers is 122,000. That makes the ratio of policemen to citizen in Malaysia at one to two hundred and seventy-two (1:272)[7]. Of course, some would argue that such comparison cannot be drawn as the job scope of the police force is considerably much larger than the religious enforcement agencies. However, by drawing such comparison, one could not help but understand the burden faced by the religious enforcement officers in carrying out their duties, whereby one enforcement officer is expected to cater to 28,400 Muslims!

[7] My SinChew. (2008, December 3). Police to have 150,000 Personnel Target By 2011 *My SinChew.* Retrieved from http://www.mysinchew.com/node/18850

See also Bernama (2008, December 22). Police Probe Malaysian Passports being Misused Abroad. *Bernama*. Retrieved from http://www.bernama.com/bernama/v3/printable.php?id=379841

Specialised training and skills

A significant number of the Religious Enforcement officers are civil servants in the Religious Office / Officer of Islamic Affairs scheme. Like other civil servants, they are subject to unilateral transfer to other division such as Dakwah, Mosque Management, Education, Research and the like (Siti Zubaidah, 2008). As a result, there is difficulty in retaining experienced officers, and as it takes time to recruit and train new officers, the effective running of the division is significantly affected.

Another serious problem is in the issue of recruitment. Currently, the recruitment of new officers is not determined by whether the candidates possess a degree in Shari'ah (Siti Zubaidah, 2008). This makes the training of officers twice as hard as they need to be ingrained with the basic knowledge of Shari'ah first before they can truly grasp the rudimentary knowledge of the various Shari'ah offences under the Syariah Criminal Offences Enactment and Syari'ah Criminal Procedure Enactment.

Like other enforcement agencies, the religious enforcement agencies must develop standard operating procedures (SOP) so that their operations will withstand legal challenges (Ibrahim & Hanipah, 2015). Among the standard procedures that require consideration are receiving complaints, taking statements from the witness, carrying out investigation, conducting operations, arresting, preparing investigation papers for the purpose of instituting prosecution, analysing evidence, collecting evidence for the purpose of court

exhibits and dealing with witness in the Court when the case was finally heard. Siti Zubaidah (2008) alluded to this by stating that despite the positive efforts of the Islamic Religious Department in coming out with SOPs for handling information and complaints, standing instructions on pre-emptive measures on public morality and power of arrests such as Arahan Tetap Pengarah Jabatan Agama Islam Negeri 2007 (Garis Panduan Penguatkuasaan Undang-undang Jenayah Syariah) need to be done to refine them further.

Investigation procedures and the pursuant preparation of evidence are crucial in the effective prosecution of a case (Zulfakar, 2015). The make and break of a case depends on the successful proof of the elements of the offence and the full compliance of all the procedures related to the offence. The inefficiency of the enforcement officers inadvertently affects the prosecution of a case. This further mars the already negative image of the division. As a result, a few cases are prosecuted with the most popular cases being those involving proximity and indecent acts, which are easier in terms of burden of proof compared to cases like *qazaf* or false accusation of zina (fornication) (Zulkifli Hassan, 2007).

Another observable challenge is the lack of devotion, zeal and commitment in the work force. Enforcement requires sacrifice, time and expenses, as well as meticulousness in meeting evidential and procedural rules. The officers frequently face condemnation, verbal abuse, physical abuse, threats and even physical threat, which may jeopardise retention of talents. The officers further worry over the issue of insurance coverage in case anything happen to them. Aside from that, the lack of opportunities for promotion and small pay have exacerbated the situation further and subjected the officers to be vulnerable to the abuse of power and corruption in order to make ends meet. It is therefore not surprising that, in 2013, three religious enforcement officers of JAIS were detained by the Malaysian Anti Corruption Commission (MACC) for allegedly abusing power by accepting a bribe from a couple who committed the offense of close proximity. It appeared that the officers had been earning tens of thousands of ringgit within a month.[8] This is indeed a serious problem as the stature of an officer whose duty is to combat Shari'ah offences must be beyond reproach. If they are susceptible to this type of crime, which is declared as a crime in Islam and in the Enactments, the current system therefore needs to be revamped.

Lack of Resources

Proper resources and equipment are essential in the effective execution of Shari'ah enforcement in Malaysia (Mohammad Fathi & Nazri, 2015). Unfortunately, the Religious enforcement Division suffers

[8] Utusan Malaysia (2013, December 3). Pegawai JAIS didakwa terima suapan lupus fail khalwat. *Utusan Malaysia*. Retrieved from http://ww1.utusan.com.my/utusan/Mahkamah/20130903/ma_05/Pegawai-JAIS-didakwa-terima-suapan-lupus-fail-khalwatk

from lack of equipment that is necessary to assist them in their enforcement duties. The use of devices is imperative to prove some offences such as alcohol detection device. Evidence from alcohol testers has formally been accepted by the Shari'ah court as admissible evidence (Amir & Nik Azlan, n.d.).

Another major problem faced by the division is the lack of support in terms of logistics. There is a need to add and improve the necessary transportation needs of the officers and suitable devices for storing evidence to be used in courts as exhibits. Failure to fulfil these needs may render cases to be thrown out of court as they are inadmissible. Aside from that, the lack of temporary detention rooms or lock ups has led to detainees escaping, which in some circumstances has rendered the officers vulnerable to negligence suit.

Other constraints, which are probably minor problems, include the lack of uniforms, which gives the image that these enforcement officers lack both discipline and force. On a more fundamental note, however, the Enforcement Officers are not armed unlike the police officers. This has subjected them to physical harm especially when they are faced with life threatening situations. The cold blooded murder of the Chief of the Religious Enforcement Officer of Pahang in November 2013 is a defining example of how dangerous the task of religious enforcers can be in carrying out their duties. In Malaysia, only the Terengganu Islamic Religious Enforcement officers are allowed to carry firearms in their daily duties.

THE WAY FORWARD

The findings from the field work attest to the fact that the Shari'ah criminal enforcement in Malaysia is in a dire need of a progressive change. The challenges that have been identified are not small feats but this does not mean that they are not insurmountable. Like any other criminal enforcement agencies, the division requires capital, resources and manpower upgrade. Among strategic initiative mooted is the creation of a new scheme of service for Shari'ah enforcement officers. The current officers are on "S" grade which is an ordinary scheme for all the officers in the prosecution and enforcement department. In order to reduce the possibility of corruption and bribery, it is wise to place the enforcement officers at a higher rank with higher pay. In order to further strengthen the division, the enforcement division should be made as independent from the state religious office, free to make decisions on day-to-day operations and prosecution without being subjected to the control of the state religious department.

The realisation that the religious enforcement department should be autonomous has been felt at the highest level. For example, this has been raised by the then Chief Minister of Malacca at the closing ceremony of the Conference for Religious Enforcement Officer and Prosecutor Entire Malaysia held from 6th to 8th December 2009 at Everly Resort Hotel in Tanjung Keling, Malacca. The then deputy minister at the Prime Minister's Department, Datuk Dr. Mashitah Ibrahim,

also agreed with this suggestion, stating that autonomy is the only way forward for the department. In line with that call, Rahimin (2010) espoused for the department to be upgraded into one that is highly regarded for its excellence in enforcement, at par with other enforcement agencies. Farid (2011) also echoed the concern that the enforcement division should be separated from the state religious department.

Corollary to the new scheme is to give the officers more professional training so that the new Shariah enforcement agency will be at par with other enforcement agencies such as JAKIM and the Copyright Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs. Like any other scheme of service, there must be opportunities for training, promotion, critical allowance, perks and the like. By upgrading the scheme of service, more talented candidates could be attracted to join the agency's manpower. The welfare of the enforcement officers must also be taken into consideration. Like other enforcement officers, the religious enforcement officers are subjected to ridicule, harassment, as well as physical and bodily threats. The officers must be insured from any impending injury and the family members must be properly compensated in the event of death in the carrying out of official duty.

Security issue is another major concern (Cho, 2013). Arming the enforcement officers has been mooted since 1995, but it was not seriously regarded until the murder of the Religious Enforcement Chief of Pahang, Ahmad Raffli in 1995. Other than the suggestions mentioned above, Religious enforcers must also equip themselves with any martial arts skills as a form of self defence.

Needless to say, the enforcement officers must also be equipped with state-of-the-art technology which includes breathalysers, audio spy devices, voice recorders, spy cameras, night vision cameras, etc. Enforcement of Shariah criminal offences has become more and more challenging with the rise of deviant teaching such as Rasul Melayu, Syiah, Qadiani and Al-Arqam, which require religious enforcement to infiltrate into groups to gather intelligence.

In addition, continuous training is imperative in order to upgrade the skills of the enforcement officers. The training must also include understanding of the various Shariah Enactments that are applicable to them, procedural rules and relevant court decisions (Najibah, 2012). These include skills required for conducting investigations and arrest, gathering evidence, preparing evidence to be used in courts, preservation of court exhibits, as well as questioning witness in court. Officers could acquire such skills through attachments at the Royal Malaysia Police (PDRM) or *Institut Latihan Kehakiman dan Perundangan* (ILKAP) or mock trials.

Meanwhile, the creation of a professional image, the use of special uniforms should be created to distinguish the Shari'ah enforcement officers from other officers at the Religious Department. There have been initial efforts made by

Jabatan Agama Islam Selangor (JAIS) when the Enforcement Division of JAIS introduced new uniforms for JAIS enforcement officers on 19 July 2011. The event was launched by JAIS Director, Dato 'Hj Marzuki bin Hussin, and it was one of the many initiatives taken to give a professional image to religious enforcement officers.

Much effort has been taken to professionalise the Shari'ah courts in Malaysia. It is now time for the enforcement division to be given the much needed professional outlook. After all, upholding justice is the backbone of the Shari'ah system and in keeping with that, all the agencies involved must be further moulded to make this a reality.

In what way will all these suggestions help to change the public perception? The increase in professionalism will definitely help create a more systematic method of carrying out duties. This will hopefully minimise the negative perception that has long tainted the image of the Department and the officers. However, a mere system and even lucrative incentives will not be enough. The requirements used for selecting enforcement officers must also be increased to include not only academic qualifications but also the possession of the true Islamic *akhlak* (morals).

This is pertinent to ensure that whenever the enforcement of Islamic Criminal offences is carried out, it is done in the most delicate manner, while taking into consideration the issue relating to the right to privacy and the sensitivity of the situation. As criminals under the Penal Code are informed of the reason for their arrest, similarly, those committing Islamic offences must also be made to understand the reason for their arrest. The Department of Religious Affairs of each state also has the imperative duty to educate the Malaysian public on the necessity of espousing good and preventing evil by the State. Hopefully, with the improvement, the enforcement of Shari'ah crimes will no longer be negatively perceived in the future. Instead, it will help Muslims and non-Muslims in Malaysia to understand that the concept of imposing "harm to others" as it is understood that the common law system is slightly different from the Islamic legal system. This is because what is regarded as causing harm to others in the common law system is decided on a case-to-case basis, whereas in the Shari'ah, it is determined by Allah s.w.t.

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Forgiving the Enemy: A Comparative Analysis of The Concept of Forgiveness in Shari'ah and Malaysian Law

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ABSTRACT

The law of *Qisas* is a concept under Islamic law which allows the victim who has been physically hurt by an offender or the heirs of the deceased to a murder to play a role in determining the fate of the offender once he is found guilty. This includes the ability to choose whether to opt for equal punishment (*qisas*) or to demand monetary compensation (which is *diyat*), or to forgive the offender altogether. This article concentrates on the concept of forgiveness in *qisas* involving murder. The aim of the article is to show that contrary to popular criticism, the law of *qisas* is not about revenge. This is proven by the choice of forgiving the offender in total for the hurt or even life that he has taken. If compared to the current position in Malaysia, the right to forgive an offender is not given to the heirs of the decease but instead, it is given to the Yang di-Pertuan Agong or the Ruler of ALL States. This goes against the rights of the victim's heirs who not only is deprived of any compensation but also deprived of seeing justice done for the deceased. Malaysia is taken as an example of a modern country and the criminal law practised here is similar to many modern countries such as Singapore and India. Hence, this article submits that this concept of forgiveness should be revisited and re-applied to allow the victim or his heir(s) to decide the fate of the offenders instead of merely leaving it to the Rulers. This submission is arrived at after critically analysing primary sources being the injunctions in the Holy Qur'an and secondary sources that have interpreted its application. Meanwhile, the Malaysian position is examined in light of the Penal Code and the right to forgive as provided by the Malaysian Constitution.

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INTRODUCTION

"In the Law of Equality (*Qisas*) there is (saving of) life to you, O you men of understanding, that you may restrain yourselves." (*al-Qur'an, al-Baqarah,* 2: 179)

The above mentioned verse clearly states that with *qisas*, there is the saving of life. If one were to read this verse in isolation, one could not help but be baffled. This is because, according to the literal and direct translation of the word *qisas*, it means "to retaliate", then one cannot help but be confused. Why is it that Allah has promised that there is life in *qisas* when at face value it would seem like a simple act of revenge. How could there be life if the law allows, for example in the case of murder, the heir(s) of the deceased to take revenge over the person who had committed the act of murder? If taken from this angle, then in *qisas*, there is no life, there is only certain death!

This article is about the other side of the law of *qisas*, which is rarely highlighted. In actual fact, the law of *qisas* provides options for the victim of a hurt or the heir(s) of the deceased in cases of murder to choose from if the accused is found guilty of causing hurt or death by the Court (Awang Osman, 1996; Anwarullah, 2004). The first option is of course the choice of *qisas* or equal retaliation. The second option is to choose payment of *diyat* or compensation from the offender, and the third option is to forgive the offender and accept payment of compensation or to forgive the offender without any compensation whatsoever. This article concentrates on the concept of forgiveness in *qisas* cases involving the crime of murder. The aim of the article is to show that contrary to popular criticism, the law of *qisas* is not about revenge. This is proven by the choice of forgiving the offender in total even if he has committed one of the most heinous crimes to man, i.e. by taking the life of another human being without just cause.

Compared to the current position in Malaysia, the right to forgive an offender is not given to the heirs of the decease but it is instead given to the Yang di-Pertuan Agong or the Ruler of each State. This goes against the rights of the heirs of the victim who not only deprived of any compensation but also deprived of seeing justice done for the deceased. Hence, this article submits that this concept of forgiveness should be revisited and re-applied to allow the victim or his heirs to decide on the fate of the offenders instead of merely leaving it to the Rulers. This submission is arrived at after critically analysing primary sources being the injunctions in the Holy Qur'an and secondary sources that have interpreted its application such as in the books of *Tafsir*. Meanwhile, the Malaysian position is examined in light of the Penal Code and the right to forgive, as provided by the Malaysian Constitution.

The article is divided into four parts. The first part is the crux of the article, where it discusses the interpretation behind the Qur'anic verse mentioned above, as well as its preceding verse. This understanding is important because it provides the basis for forgiveness in such a difficult

circumstance. From here, part two of the article looks at the existing law in Malaysia to see how the crime of murder is being punished. Malaysia is taken as an example of a modern country and the criminal law being practiced here is similar to that in many modern countries such as Singapore and India. In this part, a critical analysis is made on the concept of forgiveness being practiced under the Malaysian correctional system. The third part of the article looks at whether or not the concept of forgiveness as it is practiced in Islam could be adopted to the modern Malaysian scenario. This is the final part of the article where it is concluded that the concept of forgiveness under Islamic law should be revisited and applied to the modern world, especially in Malaysia, whereby in the interest of justice and fairness to the heirs of the deceased, the option to forgive should be given to them instead of placing it in the hands of the Yang di-Pertuan Agong or the Rulers of each state.

THE LAW OF QISAS AND THE CONCEPT OF FORGIVENESS

Siddiqi (1985) rightly sums up the law of *qisas* as:

"The subject of *qisas* must be considered, first, as to occasions affecting life and, secondly, as to retaliation in matters of hurts or causing bodily injury."

Nevertheless, since the article only discusses the issue of forgiveness in cases of murder, there is a need to return to the abovementioned verse. This verse is preceded by verse 178 which discusses the *hukum* or legal ruling of *qisas* as being mandatory for Muslims under the Shari'ah.[1] The word `*kutiba*' signifies `*wajib*' or a mandatory obligation to fulfil the rights of those who demand for it (Al-Maraghiy, 2001). Meanwhile, the word '*qisas*' literally means to make a thing equal or fair to another thing (Siddiqi, 1985; Al-Maraghiy, 2001). It is further explained that the word 'scissors' in Arabic is known as `*miqas*', which shows that both sides of the shape and size of the blades are similar (Al-Maraghiy, 2001). The word `*musawah*' has also been used to describe the meaning of *qisas* as taking something that is similar or equal to another thing (Shabbir, 2003). The preceding verse reads as follows:

"O you who believe! Retaliation has been prescribed for you in the matter of murder. The free for free, the slave for a slave, the woman for a woman.[2] If any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with gratitude. This is a concession and a mercy from your Lord

[1] The implementation of the Islamic criminal justice system is actually dependent on whether or not the Government of the day accepts the whole corpus of the Shari'ah as the applicable law of the State. This will depend largely on the political will of Muslims who are in power.

[2] In relation to the meaning of this part of the verse, it does not mean that the there is discrimination in terms of the punishment where for example if a woman kills a man then there will be no qisas as the verse specifically mentions "the woman for a woman". On the contrary, according to al-Marghiy, this means that if a woman commits the crime of murder than a woman shall be punished.

and after this whoever exceeds the limits, shall be in grave penalty." (al-Qur'an*, al-Baqarah*, 2, 178)

The verse mentions the right of requesting for *diyat* in place of *qisas* in the case of intentional murder (Anwarullah, 1997; Oudah, 1999). This part of the verse shows the permission given by Allah to the victim or the heirs to the victim of a *qisas* crime to opt for *diyat* (Al-Sagoff, 2007; Ismail, 2012). According to this verse, when the victim or the heirs of the deceased opts/opt for this option in place of *qisas,* they must not do so with an intention of asking for an unreasonable amount. The request for *diyat* must be done according to the specific calculation on the amount of *diyat* to be awarded to the victim or the heirs of the deceased (Ismail, 2012). As for the offender, if *diyat* has been requested, he must endeavour to pay the amount as soon as possible and it must be done in a cordial way within the prescribed period, without forsaking the rights of the victim or the heirs of the deceased (Al-Maraghiy, 2001).

Should the offender be in a difficult position to pay the amount of *diyat* that has been determined, the Court has the power to order that the payments be made in instalments. Another option for the offender is to seek assistance from his *'aqilah* or next of kin (Haneef, 2000). There are jurists like Imam Abu Hanifah who are of the view that there can be concessions made by the heirs of the deceased. If this happens then through *sulh*, the offender can offer any other concessions and if this is accepted, this is known as *badal al-sulh* (Anwarullah, 1997).

Forgiving the Enemy (al-'Afw)

The jurists are unanimous that to forgive the offender gratuitously is the principal ground for remitting *qisas*. It is considered in remitting the punishment from an offender only if it is granted from the victim's side and not from the ruler's side. Thus, when the victim or his relatives forgive the offender, the prescribed punishment cannot be inflicted on him. However, the forgiveness of the victim and his relatives does not affect the right of the ruler to impose a *ta'zir* punishment on the offender after that, if the public interest necessitates it. The ruler, on the other hand, cannot remit the prescribed punishment of *qisas* on the offender by granting his pardon, if the victim does not allow him to do so (Oudah, 1999).

The right of the victim or his relatives to forgive the offender from the punishment of *qisas* is in fact encouraged by the Prophet s.a.w., who said:

> *No person is caused to suffer injury on his body and then he forgives him (who injured him) but Allah elevates him a degree on that account or expiates his sin (Ansari, 2000; Ibn Majah, n.d.; Hadith no. 2693).*

Anas ibn Malik is reported to have said that the Prophet s.a.w. invariably advised forgiving cases involving *qisas* (Ansari, 2000; Ibn Majah, n.d.).

The right given to the victim or the heirs of the deceased to forgive the offender must be done freely and without any pressure or insistence on the part of the offender. The verse shows that once the heirs have chosen to forgive the offender, there can be no longer any ill-feelings or dissatisfaction or vengeance towards the offender. Anyone who wishes to avenge the death of the victim shall be given painful recompense (Al-Zuhayli, 1991).

Al-Maraghiy (2001) continues to explain the situations that the offender could be forgiven instead of demanding for *qisas* or even *diyat*. These include a situation where the offender is the sole breadwinner of the family and the exercise of *qisas* on him which would result in the whole family having no means of fending for themselves. If the offender were to be given the *qisas*, then this would not only affect him alone, but it would also give a negative impact on his family (Anwarullah, 1997). This is especially so in situations where the offender has a family with small children depending on him. However, the choice to forgive does not depend on these reasons. If the heir of the deceased so wishes, forgiveness need not be prompted by these reasons.

The main aim of the law of *qisas* that is administered in a fair and proper manner is actually to educate the victims to have forgiving heart, for even after having been victims to the most heinous crime, where their loved one is killed and taken away, they can still forgive for the sake of Allah. This means that they are willing to let the offender go so that his family will not feel the pain that they are suffering from. It is this sacrifice which in the end sets them free from any need for revenge because Allah has promised them the best rewards in this world and more importantly in the Hereafter. The belief in the existence of the Hereafter and the fact that it will last far longer than this existing world has become an impetus for Muslim victims to forgive the offender and hope for Allah's blessings and mercy. This is further confirmed in the following verse, which mentions:

> *"And if you punish (your enemy) then punish them with the like of what which you were afflicted. But if you endure patiently, verily, it is better for those who are patient." (al-Qur'an, Surah al-Nahl(16), 126)*

This verse emphasises the virtue of patience over retribution against the offender. It shows that in order to give forgiveness to an offender, the heirs of the victim must have absolute trust in the hidden benefits and rewards that only Allah can award to His servants who are patient. It is an ultimate test in faith and trust in the will of Allah and it is a test to the believers as to the extent of their belief in Allah as the best recompense and the existence of the Hereafter, where each individual will be answerable for their deeds in this world.

This is what is meant by there is `life' in *qisas*. Although the act of forgiveness allows the offender to continue to live, it does not mean that Allah s.w.t. allows offenders who have done wrong to simply be set free and endanger the rest of the

society. Instead, verse 178 states the need of the offender to "compensate him (the victim) with gratitude. This is a concession and mercy from your Lord and after this, whoever exceeds the limits shall be in grave penalty". This shows that once forgiven, the offender is to show remorse and truly repent for all the wrongful act that he has committed and vow to never commit the same crime again. Nevertheless, according to the views of Imam Malik, which is agreed upon by Maulana Abdullah Yusuf Ali, the State may still impose other types of *ta'zir* punishment to ensure that the offender has really repented and to provide rehabilitation programmes to this effect (Ibn Rushd, 1983; Al-Mawardi,1973; Abu Zahrah, n.d.).

The Effect of Forgiveness

Once forgiveness has been granted, even by only one member of the heirs of the deceased, the result would be the lifting of the death penalty (Al-Maraghiy, 2001). The right of forgiveness is only given to the heirs of the deceased because to award it to the State or any other pardon body would not result in fairness. It is the family who has been left bereft without a member, who feels the pain, who will be directly affected by the loss. If the power to forgive was to be awarded to the State or the Pardons Board, this would violate the rights of the victim as well as his heirs. If the State or the Pardons Board were given the right to forgive offenders who committed murder, then this would also bring with it the dangerous possibility of bribery and issues relating to integrity. Since they do not personally know the victim, a State that issues a pardon to an offender has no way of ensuring that the rights of the heirs of the victim are well cared for. Aside from that, if pardoning by a third party would result in dissatisfaction on the part of the heirs of the deceased as they might feel that justice has not been done. This feeling of dissatisfaction could later develop and promote the need for revenge. This will lead to a prolonged feeling of hatred and add to the possibility of causing unrest in society which may lead to further condemnation or fitnah (Al-Maraghiy, 2001; Abu Zahrah, n.d.).

Coming back to the issue of lifting the *qisas*, once this has been done, then it becomes the responsibility of the offender to pay *diyat* unless that too has been remitted by the heirs of the deceased. This is based on a reading of the following verse, which means:

> *"...and verily has paid diyat which has been given to the heirs of the deceased, except if they have agreed to give it up (as-sadaqah) and forgiven her." (al-Qur'an, An-Nisa' (4): 92)*

According Abu Syuraih al-Khuzai r.a., Rasulullah s.a.w. was reported to have said:

> *"And whoever has been victimised by murder or insanity, verily they may choose one of three:*
>
> 1. *To ask for qisas; or*
> 2. *To award forgiveness; or*
> 3. *To make payment of diyat.*

If more is asked verily stop it with your hand and whoever transgresses, verily the Hell of Jahannam are open and there they will stay forever." (Bahreisy et al., 1988; Abu Dawud, 1998; Hadith No. 4496)

It is important to note that the fact that the heirs of the deceased have forgiven the offender does not mean that the offender can go free. As mentioned above, the State may provide for *ta'zir* punishment such as imprisonment for a determined amount of time, together with a structured rehabilitative programme aimed at reforming the offender and preparing him to be released as a better person than he was before.

THE PUNISHMENT FOR MURDER IN MALAYSIA

This part of the article concentrates on the punishment for the crime of murder under the Malaysian Penal Code. A discussion shall also be made on the possibility of forgiving the offender. The position in Malaysia could be taken as a reflection of the position in Singapore and India as the Malaysian and Singaporean Penal Code are *in pari materia* with the Indian Penal Code. Section 302 of the Malaysian Penal Code provides:

"Whosoever commits murder shall be punished with death."

This section clearly does not provide any options to the heirs of the deceased to have any say in the punishment of the offenders. This is largely due to the fact that under the Malaysian criminal justice system, a criminal act is considered an unlawful act against the State as it affects the public at large. Hence, once the punishment of a particular crime has been determined by way of statute, the individual has no say in the matter, although he is the one who has been victimised. The State views criminal acts against any of its citizens as criminal acts against the State. This is because the citizens have subjected their rights to be protected by the States (Aun, 2005).

The current law relating to the punishment for the crime of murder only provides for the death penalty to be awarded to an offender who has been found guilty of the offence. The punishment is retributive in nature and does not reflect any consideration made to the welfare of the surviving heirs of the deceased (Dhillon *et al.*, 2012).

Nevertheless, Article 42(1) of the Malaysian Constitution provides:

"The Yang di-Pertuan Agong has the power to grant pardons, reprieves and respites in respect of ***all offences*** *(emphasis added) which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Putrajaya and Labuan; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State."*

Article 42(1) uses the word "pardon" to describe forgiveness. This power to pardon offenders is given to the Yang di-Pertuan Agong for crimes committed in the

Federal Territories. For crimes committed in other parts of the country, each of the Rulers of the States has similar power to pardon criminal offenders.[3]

The above discussion shows that although the concept of pardoning an offender under Malaysian law does exist, the exercise of this particular concept is different from the position under the Shari'ah. The most glaring difference lies in who has the power to grant pardon between the two systems. Under the Shari'ah, only the heirs of the deceased may choose to forgive the offender in cases of murder. This is clearly different from the position under the Malaysian law which gives the power of remitting the death punishment to the State Ruler or the Yang di-Pertuan Agong, who does not know the reasons behind the cruel act, who has not suffered the effects of the crime and who does not know any who has not felt the loss which has been suffered by the victim and his family. Therefore, what right does the Ruler have to forgive an offender who has committed the crime of murder? On the contrary, under the Shari'ah, the heirs of the victim are given the powers to decide whether to opt for *qisas, diyat* or forgiveness. This is justified because the heirs of the deceased are the ones who are directly affected by the act of the offender.

Nonetheless, there is the issue of whether it is right for the heirs of the deceased to forgive the offender, which leads to the release of a murderer into the society and hence endangering the lives of other citizens of the state. Therefore, there is a need to remember that one of the influencing factors which can lead to the heirs forgiving the offender is the fact that the offender has shown total remorse and repented for all his terrible acts. Aside from that, the State has the authority to provide for *ta'zir* punishment to ensure that the offender can no longer hurt other members of the public (Anwarullah, 2004). What is clear here is that, contrary to the practice under Malaysian law where the Ruler may remit the prescribed death penalty, the law of *qisas* does not allow the Ruler to remit a Qisas punishment unless the victim allows him to do so.

The Process of Pardoning in Malaysia

Article 42(4) mentions that when exercising his powers to grant pardon, the Ruler and/ or the Yang di-Pertua Negeri is to exercise based on the advice given by the Pardons Board which is constituted under Clause (5) of Article 42.[4] The Pardons Board is to be constituted at each State and shall consist of the following:

[3] For example the Sultan of Kedah has the power to grant pardons for crimes of murder committed in the state of Kedah. This power is reflected in Article 42(1) of the Kedah State Constitution.

[4] In the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, a single Pardons Board shall be constituted and the provisions of Clauses 5,6,7,8 and 9 of Article 42 shall apply mutatis mutandis to the Pardons Board under Clause 11 except that reference to the "Ruler or Yang di-Pertua Negeri" shall be construed as reference to the Yang di-Pertuan Agong and reference to "Chief Minister of the State" shall be construed as the Minister responsible for the Federal Territoty of Kuala Lumpur, Labuan and Putrajaya.

a. The Attorney General of Malaysia;[5]
b. The Chief Minister of the State;
c. Not more than three other members, who shall be appointed by the Rulers or the Yang di-Pertua Negeri.[6]

Although the Article mentions that the members of the Pardon Board are appointed for a term of three years and may be eligible for reappointment, the Article does not specifically mention how many times the Board must meet in order to hear applications. As such, this gives rise to the issue of prolonging detention time while waiting for pardon to be given by the Ruler or the Yang di-Pertuan Agong. This in turn goes to the rights of the offender to have his case being determined within a specified period of time. There is a case where the offender had to wait for years to have his petition for pardon or clemency heard by the Pardons Board. Among the reasons for this is the absence of a fixed duration that requires the Board to meet and settle such petitions. As a result, the offender is subjected to the punishment of imprisonment and the death penalty if his petition for pardon is not granted by the Pardons Board.

An analysis of cases in Malaysia such as *Juraimi bin Husin v Lembaga Pengampunan Negeri Pahang & Ors* [2001] 3 MLJ 458 and *Sim Kie Chon v Superintendent of Pudu Prison & Ors*. [1985] 2 MLJ 385 show that the Courts do not consider the requests for pardon to the Pardons Board as a legal right. Justice Faiza Tamby Chik, in the case of Juraimi bin Husin for example held that "*mercy is not the subject of legal rights. It begins where legal rights end.*" Therefore, he decided that, "*the exercise of a royal prerogative of mercy by His Royal Highness the Sultan of Pahang cannot be varied or confirmed.*" In this case, although the Court of Appeal agreed with the Appellant that the prolonged delay in the execution of the death sentence had deprived him of his life in accordance with law, this decision was reversed by the Federal Court. In justifying the prerogative of the Ruler in making his decision, Abdul Hamid in the case of Sim Kie Chon stated that, *"...the power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong or the Ruler of the State ...who acts with the greatest conscience and care and without fear or influence from any quarter.*"

The above discussion also shows that there are no cases or statutes that provide for a time limit to petitions for clemency to be heard. There are also no cases or statutes to show that if there is a delay in the execution of the death penalty, then the offender may be absolved from the death penalty.

[5] The Attorney General may delegate his functions as member of the Board to any other person provided that he does so through an instrument in writing. See Article 42(5) of the Federal Constitution.

[6] There is a caveat here, in that a member of the Legislative Assembly of a State or the House of Representatives shall not be appointed by the Ruler or the Yang di-Pertua Negeri to be a member of a Pardon Board or to exercise temporarily the functions of such a member. See Article 42(7).

Another issue relating to the issuance of pardon by the Ruler or Yang di-Pertuan Agong is the fact that Article 42 is also silent on the criteria that would allow pardon to be given. Nothing is mentioned on the need to look at the views of the heirs of the deceased on this matter. Neither is there any specific consideration given to repentance, remorse and willingness to rehabilitate and mend his ways on the part of the offender. It is true that the Ruler or Yang di-Pertuan Agong does rely on good behaviour reports and the fact that the offender has already served a long-term jail sentence is a factor which may influence him to commute the death sentence to the sentence of life imprisonment. However, there is an absence of a definitive law which lays down what needs to be fulfilled by the offenders in order to have his petition to be pardoned accepted by the Ruler or Yang di-Pertuan Agong. Therefore, it is submitted at this point that the current practice of awarding pardon or clemency to offenders in Malaysia needs to be revisited and improved in order to ensure that justice is done not only to the heirs of the victim but also to the offender.

CONCLUSION AND POLICY RECCOMMENDATIONS

There have been suggestions made by writers such as Guru Dhillon, Noor Mohammad and Ng Yih Miin (2012) that the mandatory death sentence in cases of murder be replaced with a compulsory compensation scheme for the heirs of the deceased. Making compensation compulsory, however, still does not address the issue of recognising the rights of the heirs of the victim. To this, the three writers did agree that in determining the punishment for murder, the Court should decide according to the wishes of the victim's family. Hence, it is submitted that in order to ensure that the rights of both the victim and offender are protected, an adoption of the full concept of *qisas* as a whole is necessary. This would entail the recognition given to the heirs of the deceased to exercise the three options, i.e., whether to choose *qisas* or equal retaliation, or to opt for *diyat*, or to opt for pardoning the offender, either with or without *diyat*.

It is submitted that the concept of forgiveness is possible as it is understood under the Shari'ah, and could be adopted in the Malaysian context. The spirit of the law is aimed at protecting the innocent party and allowing for the form of the law to be administered in order to bring the offender back to the right path by allowing him to realise his mistakes, repent and be rehabilitated. The challenge in this is to convince the Malaysian public, both the Muslims and the non-Muslims to accept a law that is based on religion. There is also a challenge of educating the public of the universal aim of the Shari'ah, that is, to protect the five essential values of life, religion, intellect, honour and property of every member of the society, regardless of their religion.

It can be seen that the concept of forgiveness should be revisited and re-

applied to allow the victim or his heirs to decide on the fate of the offenders instead of merely leaving it to the Rulers.

This would indeed be possible with the amendment to Article 42 of the Federal Constitution to replace the power to give clemency to the heirs of the deceased instead of to the Rulers of the States, the Yang di-Pertua Negeris, or the Yang di-Pertuan Agong. Aside from that, there is also a need to amend Section 302 of the Penal Code to not only provide for mandatory death penalty as a punishment for murder, but also to allow for a remittance of the death penalty by paying a determined amount of monetary compensation if the heirs of the deceased wish so. The law should also provide that before the pronouncement of the punishment, the Court needs to consult the heirs of the deceased as to what options that they would prefer the Court to declare. The concept of justice in the law of *qisas* is aimed at being fair and just primarily to the victim, while at the same time providing hope and repentance for the offender.

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Shari'ah Court and the Role of *Muftī*s in the Nigerian Judiciary: Mission on Reviving the Lost Glory of Its Past

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ABSTRACT

Islamic institutions including courts and *fatwā* have been in existence in Nigeria since the advent of Islam in the country. While the courts were established in order to adjudicate between disputant parties, *muftī*s were also used as assessors (court officials) responsible for assisting the courts in dispensation of justice. When the colonial administrators came, they introduced their legal system to the colonies, which led to a gradual wipe away of some aspects of the Islamic legal system (including the courts and *fatwā* institutions). The doctrine of the tripartite tests (i.e., the repugnancy test, incompatibility test and public policy test) was introduced into the country's legal system to the extent that the full and hitherto application of Islamic law was modified and some were suspended. Muslims are left with only matters related to civil causes and personal matters. Islamic jurists such as *muftī*s become *functus officio* in the Shari'ah Courts. In view of this, the paper explores the possibility of finding an avenue on how to revive the past glory of *muftī*s in the Nigerian judicial system. Thus, it sets out some modalities on how *fatwā* can be streamlined to achieving this objective. One of such modalities is to institutionalise *fatwā* in the country.

Keywords: Shari'ah Court, role of a *muftī*, Nigeria, judiciary

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INTRODUCTION

The role of *muftī*s in the Shari'ah courts is paramount, especially in dealing with an effective dispensation of justice. In Nigeria, this role has been robbed by some structures laid out by the colonial rule. The

British colonial administrators colonised Nigeria between the period of the late 19th century (1861) and the middle of the 20th century (1960), within which, many Islamic structures recorded some setbacks including the *fatwā* institutions. In fact, the role of *fatwā* and the administration of Islamic law generally started to decline by the advent of the colonial administration. Indeed, this has to do with the influence of the English legal system, which for long has been interacting with the Islamic law side-by-side in the country. The interaction between the two laws has no doubt resulted to the setback in the administration of Islamic law in the Nigerian courts. Practically, the existence of the English legal system in Nigeria has created a vacuum for the application of Islamic law, particularly in its judicial and the administrative systems. It has affected the entire Islamic system in the country to the extent that the Shari'ah Courts and other Islamic institutions lost their past glory. Thus, judges who preside over Shari'ah matters, lack requisite knowledge of Islamic jurisprudence talk more of the vast knowledge of Islamic law. Some of them cannot read even a portion in the Glorious Qur'an and the *ahādith* of the Prophet (s.a.w), not to talk about understanding the knowledge of how to apply and make use of sciences of the Qur'an and hadith. The worst part of all is that there is no qualified person to guide these judicial personnel whenever they find themselves in a fix position. Hence, their reliance has been always on the submissions of legal practitioners who do not have vast knowledge of Islamic law. As the role of *muftī* is paramount to the development of Islamic law and the administration of justice in the Nigerian courts, the paper reveals the necessity to revive the hitherto institution of *fatwā* and the role of *muftī*s in the Shari'ah Courts so that Islamic matters would be effectively determined.

NATURE AND ORIGIN OF *FATWĀ* IN NIGERIA

The nature and origin of *fatwā* in Nigeria is having a nexus with the development, nature and extent of the application of Islamic law within the country's legal history (Juwayriya *et al.*, 2011). Hence, in order to be well-informed about the concept of *fatwā* in Nigeria, it could better be traced from the historical antecedents of Islamic law in the country (Girbo: interview by Author, Nigeria, 2013). To begin with, the Nigerian legal system is a legal system that is hybrid in nature. It encompasses and deals with the entire laws, rules and all legal machineries obtained in the country (Asein, 2005). Just like some other Commonwealth countries, Nigeria is a diverse country that has been characterised with diversity of religions and legal pluralism (Tonwe *et al.*, 2000). It is a Sovereign Nation located on the Gulf of Guinea in the West African Sub-Region. It shares boundary with the Republic of Niger at about 1497 km from the North, the Republic of Cameroun from the east at about 1690 km, the Republic of Chad at about 87

km from the North-east, and the Republic of Benin from the West at about 773 km. It has a total area of about 923,678 square km including 13,000 square km of water boundaries. The country has been endowed with water ways such as river Benue and river Niger, Lake Chad and Atlantic Ocean. Its climate is arid in the Northern region, tropical at the centre and equatorial in the Southern Region. It has a population of more than 160 million and embraces multi religions (Islam, Christianity and traditional religions) and also comprises of a multi-ethnic society (over 250 ethnic groups), whereby major ethnics like Hausa-Fulani in the North, Igbo from the East and Yoruba in the West. Out of the total population, Muslims constitute more than 50%, Christians more than 30% and the traditionalists constitute the remaining percentage of more than 10%. The Country is a Federation consisting of 36 States and the Federal Capital Territory, within which the Presidential system of Government is practiced (Library of Congress, July 2008). Its legal system comprises the Received English law (Common law, Equity and the Statutes of General Application); Legislation; Case law; Islamic law (Ubah 1982); and the Customary laws (more than 250 ethnic groups and each with its own peculiar custom) spread all across the country (Tobi, 1996). In the case of *Laoye & ors V. Oyetunde* (1944) A.C. 170, the application of the native customs was also judicially recognised by the court; thus, the Privy Council in examining the basis of the establishment of Native Courts said, "The policy of the British in this and in other respects is to use for purpose of administration of the country, the native laws and customs in so far as possible and in so far as they have not been varied or suspended by Statutes or Ordinances affecting Nigeria." For the purpose of this discussion, the study focuses on the Islamic legal system under which the authority of a *fatwā* can be issued and applied. In Nigeria, the Islamic law is applicable based on the Qur'an, Hadith and the principles of Maliki *Madhhab* (School of Islamic jurisprudence) (Tobi, 1996). Meanwhile, the English system comprises the Common law, Equity and the Statutes of General Application in force in England as at 1st January 1900 (Yakubu, 2006). To this end, Section 28 of the High Court Laws of Northern Nigeria provides that, "subject to the provisions of any written law… Common law, the Doctrine of Equity, and the Statute of General Application which were in force on the 1st Day of January 1900, shall be in force within the Jurisdiction of the High Court". The local enactments consist of the Constitution of the Federal Republic of Nigeria and other Nigerian legislation (primary and subsidiary). In addition, the case law is a decisions of the courts applicable based on the doctrine of judicial precedent (Asein, 2005). Custom, as a source of the Nigerian legal system, consists of usage or practices of a particular group of people, which by common adoption and acquiescence and by long and unvarying habit has become compulsory and acquired the force of law

with respect to the place or subject matter to which it relates (Kolajo, 2000). To this end, the law of the defunct Plateau State of Nigeria defines customary law as the rule of conduct which governs legal relationships as established by custom and usage (s. 2). Similarly, in the case of *Lewis v Bankole* (1908) 1 NLR 81 at 100), the Court defined customary law as unwritten law (*jus non scripta*) and a mirror of accepted usage recognised by the members of particular ethnic group.

Therefore, the above definition has designed a clear cut demarcation between customary law and Islamic law. The two laws are not same, even though most of the 20th century writers on the origin and nature of the Nigerian legal system have attempted to classify and incorporate the Islamic law to customary law with the belief that the Islamic law is a Muslim custom and therefore cannot be spared from being part of the customary law (Miles, 2006). However, the story became an issue of the past in 1998 when the Supreme Court of Nigeria (*Per Wali JSC*) made it categorically in *Alkamawa v Bello* (1998)6 SCNJ 27) that the Islamic law is not same as the customary law (Tobi, 1996) because it does not belong to a particular group of people (*Alkamawa* supra). According to the learned justice (*Wali JSC*), the Islamic law is a complete system of universal law and even more universal than the English Common law. Hence, the decision has settled that the Islamic law is not a customary law, but it is an independent source of Nigerian legal system (Abikan, 2002).

Today in Nigeria, the concept of *fatwā* and the role of *muftī*, being part and parcel of the Islamic matters, have become *functus officio* in the legal system, which is largely an English-based system. Thus, by virtue of the current Nigerian legal system, the decisions of *muftī*s are considered as personal and non-binding. This has been affirmed by a Shari'ah Court of Appeal Qadi, Alhaji Ibrahim Wakili Sudi (Qadi Sudi, interviewed by the Author, Nigeria, 2013), who reiterated the importance of *fatwā* in the country, especially in the dispensation of Shari'ah justice in the courts. To this end, he said:

> "*Fatwā* plays a very important role in the dispensation of justice in the courts, even though it is considered simply as an opinion by a learned Islamic scholar aimed at assisting and guiding the courts, it is however, advisory and not binding."

The learned Qadi has lamented that it is unfortunate that there is no institutionalised and bureaucratised *fatwā* issuing body which could be saddled with responsibilities of issuing a binding *fatwā* in Nigeria. In fact, according to him, it is only the periphery committees of *fatwā* within different Muslim organisations that exist in the country. This also goes in line with the opinion of a learned scholar Shaykh Adamu Girbo (2013), who confirmed that *fatwā* in Nigeria is not institutionalised and something needs to be done by the authority concerned in order to make it possible (Girbo, 2013). Similarly, in the words of Senator Abubakar Sodangi (interviewed

by the Author, Nigeria, 2013) "*fatwā* is not institutionalised in Nigeria and the lack of its institutionalisation has left so many gaps in the country's legal and judicial systems." He confirmed that currently in Nigeria, there is no institutionalised *fatwā*, except the *fatwā* committees that are lying in various Islamic organisations such as those in the Nigerian Supreme Council for Islamic Affairs (NSCIA), *Jamāʿatu Nasrul Islam* (JNI), *Jamāʿatu Izālatul- Bid'a wa Iqāmatis-Sunnah* (JIBWIS) *Fityānul Islam* and others.

It is based on the above lacuna that the politicians and some legal luminaries such as lawyers and academia (law teachers) in Nigeria have more or less taken over the *muftī's* job of issuing *fatwā*. They have been perceived as modern *muftī*(s) by some people (Haji *et al.*, 2012) even though there are a lot of contentions on whether or not they could be regarded as such, especially looking at the tasks of becoming a *muftī* under the Islamic law, which indeed are not quite simple (Girbo, 2013). Such modern *muftī*(s) in Nigeria are those whose background in most cases is not fully Islamic; sometimes they possess a little combination of both Islamic and western knowledge. As a result of this, they may fall short of the requirements for being a *muftī*. Hence, they could not be considered as *muftī*(s) in the eyes of Shari'ah due to their lack of requisite requirements and sufficient expertise in the Islamic law (Muhammad, interviewed by the author, Nigeria, 2013). However, in order to tackle such problem, Shaykh Adamu Girbo (2013) suggests, among other things, that *fatwā* should be institutionalised and bureaucratised in Nigeria so that private and unqualified individuals would stop parading themselves as *muftī*s.

At this juncture, it is worthy to mention that Islam generally came into Nigeria centuries ago through Kanem Borno Empire in the North- Eastern part of the country (Balogun, 1969). For the purpose of this discussion, however, the concept and history of *fatwā* in Nigeria are considered from the period of the Fulani jihad (in the 19th Century) due to the commitments of the then leaders of jihad towards restructuring the administration of the Shari'ah justice in the region. The emergence of the Fulani Empire, which is otherwise known as "the Sokoto Caliphate", has given the Shari'ah a new outlook in Nigeria from its system of governance, economic policy, foreign policy, administration of justice, as well as the organisation of the society (Yadudu, 1992). Apart from that, the Caliphate was also famous for the conception of law and utilisation of its institutions in order to achieve maximum benefits for the Muslim *Ummah* (community) in the country (Ladan n.d.). For this reason, this paper traces the nature and origin of *fatwā* from the following periods: the period prior to the Fulani *jihād*; the period of the *jihād* but before the colonial era; the period of the colonial administration; and the post-colonial period.

Period Prior to the Fulani Jihād

Before the Fulani jihad in the 19th century (1804), Islam in itself had experienced a serious setback, where the whole system was adulterated with so many customs and conventions (Juwairiyya *et al.*, 2011). Islam was just a caricature of itself, thus corruption and all forms of injustice were well pronounced. Shari'ah was flagrantly abused and most of the people were ignorant of the religion. The practice of Islam was reduced to dry rituals, thus Islam was not in the social, political and economic spheres of the community (Kumo, 1997). In the aspect of administration of justice, the Islamic law was only applied in cases where the interests of the then tyrant Kings were to be served. In short, the development of the Islamic law and practice in the pre-*jihād* period can best be described as a to-and-fro movement on the negative axis of a graph. It should, however, be noted that despite the nature of the regime before the jihad and the flagrant abuse of the Shari'ah by the oppressive and ignorant Kings and some venal scholars, other honest and prominent scholars played positive roles to save the situation (Albasu, 1985). Shaikh Jibril Ibn Umar, who was a teacher to both Shehu Usmanu Dan-Fodio and Mal Abdllahi Dan-Fodio (popularly known as Abdullahin Gwandu, a brother to the latter), was indeed a role model. It should be added that in the aspect of law and its administration in Nigeria (present Northern Nigeria) before the jihad, local traditions and enactments by rulers were the two main sources of law. When Shehu Usmanu Dan-Fodio started preaching Islam preparatory to the jihad, the King of Gobir Nafata (who was a pagan) did all he could to stop him through some of his arbitrary and anti-Islamic legislation, but to no avail. The wicked legislation was to the effect that it was illegal for Shehu Usmanu Dan-Fodio to preach to people; that converts must revert back to their religion and that no one should wear turban and women should not cover their groin in line with the teachings of Shari'ah (Kumo, 1997).

The above proclamation was made in the market place and it became the law with immediate effect. This shows that in the pre-jihad period, the Kings were the supreme leaders of their subjects and anything they said became a law. They were the masters and their people were slaves. In fact, the Kings made the laws and they remained immune from the law. This simply means that Shari'ah and proper administration of justice did not thrive in the pre-*jihād* period. Hence, the concept of *fatwā* was not even the supposing issue talk more about the role *mufti* supposes to play (Olorunfemi, 1985).

The Period of the Jihād (the Period before the Colonial Era)

The *jihād* of Shehu Usmanu Dan-Fodio has brought an end to the leadership of the then contemptuous and oppressive Nigerian Kings especially in the Northern part of the country (Shagari *et al.*, 1978). The Islamic law and practice were restored by the Shehu with vigour, leading to the replacement of old and infiltrated Islamic practices with the

new and pure Islamic system. Thus, *Qādis* were appointed to try cases in line with the Islamic injunctions and they were also assigned jurisdictions. During that period, Shehu Usmanu Dan-Fodio showed keen interest in matters related to administration of justice because of its importance. This was why he appointed certain officials in addition to *Qādis* to ensure a smooth administration of justice. The officials include *Na'ib* (Deputy Judge), *muftī* (jurist-consult), *Kātib* (court clerk), *Qāsim* (estate distributor), *ʿAwn* (messenger) and *Tarjumān* (interpreter) (Kumo, 1977). It should be noted that, among these officers, the office of the *muftī* is the most important one for the reason that *muftī* being a jurist can assist the court in arriving at a just decision. By implication, this means that the concept of *fatwā* in the pre-colonial Nigeria was tilted and inclined largely towards the administration of justice than any other sector.

The Period of Colonial Administration

The concept of *fatwā* under this period has experienced a serious retardation due to the restrictions placed by the colonial administrators against the complete application of the Islamic law in Nigeria. However, according to Suleiman Kumo, the Islamic law did not suffer any setback during that period; rather, it thrived under the colonialists contrary to the expectation of many (Kumo, 1980). The early period of *jihād* indicates a return to the Islamic system of government and by extension, the application of the Islamic law in the administration of justice. This continued for about two decades before the demise of the original founders of the Caliphate (Shehu Usmanu Dan-Fodio and his allies). After their demise, the successors took over the mantle of leadership and since then, decadence in the system resurfaced. The learned scholar described the situation:

> "By the middle of the century, when the founders of the Caliphate had passed away, their heirs and successors had become altogether something different. Their conduct and general comportment had become identical in practically every respect with those of the pre-*jihād* Hausa Rulers and by the time the British conquered the country, there was not one emirate throughout the Sokoto Caliphate, where the principles, the methods and the procedures of an Islamic government were applied. The rulers of that time had arrogated to themselves the powers of life and death over their subjects in total and contemptuous disregard for the Shari'ah, and the original principles upon which the *jihād* leadership was founded were totally discarded."

This simply suggests that during the period of the British indirect rule, Emirs in Nigeria had free hand in the administration of justice subject to such limitations as may be imposed by the British. In this regard, the Emirs were allowed to appoint the judges and other court officials and also decide where to place a court. The Resident (who was usually sent by the British) only gave a warrant but the control was vested

in the hands of the Emirs. The provision of the first Proclamation called the "Native Courts Proclamation" of 1900 was clear on this. The only hurdle in the law was that it gave the Resident the power to establish the court and possess the power of supervision of the court. Another obstacle was that the law ousted the application of *Hadd* punishments for *Zina* and other *hudūd* (the prescribed punishments) offences. However, it has not tempered with the office of the *mufti* since the power to appoint the judge vested in hands of the Emir. This simply means that the Emirs had ample opportunity and responsibility of choosing the correct or ensuring that the correct person is appointed to deliver justice in the courts (Kumo, edited by Bobboy *et al.*, n.d.). However, other scholars, like Prof. A. A. Gwandu who relied so much on the thesis and other publications of Dr Suleiman Kumo (PhD Thesis, SOAS London), were of the view that the colonialists were responsible for the sorry state of affairs of Shari'ah in Northern Nigeria, particularly in relation to the office of *muftī*. He stated that:

> "Gradually with the coming of the colonialists, the office of the *muftī* began to be neglected to the extent that while the title of *muftī* remained, the qualifications and status of the occupant of that office became no more than those of the court clerk".

It is clear from the above that the learned scholar believes that the colonialists were responsible for the setback people were experiencing in the application of Islamic law generally and that, they are responsible for the weakness and subsequent disappearance of the office of the *muftī* in the country.

The position remained almost the same under the 1906 Native Courts Proclamation, notwithstanding some changes introduced by the law in respect of re-establishing the status of the *Alkāli*,[1] the Emirs,[2] the Shari'ah/*Alkāli* courts and the Judicial Council. Their establishment was made by warrant under the hand of the Resident. The *Alkāli* presided over the *Alkāli* courts, with or without councillor helpers, while the Judicial Councils were to be presided over by the Emirs or Chiefs with other members to be determined by the Resident. Another change was on the appointment of the judges. It now shifted to the Resident but he was required by law to consult an Emir or a chief before exercising such power. Apart from these changes, the position remained as it was subject to no interference by the British Courts either through appeals or the like. In addition, the 1916 Native Courts Ordinance did not bring much change either (Kumo PhD Thesis SOAS London).

The Post-Colonial Era

When Nigeria became an independent state on the 1st October 1960, a lot of reforms were put in place, especially in

[1] This is a Hausa native term referring to "*Al-Qādi*" in Arabic language, which in anglicized form refers to a Shari'ah judge.

[2] This is referred to as "*Amir*" in Arabic language, a Muslim leader or a commander.

respect of the position of *muftī* and the application of Islamic law in general. Islamic law was applied partially, *fatāwa* were issued privately and personally in an informal way, *muftī*s were no longer called *muftī*s but with different description and nomenclatures. Sometimes, they were referred to as "assessors" of the courts (s. 5 (1) and (2) of the Area Court Law 1968). This provision has been maintained and applied by the Area courts of Northern Nigeria for quite some times. To this effect, a section of the Area court law provides the features of the Area courts, as follows:

> "(1) An Area Court may with or without assessors.
>
> (2) An assessors for each Area Court shall be approved by the Chief Justice or by such person as he may appoint for such purpose.
>
> (3) Assessors shall act in an advisory capacity and shall have no vote in the decision of the court." (s. 5 (1) and (2) of the Area Court Law 1968).

Furthermore, effort was also made by the military administration in 1975 under the leadership of General Murtala Ramat Mohammed to revive the practice of issuing *fatwā* (*iftā*) within the Shari'ah courts in Nigeria but unfortunately it was not seen the light of the day. The then military head of state even announced the appointment of the Grant *Muftī* of Nigeria (Shaykh Abubakar Mahmud Gummi), whose appointment should have taken effect around April 1976. Due to the assassination of the then military leader (General Murtala Ramat Mohammed) in a bloody *coup d'etat* in February 1976, however, the appointment was thereafter set aside by his successor (General Olusegun Obasanjo) following a series of criticisms (Mustapha, interviewed by the author, Nigeria, 2013). The situation continued until 1999, when about 12 Northern states[3] passed a Bill into law for the implementation of Shari'ah (complete Shari'ah in both civil and criminal cases) within their respective states. This also called for the revitalisation of the hitherto practice of *fatwā* and the position of *muftī* in the administration of justice and the Islamic administration generally in such states (Ostien, 2007). Thus, some states in northern Nigeria, through the legislative process, were able to establish some institutions such as the State Shari'ah Commission or its equivalent, and The Council of *Ulamā'* with important advisory and executive functions. In light of this, it is the opinion of Professor Mustapha that the concept of institutionalisation of *fatwā* will tackle the contemporary issues and challenges that may arise before the courts such as the concept of artificial insemination, polio vaccines, family planning and their effects. He further affirmed that the smooth implementation of Shari'ah would be considered ineffective and incomplete without *fatwā* being institutionalised (Mustapha, 2013).

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[3] Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara states

CONCLUSION

Generally, the concept of *fatwā* in Nigeria is as old as the history of the application of the Islamic law in the country. It has become *functus officio* since the beginning of the colonial administration. In fact, the whole Islamic system encountered some setbacks when the British colonial administrators trooped into the country. They rendered most parts of the Islamic system and structure not functional as they used to say, it is repugnant to natural justice, equity and good conscience; it is incompatible directly or indirectly to the law for the time being in force; and it is also contrary to the public policy. In the past, *fatwā* and *muftī*s played a significant role in Nigeria, ranging from rendering legal and consultancy services to the courts, as well as giving advisory services to the Islamic Rulers of the time. However, such roles and services rendered by *fatwā* committees or *muftī*s have nowadays remained a mirage due to the lack of well-structured Islamic institution, lack of a suitable legal framework and lack of qualified personnel. Several efforts were made thereafter by subsequent administrations in the country to revive the hitherto system and put things into the right direction, but to no avail. Consequently, the citizens (especially the Muslims) in the country who have the rights to freedom of religion, as enshrined in the Constitution, are left without any statutorily established Islamic institutions such as the *fatwā* institution that can assist in regulating their conduct of religious activities in the country. Most of such activities in recent times are taken over by unqualified legal practitioners who have been perceived as modern *muftī*(s). At this moment, the opinions of *muftī* and the status of *fatwā* in Nigeria have been regarded as a "take it or leave it" issue. In fact, it has been considered as a mere advisory opinion. Thus, the courts in Nigeria require a distinct and well-structured *fatwā* framework and institutions in support to effectively function and compete with their conventional counterparts in the world. In view of this, it is indeed significant to have in the Nigerian judicial system, a workable relationship between *muftī* and the courts similar to the practice in some modern Muslim countries such as Malaysia. In Malaysia, there exists a formal relationship between *muftī* and the courts to the extent that the decision of *fatwā* committee, after being published in the Gazette, shall become binding on the Shari'ah courts (Section 34 (4) the Administration of Islamic Law (Federal Territories) Act 505, 1993). In fact, *fatwā* in Malaysia is regarded as a binding piece of legislation and judicial precedent, which every Muslim and Shari'ah courts should be bound by (Farid, 2012). To make this aspiration a reality, the paper suggests the following:

i. The Nigerian Government (at both federal and state levels) should enact a *fatwā* legal framework in preparatory to its institutionalisation. This can be done by amending some

provisions in the constitution and/or relevant laws that are standing as stumbling blocks to actualization of this suggestion.

ii. The Nigerian Government (at both federal and state levels) should establish the *fatwā* institutions or committees that will from time to time, or based on request, liaise with the judiciary with the view to assisting same in resolving some fix matters concerning Islamic law. This can be done after the first suggestion has been put in place

iii. The Nigerian Government should establish a special induction training institute for training *mufti*s and *fatwā* committee members, so that they will be well-equipped with not only the theoretical knowledge of the Shari'ah but also with the knowledge of present day reality.

iv. The Nigerian Government should educate and enlighten the public about the significance of *fatwā,* the role of *mufti* and the necessity of having a *fatwā* institution in a diverse country like Nigeria, especially towards ensuring a stabilised and harmonised judicial system. This can be done through organising periodic seminars and workshops.

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Crime of Baby Dumping: A Review of Islamic, Malaysian and Nigerian Laws

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ABSTRACT

Islam prohibits all acts that endanger the life of a child or exposes children to abuse including dumping of babies. Those acts are crimes punishable under the law. In a similar vein, internationally, baby dumping and all acts that expose children to danger are prohibited under the United Nation's Convention on the Rights of the Child 1989 (CRC). Malaysia and Nigeria, like most nations of the world, are signatories to most international legal frameworks on child protection including the CRC. In Malaysia and Nigeria, baby dumping is an alarming phenomenon. Many babies suffer or even die as a result of the act of baby dumping. This article intends to examine the laws relating to the protection of babies from dumping in Malaysia and Nigeria. Discussions will include the position of baby dumping in Islam to serve as a comparison. Examination will extend to analysis on whether the laws in Malaysia and Nigeria are adequate to address the problem of baby dumping and to fully protect children from baby dumping. The study is basically a library based research where reference is made to books and articles. A comparative legal research methodology is employed in looking at the positions in Islam, Malaysia and Nigeria. It is hoped that the findings on child protection laws, particularly those related to baby dumping in the Islamic, Malaysian and Nigerian laws, will provide better protection for babies and prevent them from being dumped.

Keywords: Baby dumping, Islamic law, Malaysian law, Nigerian law

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INTRODUCTION

Dumping of babies may happen at any place and in any society. The classic case of children dumped by parents is the exposure of babies to the elements for rescue by 'kind strangers' though the act barely sidesteps infanticide. Western

anthropologists have mentioned the case of Prophet Musa who was placed in a basket and floated at the edge of Nile River and rescued by Fir'awn's people as a proof that dumping of babies is not something new (Brick , 2000; Mohd, 2008). A historian, John Boswell, estimates that during the first three centuries of the Christian era, about twenty to forty percent of newborns were dumped or abandoned in Rome. Similarly, a large number of newborns were dumped in the middle ages (Kertzer, 2000; Mohd, 2008). Historical research reveals that a foundling system arose in Europe as early as the thirteenth century (Guimaraes, 2000; Mohd, 2008). The number of foundlings home grew as they first spread throughout much of Italy and later to France, Spain and Portugal (Viazzo *et al.*, 2000; Mohd, 2008). By the nineteenth century, foundling homes had appeared not only throughout these countries but also in Ireland, Poland, Austria and Russia. By the middle of the nineteenth century, over hundred thousands of babies were dumped per year in Europe by people with no family, kin and property (Kertzer, 2000; Mohd, 2008).

In Malaysia, the nature and the rate of reported cases on baby dumping are disturbing. In most cases, perpetrators of this heinous crime, discard the babies in any place without being mindful of the consequences of such action on the innocent baby. This is largely due to fear of arrest and attempt to conceal their identity. It is therefore common to see babies dumped in the garbage or dustbin, along road side or wrapped in newspaper and kept under the harsh beating sun (Termizi *et al.*, 2014). Students who deliver at the hostel abandon such babies in the toilet or birth room (Adesiyun, 2010). The manner and place of dumping are often linked directly with the effects of such dumping on the baby. A baby dumped in the mosque or motherless baby's home has a greater chance of survival than a baby dumped inside a dustbin or left under the scorching sun (*New Straits Times,* 18 July 2010). The Federal Criminal Investigation Division Director, Datuk Seri Mohd Bakri Zinin, reported that the cases of baby dumping in Malaysia are increasing. From 2005 to January 2011, a total of 517 baby dumping cases were registered in the country. He said 203 of the cases involved boys, 164 girls, while the gender of the other 150 babies could not be ascertained. He also told reporters that, "for cases in which the gender cannot be identified, post-mortems could not be carried out because the bodies were too badly decomposed. Of the total, 230 were found alive while 287 were dead" (*Bernama*, 9 February, 2011). Meanwhile, according to PDRM's statistics on baby dumping cases in the subsequent years, there were 98 cases in 2011, 88 cases in 2012, 90 cases in 2013 and 13 cases as of March 2014 [Malaysian Royal Police (PDRM), 2010-2014). Additionally, in Parliament, the Deputy Minister of the Ministry of Woman, Family and Community Development, Datuk Azizah Mohd Dun, stated that there were about 26 reported cases of abandoned babies nationwide for the first quarter of 2014

(BERNAMA, 2014). According to JKM's statistics on abandoned child as described under section 17 (1)(e)(ii) of the Child Act 2001, there were 49 cases in 2010 (Jabatan Kebajikan Masyarakat, 2011), 59 cases in 2011 (Jabatan Kebajikan Masyarakat 2011), 49 cases in 2012 (Jabatan Kebajikan Masyarakat, and 47 cases in 2013 (Jabatan Kebajikan Masyarakat, 2013). This information seems to highlight the worsening yearly scenario of baby dumping in Malaysia that requires serious attention from all including the public.

In Nigeria, the rising scourge of baby dumping has led to the question as to whether this tradition of dumping babies still exists (Adesiyun, 2010). Although there are no accurate data on cases of baby dumping in Nigeria, the figures put together by some states led to the rising concern of the rampant cases of baby dumping across the country. For example, the Special Adviser to the Lagos State Government on Youth and Social Development recently revealed that Lagos State in 2011 recorded 497 cases of abandoned babies dumped in different streets of the state (Okoje, 2012). In fact, baby dumping has been acknowledged as one of the common forms of child abuse in Nigeria (Akani & Erhabor 2006). It is a cruel act that is contrary to the Nigerian law in every respect; hence, wrong doers must be made to face the full wrath of the law (Ali, 2014).

This article therefore aims at examining the menace of baby dumping vis-à-vis its position under the Islamic law, Malaysian law and Nigerian Law. The article provides a general overview of baby dumping in Islam and looks at how Islam protects babies from being dumped. The article finally analyses and provides suggestions, where relevant and necessary, on how babies can be given better protection from the menace of baby dumping.

GENERAL OVERVIEW OF BABY DUMPING IN ISLAM

The Arabic word for a baby who is dumped is *al-tifl al-laqit* (Al-Subail, 2005). Al-Sarakhsi defines a foundling (*laqit*) as "a name given to a living child who is dumped by his relatives due to fear of the family or accusation" (Sarakhsi, 2000). The Qur'an has mentioned some incidences of dumping. The Qur'an mentions the story of Prophet Yusuf who was dumped into a well by his siblings (Qur'an, Yusuf, 12:10). However, the case of Yusuf is slightly different from our topic since he was grown up and the crime was done by his brothers out of jealousy (Mohd, 2008). Similarly, the Qur'an also mentions the story of Prophet Musa (a.s.) (when he was a baby) whose mother was inspired by Allah the Almighty to put him in a basket and dumped him into the river. The basket was later on picked up by the Pharoah's servant (Qur'an, Taha, 20: 38-39; Qur'an, Qasas 28: 7-8). In relation to the *Sunnah* of the Prophet, the Prophet (PBUH) gave several verdicts with respect to the position of the baby. For example, the Prophet (PBUH) stated in one of his traditions that when a dumped baby is found, just two witnesses should be notified and the story must not

be made a secret (Ahmad, vol. 29, Hadith 17481). However, it was during the time of the companions that the cases of baby dumping became known. Hassan al-Basry reported that in one occasion a dumped baby was found and brought before Ali (RA) and Ali stated that the person who took the baby had done a commendable act and the baby is a free person (Sarakhsi, 2000). This occasion seems to highlight a very important rule on the duty to take up a dumped baby, which is considered as a recommended act. The above occasion also shows that Islam appreciates the person who helps the vulnerable child. The incident further upholds the status of a dumped baby as to be a free person.

How Islam Protects Babies from Dumping

Islam enjoins love and mercy to children. The Prophet states "He is not from us, he that does not have mercy on our young and does not respect our old" (Abu Dawud, Vol. 4, Hadith 4945). Therefore, no harm can ever be imposed on children, particularly if dumping may lead to death. To that effect, Islam prohibits infanticide out of any reason that may include poverty or shame. The Quran states to the effect that "Kill not your children on a plea of want, we provide sustenance for you and for them" (al-Quran; al-An'am 6:151). The Quran further states that "If a man kills a believer intentionally, his recompense is Hell, to abide therein (for ever)" (Al-Qur'an, Nisa 4:93). The killing of a human being is considered a very serious matter that the Qur'an equates it with the killing of the whole of mankind (Al-Qur'an, Al-Maaidah 5: 32; Sudan *et al.*, 2012). Similarly, abuse of dignity is an effect of dumping; the Qur'an protects the right to dignity of every child (Qur'an, Isra 17: 70). The Qur'an states "Verily, We created man in the best mould" (Qur'an, al-teen: 4). The messenger of Allah equally describes the dignity of man in the following words, "People are God's children and those dearest to God are the ones who treat His children kindly" (Al-Tibrizi, 1979; Hadith 4998). In yet another tradition, the Prophet (PBUH), while facing the Holy Ka'aba, said "You are most pure and most dignified, but by the One in whose hands Muhammad's life reposes, the sanctity and honour of a believer, his life and his property, is far greater than yours in the eyes of God" (Al-Tibrizi, 1979; Hadith 2724). The verses of the Quran and the hadith of the Prophet (PBUH) clearly prohibit any act that may harm a baby. The Quranic provision clearly and strictly prohibits infanticide, and killing of children leads to an inference that the act of dumping of babies is condemned and regarded as an offence. Where the act of dumping babies leads to the death of babies, it can fall under the crime of murder that is strictly prohibited in Islam.

Furthermore, the place in which a baby is dumped may affect his health and well being. For example, a baby that is dumped in a very cold weather can develop asthma, pneumonia and other lung related diseases (Jackson, 2011). Islamic law also emphasises on the right of a child to good health. As a mark of acknowledgement

of the importance of health in Islam, the Quran states the words of Prophet Ibrahim who mentioned, "And when I am ill, it is He who cures me" (Qur'an, al-Shu'ara: 80). Al-Tha'labiy opined that attributing cure to Allah is a mark of respect and the believer is expected to take all the practical steps towards attainment of good health (Al-Tha'labiy, 2002).

The fact that Islam places great importance to the right of a child to good health can be appreciated from the fact that Islam calls for steps to be taken to ensure that the child's health is respected even before the child is born by ensuring that the expecting mother is given adequate care and protection so that the foetus is delivered unharmed (Arfat, 2013). Although fasting is one of the five pillars of Islam, a pregnant or breastfeeding mother is allowed by shari'ah to leave the fasting of the month of Ramadan if the fasting can be a threat to the health of the mother or her foetus (Qur'an, Al-Baqarah: 184; Shaybany, 1406 AH). These authorities have made clear the fact that it is obligatory on the believers to avoid any thing that could be a threat of the right of a child to dignity. Baby dumping is indeed a terrible practice that exposes a child to various acts of danger, all things that could lead or cause baby dumping must be avoided because prevention is always better than cure (Noordin *et al.*, 2012). If this step is not taken, the innocent children will be the ones to suffer.

The definition of abandoned baby (*laqit*) in Islam clearly provides fornication or adultery as one of the causes of baby dumping. It seems that this cause is common in all jurisdictions since thousands of years ago. Based on the concept of 'prevention is better than cure', the Islamic law strictly prohibits adultery and regards it as a serious criminal offence. The Quran states, "Do not approach adultery; it is indeed an abomination and an evil way" (Qur'an, Isra: 32). In fact, it is prescribed as a grave sin in the eyes of Allah, which requires sincere repentance from the adulterer (Qur'an, Furqan: 68-69). The Qur'an prescribes punishment of 100 lashes for fornication (Qur'an, Nur: 2). According to al-Qaradawi, zina is a crime under the Islamic law that opens the gate for other crimes. Believers should therefore distance themselves from anything that could lead them to commit such a wrongful act (Al-Qaradawi, 1995). Based on this provision, it is very clear that the rationale of prescribing the punishment by the shari'ah is to serve as deterrence and not actually the infliction of harm (Al-Qurtubi, 2002). The fact that four reliable witnesses are required to prove adultery equally underscores the fact that it is meant to be for deterrence purposes since it will be very difficult for such witnesses to witness such a crime at the same time (Audah, 2005).

For those who may think of committing baby dumping for financial reasons, Islam makes it clear that the sustenance of the baby is in the hands of Allah. The Qur'an states "Kill not your children for fear of want. We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin" (Al-Qur'an, 17: 31). The

Prophet (PBUH), in response to a question asked, "what is the greatest sin?" replied, "To ascribe partner to Allah, when he is the one who created you." "What next?" asked the companion, and the Prophet (PBUH) replied saying, "To kill your child out of fear that he will share your food" (Muslim, Vol. 9; Hadith 6861; Bukhari, Vol. 6; Hadith, 4761).

A further supporting fact about the Islamic law's approach to preventing baby dumping is the fact that Islam allows marriage of girls without specifying a particular age limit. The Qur'an does not specify any specific age for marriage. However, the Qur'anic verse states that, "And test the orphans [in their abilities] until they reach marriageable age" (Qur'an, Nisa: 6); by age of marriage in this verse, Allah refers to attainment of adulthood (Al-Baghwy, 1997; Jimeta, 2008). This position helps girls who attain maturity to lawfully get married and satisfy their sexual urge without indulging in *zina*, thereby leading to pregnancy outside their matrimonial home.

Islam promotes *al-'amr bi al-ma'ruf wa al-nahyu 'an al-munkar* (calling others to do good and prevent wrong doing). The Qur'an, in several places, encourages believers to call each other to good and prevent wrong doings (Qur'an, Ali Imran, 3: 104 and 110). Taking this approach will enlighten the potential parents of the danger and repercussion of the crime of baby dumping in this world and in the hereafter, and help in curtailing this serious crime because it discourages the practice and all acts that lead to it.

Further protection is manifested through provision on punishment of wrong doers accordingly if the crime is committed so that it will serve as deterrence to the individual and to others. If the baby dies as a result of the dumping, the offender will be punished based on the principle of retribution. However, if it has not resulted in death, the ta'azir (discretionary) punishment will be the appropriate punishment for the crime (Al-Subail 2005). Finally, it is important to provide for reformation of the offenders after their punishment. This will help in preventing return to the crime because if they are reformed, they will become good persons and hence there will be no chances of returning to the crime (Danbazau, 2007).

The Islamic law further protects babies who are dumped by enjoinment of picking up. However, the nature of this protection is more on reforming the act of dumping rather than preventing. Muslim Scholars opined that picking a dumped baby is a very commendable act of piety that comes next to the belief in Allah (Al-Subail, 2015). This opinion is premised on the Qur'anic provision that repeatedly calls for the respect of the sacred of the life of human beings (Qur'an, al-An'am 6: 151). In fact, the Qur'an states that saving a single life of a human being is like saving the life of the whole mankind (Qur'an, Maaidah 5: 32). Islam enjoins to be good to others as it states, "And do good that you may prosper" (Al-Quran, Surah al-Hajj, 22: 77). It follows that the dumped baby can be taken care of either by the finder

who is qualified or surrendered to the government (al-Sarakhsi, 2010; al-Hattab, 1992; al-Dimyati, n.d.). If that happens, the innocent baby will enjoy better protection.

PROTECTING BABIES FROM BEING DUMPED IN MALAYSIA

Several factors could be attributed as the causes of baby dumping in Malaysia. A factor that is generally seen as the common cause of baby dumping is extra marital relationship. When young girls get pregnant outside marital ties, the baby becomes a burden in many aspects. It affects the mother socially, educationally, financially and emotionally. In a society like Malaysia, religion is valued and the social norm rejects immorality, where a woman who gets pregnant outside her matrimonial home will be rejected by the society (Yousif, 2004). Similarly, having a baby outside the marital home will have a serious financial implication on the girl. This is because since the child lacks a legitimate father, the mother becomes responsible for the training and upbringing of the child. Under the Islamic law, even if the person responsible for the pregnancy is known and has acknowledged responsibility for the pregnancy, he is not considered as the father of the child that will be saddled with the financial responsibility of the child's upbringing (Gunaim, 1995).

Further, educationally, the child will be a source of disturbance and problem for the mother. It is a fact that child upbringing requires time and energy; where the child is legitimate, the family especially the father can support the mother in raising their child. If the child is illegitimate, however, the mother will do everything alone without the support and assistance from the father. This will seriously affect her educational pursuit. Psychologically, having an illegitimate child will no doubt affect a woman especially in a social setting like that of Malaysia, where religious and cultural norms are highly respected. If the society rejects the woman for that action, she will feel isolated and will have psychological trauma (Smith, 2004).

The effect of ratification of the Convention on the Rights of the Child (CRC) by the Malaysian government has led to the enactment of the Child Act 2001 (the CA) (Act 611) (Khalil, 2001). Generally, children in Malaysia enjoy special protection under the CA. In relation to protection of babies from dumping, the CA regards the act of dumping or abandonment as an offence punishable under the law from a fine not exceeding twenty thousand ringgit to imprisonment for a term not exceeding ten years, or both [Child Act 2001, section 31(1a)].

The CA also impliedly protects an unborn foetus from being dumped through protecting the unwedded mother of the child as part of children in urgent need of protection [Child Act 2001, section 41 (2)(d)]. Although the law obviously attempts to protect a pregnant female child, it indirectly provides protection for the pre-born baby as this provision is in fact included to give protection to unborn babies so that they are delivered in a safe and protected place

and at the same time, the scenario of baby dumping can be decreased (Majid, 2002). Dumping of babies is also regarded as a criminal offence punishable under the Penal Code with imprisonment for a term up to seven years, or with a fine, or both (Malaysian Penal Code, Act 574, section 317; Rathakrishnan, 2013).

Although the act of baby dumping and its punishment have been stated by existing laws in Malaysia, this unfortunately does not absolve a person's responsibility for the dumping or any other criminal liability as a result of the dumping. By virtue of the vulnerability of the baby and its inability to protect itself, death, injury and any form of abuse can result from this action. The illustration of section 317 of the Penal Code clearly buttresses this point. According to the illustration, the punishment for dumping a baby does not stop the court from administering further punishment for harm or injury caused to the baby as a result of the dumping.

The scenario and circumstances surrounding the dumping will largely determine the nature of the *mens rea* (criminal intention) and the *actus reus* (criminal action) of the offence (Abdul Rahim, 2012). Where the baby is put inside a plastic bag or thrown inside a gutter, the probability in all these situations is that the child will die, hence amounting to culpable homicide. The Penal code states, "Whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide" (Penal Code, Section 299; see also Section 300 of the Penal Code).

On the contrary, where the act of dumping is made in such a manner that death is unlikely such as dumping the child in a mosque, Police station or motherless baby's home but unfortunately results in death, it will be unreasonable to charge the offender under section 317, and there is a need to further charge the offender under section 304 which os provided for culpable homicide not punishable with death.

Where the child dies as a result of the dumping and such act is done by the mother immediately after the child's birth, she could have lesser punishment if she could establish that she became mentally disturbed as a result of the child birth and thereby dumping the baby. Such act is referred to as infanticide by the Penal code (Section 309A). The punishment for the offence is prescribed, "Whoever commits the offence of infanticide shall be punished at the discretion of the Court, with imprisonment for a term which may extend to twenty years, and shall also be liable to fine" (Section 309B of Penal Code).

The punishment provided for baby dumping is a positive move towards protecting children from being dumped. With the provision of the Penal Code that provides for even a more serious punishment in case of death or other harm to the child, deterrence will be achieved and that is very commendable. Similarly, the Malaysian government has equally embarked on campaigns on secondary

school girls on matters relating to sexuality to fight against the crime of baby dumping, according to Women, Family and Community Development Deputy Minister, Datuk Azizah Mohd Dun; to tackle baby dumping, the ministry now has seven programmes which include the National Policy and Plan of Action on Reproductive Health and Social Education, introduced in 2009. Besides that, the Reproductive and Social Health Programme (Pekerti) was introduced in 2012 as a co-curricular activity in schools, which targeted students in Year Six, Form Three and Special Education. In 2012, 2,376 students from 33 schools took part in the programme. The project was then implemented in 2014 by carrying out Training for Trainers (TOT) course at three primary, secondary and special education schools in September 2014 (New Straits Times online, 19 June 2014).

There are also efforts to prevent baby dumping by non-Governmental organisations (NGO) through protection of unwed mothers until delivery of the baby. These include Raudatus Sakinah, KEWAJA, Darul Wardah, etc. (Rumah Perlindungan Wanita, n.d.). It is also interesting to note that apart from legal sanctions and social programmes to tackle baby dumping, Orphan Care (an NGO) introduced Baby Hatch facility in 2008 to reduce cases of baby dumping. Through the Baby Hatch facility, a person may place his or her baby in a safe place without dumping him (Orphan Care Children, n.d.). Even though there is contention that this kind of protection may encourage more babies to be dumped and act of adultery, so far there is no research done that proves this. The contention seems to be a mere contention. Furthermore, before the establishment of the baby hatch, the number of abandoned babies was alarming. Meanwhile, where babies are abandoned, something must be done in order to protect the dumped babies. These are positive efforts that will immensely help in reducing the cases of baby dumping at unsafe places.

Baby dumping is contrary to the CRC for which Malaysia is a signatory. Baby dumping contravenes the provision of the Convention on the Rights of the Child which states that every child has the right to know and to be cared for by his parents (Article 7 of the CRC). It equally contravenes the right to survival and development (Article 6 of the CRC) and the right to dignity provided by the CRC (Article 19 of the CRC).

PROTECTING BABY FROM DUMPING UNDER NIGERIAN LAW

Several factors are attributable as the causes of baby dumping in Nigeria. Extra marital relation is no doubt a major cause of baby dumping. Due to fear of societal stigma, some women try to conceal the pregnancy and after delivery, dump the baby (Ojedokun & Atoi, 2012). After birth, the financial challenges associated with taking care of babies equally make mothers dump their babies (Ojedokun & Atoi 2012). Similarly, in Nigeria, before the Child's Right Act 2003 was

passed into law, the practice had been the expulsion of any female student that became pregnant before completing her secondary education. The situation was so bad that even pregnancy tests had to be conducted on the girls before they sat for their final examination. However, the Child's Right Act categorically states "A female child who becomes pregnant before completing her education shall be given the opportunity, after delivery, to continue with her education on the basis of her individual ability" (Section 2(5) of the Child's Right Act 2003). The implication of childhood/extra marital pregnancy on the educational pursuits of young girls will certainly push some of them into abandoning their baby after he/she is delivered (Ojedokun & Atoi, 2012). Similarly, poverty is another very important factor that contributes to baby dumping. Modernity, with its challenges and demands, has made the task of raising children very difficult. Providing children with their needs such as food, shelter, medical care and education could be very challenging and hence resulting in the dumping of babies by parents who they feel they cannot take care of their babies (Ojedokun & Atoi, 2012).

Baby dumping becomes problematic because it is unethical and grossly violates the dignity and sanctity of life of the most vulnerable members of the society (Ojedokun & Atoi, 2012; see Section 237 of the Penal Code). To that effect, the state must impose strict sanctions on all those who violate the rights of children.

The explanation to the section states that the section does not prevent the trial of the offender for culpable homicide if the child dies in consequence of the exposure or abandonment (Explanation to section 237 of the Penal Code). Going by the Penal Code, a person will be held directly responsible for any harm that befalls a child as a result of dumping. Even where a baby does not die or suffer harm as a result of dumping, baby dumping undoubtedly amounts to a denial of the child's right to dignity. According to the constitution, "Every individual is entitled to the respect of the dignity of their person, and accordingly, no person shall be subject to torture or to inhuman degrading treatment" (Section 34(1) of the Constitution of the Federal Republic of Nigeria, 1999). The Child's Right Act 2003 equally states that no child shall be subjected to any cruel or inhumane kind of treatment (Article 37 Child's Right Act 2003). It further states that "Every child has a right of survival and development" (Section 4 of the Act). The 1999 Constitution also states that every person has a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. In *Esabunor v Faweya* ((2008) 12 NWLR (pt 1102)) the Court of Appeal re-echoed the provisions of Section 33 of the Constitution and reaffirmed that any attempt to take the life of an individual outside the provisions of the Constitution is illegal and must be condemned.

Under the Criminal Code and the Penal Code, the act of causing the death of another person is a homicide punishable by law. The Criminal Code has clearly mentioned that a child that is born alive is capable of being killed. That indicates where a baby dumped immediately after its birth dies, the mother will be charged for murder (Section 307 Criminal Code).

This is similar to Malaysia, a mother who kills her baby due to disturbance of the mind caused by the child birth will get a lighter punishment for manslaughter and not murder under the Nigerian law. According to the Criminal Code, a woman who wilfully kills her child who is under twelve months old, and at the time of the killing, her balance of mind was disturbed because she had not fully recovered from the effect of childbirth or because of the effect of lactation following the birth of the child, is guilty of the felony of infanticide, and the woman is dealt with as if she has committed manslaughter (Section 237A Criminal Code).

The CRA states that a child can bring an action for any harm done to him before his birth. It states, "A child may bring an action for damages against a person for harm or injury caused to the child wilfully, recklessly, negligently or through neglect before, during and after the birth of the child" (Section 17(10) of the Act). This provision has clearly shown that a baby who is dumped is allowed by the Child's Right Act to institute a legal action against his parents or any person responsible for dumping him upon attaining maturity.

In a similar vein, the threat to child's health caused by dumping makes it contrary to the Child's Right Act 2003. This is because the Act has guaranteed the right of every child to good health and all acts or omissions that threaten the right of the child to good health are contrary to the Act. The Act states, "Every child is entitled to enjoy the best attainable state of physical, mental and spiritual health" (Section 13 of the Act).

The right to health is part of the rights reflected under chapter II of the 1999 Constitution (Fundamental Objectives and Directive Principles of State Policy), which provisions are non-justiciable (*Fawehinm v Abatcha* (1998) HRLRA p549; Section 13 of the 1999 Constitution). The Child's Right Act 2003 equally guarantees the rights of the child to protection from all forms of harms and injury (Section 11 of the Act).

Nigeria is a signatory of the CRC and the African Charter on the Right and Welfare of the Child. Baby dumping is clearly a contravention of both instruments. The African Charter on the Right and Welfare of the Child guarantees every child the right life (Article 5), right against torture and cruelty (Article 16), right to parental care and protection (Article 19), and the right to good health which baby dumping contravenes (Article 14 of the African Charter on the Right and Welfare of the Child).

The punishment provided by the several laws mentioned is a good means in protecting babies from being dumped

due to the deterrence involved in the punishment. Similarly, the non-expulsion of young girls from school is equally a good step because it prevents dumping due to fear of education (Section 2(5) of the Child's Right Act 2003). Meanwhile, creating awareness and addressing poverty will equally help in protecting babies from being dumped. Baby dumping in Nigeria is a crime and the Nigerian law is very clear to the effect that anyone who dumps a baby and thereby causes harm to a baby will face the full wrath of the law. There is no gain saying the fact that the punishment provided under the law in Nigeria is commensurate to the wrong being done to the child. However, the enforcement mechanisms need to be improved to enable the law to effectively work for the good of our children. The Police, courts and social workers need to be trained and retrained on the effective ways of ensuring that the laws are effectively harnessed for the betterment of all. Even if the laws are in place, if the ordinary man does not know of the existence of the law, the effectiveness of the law cannot be appreciated. It will therefore be proper to state that enlightenment needs to be made on the existence of the law and punishment provided by the law for baby dumping. In order to realise the much needed deterrence, trial of cases of baby dumping needs to be given the highest level of publicity.

CONCLUSION

Baby dumping is a crime under the Islamic law, Malaysian law and Nigerian law. The crime attracts similar punishment in the form of sanction under all laws. Although under the Islamic law, there is no fixed punishment, the punishment can be higher depending on the effect of the dumping on the baby. The Islamic approach of prevention will equally be a suitable and appropriate approach to be applied in Malaysia and Nigeria in tackling the menace of baby dumping. Prohibition of adultery, intoxication and all forms of evil is a good measure towards preventing baby dumping. The permission of early marriage and promotion of justice in the distribution of wealth so that poverty will be reduced are positive steps towards the prevention of the crime of baby dumping. In view of the seriousness of this crime and the personalities involved, it is suggested that campaign on sexuality needs to be improved. The government needs to create and improve motherless baby homes for the purpose of taking care of dumped children. Most importantly, the government should allow parents who cannot take care of their babies to keep such babies in such homes for that will significantly reduce the cases of dumping. The sanctions provided by the Malaysian and Nigerian laws are reasonable and satisfactory; however, to make the laws more effective, there is a need to ensure that proper investigation is done to apprehend and sanction wrong doers in accordance with the law.

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War Crimes and the Downing of Malaysian Airliner MH-17

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ABSTRACT

The downing of Malaysian Airliner MH 17 is not the first incident of shooting down a civilian airliner. There are several other cases where civilian aeroplanes carrying passengers were shot down. The case of MH 17 is a recent incident that attracts condemnation from the international community. MH 17 was shot down within the territorial air space of Ukraine, an area under the control of the separatists who are fighting against the government of Ukraine. It was alleged that the airliner was downed by the separatists who are enjoying the support of the Russian government. The same accusation is levied against the Ukrainian government. Thus, this article examines the shooting down of the Malaysian airliner MH 17 and determines who should be responsible for the heinous crime. It examines whether the conflict in Ukraine amounts to an international armed conflict under international humanitarian law (IHL) which can be linked with the downing of MH 17. The article further examines the probable responsibility and jurisdictional problems to be faced in prosecuting the crime of shooting down MH 17 and the possible claims for compensation to the victims' family. The article posits that the situation in Ukraine is indeed an armed conflict and the shooting down of Malaysian airliner MH 17 constitutes a war crime of targeting civilians as envisaged under the Statute of the International Criminal Court (ICC). The jurisdictional problems in prosecution of the crime may be addressed by invoking universal jurisdiction. It is recommended that an international criminal investigation should be launched on the downing of MH 17 in order to find the culprits responsible for the crime for the purpose of subsequent prosecution for war crimes and compensation claims.

Keywords: MH 17, Ukraine, civilians, armed conflict, war crime

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INTRODUCTION

The current crisis in the eastern part of Ukraine between the Ukrainian Army and

the Russian separatists who are fighting for regional autonomy has a relationship with the downing of MH 17. The conflict in the eastern Ukraine is connected with the recent annexation of Crimean and Sevastopol by the Russian Federation. Our concern with the Ukrainian conflict is central for the purpose of establishing and linking the shooting of MH 17 with war crimes. The existence of an armed conflict is a condition precedent to the commission of war crimes. Thus, it is necessary to establish the existence of either type of armed conflict before a wrongful act amounts to a war crime. In essence, the downing of MH 17 can only constitute a war crime if the armed conflict in eastern Ukraine has influenced or played a vital role in shooting down the plane.

The offence of war crime, as envisaged under Article 8 of the Statute of the International Criminal Court (ICC), may take different forms. The crime can be committed in either international or non-international armed conflict, provided that the wrongful act is directed against the people protected under the Geneva Conventions and other laws and customs applicable in armed conflicts. Thus, the downing of Malaysian airliner MH 17 with 298 civilian passengers on board may constitute a war crime since it has satisfied the *actus reus* of the core international crime - war crime. This may raise issues concerning the appropriate venue for the prosecution of the crime and whether universal jurisdiction can be invoked in order to allow for the prosecution of the crime in the ICC. Another issue of concern is the possibility for compensation to the victims' family, which may be through judicial or non-judicial process, as in the case of Iranian Air Flight 655.

A BRIEF BACKGROUND OF THE UKRAINIAN CONFLICT AND THE DOWNING OF MH 17

The current crisis in Ukraine can be traced to the Russian annexation of the Crimean peninsula. It was a direct aftermath of the Ukrainian revolution in February 2014, which forced President Viktor Yanukovych to leave the country for Russia. Following this event, the next day, the Ukrainian parliament impeached the President in flagrant abuse of the laid down constitutional due process ("Ukraine's Political Crisis", 2014). The parliament constituted a new interim government and an interim President. The newly constituted government of Ukraine has been considered as illegitimate by the Russian government. According to Russia, Yanukovych is still the Ukrainian president being the democratically elected president who was unlawfully deposed (Putzier, 2014). However, the United States of America, the European Union and the United Nations have recognised the newly constituted interim government in Ukraine despite the fact that due process was not followed in the usurpation of the elected president ("US, EU, UN Recognize", 2014).

It is important to mention that Crimea has been annexed by Russia despite

condemnation from the West and the United Nations. The Crimean accession was followed by another secessionist's movement from the eastern part of Ukraine (Byers-Lane, 2014). The secessionists are agitating for a regional autonomy and Russia has been accused of giving support to the rebels. Subsequently, Russia amassed a large number of its military on the Ukrainian border and it threatens to invade should the Ukrainian government continue to crackdown on the Russian separatists (Mearsheimer, 2014). Nevertheless, the Ukraine government continued to crackdown on protesters in the eastern Ukraine and this led to armed confrontations between the Ukraine Army and the separatists. Thereafter, Russia began to provide arms and diplomatic support to the separatists who are more or less dragging the country toward civil war (Chandrashekhar, 2015).

Meanwhile, on 17 July 2014, MH 17 was shot down when it was cruising over the air space of the Ukrainian territory under the control of the eastern separatists. The Malaysian Airliner en route from Amsterdam to Kuala Lumpur was shot down with 298 passengers on board including the cabin crews, and all the passengers died (Ngui, 2014; Rusli, 2014). A report of the preliminary investigation shows that MH 17 was flying on a safe zone and the airliner had neither mechanical nor crew fault. An initial review of the MH 17 black-box data revealed that "the crash was caused by shrapnel puncturing the fuselage, causing massive decompression and breakup of the Boeing 777 that had been flying at an altitude of more than 33,000 feet" (Zeitchik *et al.*, 2014).

However, despite the fact that most experts believe the plane was downed by the Russian separatists, the report has not assigned blame or responsibility on anyone at this stage. The separatists in the eastern Ukraine have already dismissed any allegation linking them with the downing of MH 17 claiming that they lack a weapon that can shoot a plane cruising at 33,000 feet ("MH17 Preliminary", 2014). Russia on its part has claimed to have a record of a Ukrainian combat jet approaching close to the MH 17 before it was shortly shot down ("Dutch report", 2014). In view of the allegations and denials made, the nagging question has been who is responsible for the downing of MH 17 and whether the downing of the plane has any nexus with the conflict in eastern Ukraine in order to qualify the act as a war crime. It is vitally essential that the second limb of this question be answered in the affirmative before the shooting of the plane constitutes a war crime since war crimes can only be committed during an armed conflict.

THE CONCEPT OF ARMED CONFLICT AND THE UKRAINIAN CONFLICT

Although the term armed conflict is the preferred term in the contemporary IHL instruments, these instruments do not define the term. For instance, there is no definition of 'armed conflict' in the Geneva Conventions and their two Additional

Protocols. Substantial evidence suggests, in fact, that the drafters of the Geneva Conventions purposely avoided any rigid formulation that might limit the law's field of application. However, jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has clarified the definition of "armed conflict". In *Prosecutor v. Tadic*, Case IT-94-1-AR72 (Oct. 2, 1995), 35 I.L.M. 32, 54, the Tribunal's first case, the Appeals Chamber defined the term "armed conflict" in the following words:

> [A]rmed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.

Thus, armed conflict generally refers to military confrontations between two or more States, a State and a body other than a state, a state and a dissident faction or two ethnic groups within a state territory (Carswell, 2009). Based on the above definition and as also inferred from the IHL legal instruments, armed conflict can be categorised into two broad categories, namely, International armed conflict' and non-international (internal) armed conflict (Reisman *et al.*, 1988). This definition has shown that the situation in the eastern Ukraine is indeed an armed conflict between a State and an armed group, which is covered by the Geneva Conventions.

It is important to clarify whether the conflict in Ukraine is international armed conflict or non-international armed conflict because war crimes connected with international armed conflicts are distinguished from those connected with non-international armed conflicts, as provided in Article 8 of the Statute of International Criminal Court (ICC) (Henckaerts & Doswald-Beck, 2005). International armed conflict is defined as "a declared war or any other armed confrontation between two or more States, even if the state of war is not recognised by one of them". It also includes wars of national liberation and cases of occupation (ICRC, 2008). On the other hand, non-international armed conflict refers to protracted armed confrontation between governmental armed forces and one or more armed groups, or between such armed groups arising on the territory of a State. Article 1(2) of the Additional Protocol II to the Geneva Conventions of 1949 further clarifies that armed conflict does not include situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts. However, a non-international armed conflict may change its character to internationalise armed conflict where there is involvement of a state in support of an armed group (Vite, 2009).

Therefore, the conflict in the eastern Ukraine is a non-international armed conflict since it involves a state and an armed group. However, this raises question as to whether the involvement of Russia in the conflict in eastern Ukraine has internationalised the armed conflict or

not. In the first place, the *Tadic's* test for determining whether an internal armed conflict has become international is whether "some of the participants in the internal armed conflict act on behalf of an other State." A similar question was raised in the *Military and Paramilitary Activities in and against Nicaragua* (Merits) *case*, (1986) ICJ Rep., where the International Court of Justice (ICJ) had to determine the responsibility of the United States for the armed conflict between the *contras* it had sponsored and the Nicaraguan government. The Court applied the "effective control" test to determine whether an insurgent's acts can be attributed to a State. In applying this test to the facts, the ICJ found that despite a high degree of participation and a general degree of control over the *contras*, who were highly dependent on that foreign assistance, the United States was not responsible for the violations of humanitarian law perpetrated by the *contras* since those violations "…could be committed by members of the *contras* without the control of the United States."

However, the *Tadi´c case*, as cited above, has overruled the strict "effective control" test espoused in the *Nicaragua case*, declaring the ICJ's reasoning "unconvincing […] based on the very logic of the entire system of international law on State responsibility." Consequently, an internal armed conflict may be considered as an international armed conflict if a foreign State has overall control over the conduct of the warring parties. Overall control test requires that a State has a role in organising, coordinating or planning the military actions of the group, in addition to financing, training and equipping or providing operational support to that group but that it "does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation." This particular test may be invoked to determine whether the support Russian has provided to the separatists in the eastern part of Ukraine internationalizes the armed conflict.

The second limb of the *Tadic's* test for determining whether an internal armed conflict has become international is whether "another State intervenes in that conflict through its troops". In the *Prosecutor v. Bla˘ski´c*, Case No. IT-95-14, Judgement, 3 March 2000, the ICTY Trial Chamber after examining the evidences before it found that Croatia's direct interference in the conflict in Bosnia-Herzegovina turned that internal conflict into an international one. In the case of *Prosecutor v. Raji´c,* Case No. IT-95-12-R61, the ICTY found that an internal armed conflict could be rendered international if troops *intervene* "significantly and continuously".

Therefore, based on the analysis of the decisions of the ICTY, the current conflict in Ukraine has been internationalised by the involvement of Russian. The Russian support in terms of arms, diplomatic support and military involvement has internationalised the armed conflict and consequently, the laws of international armed conflict apply. This raises question as to who bears the responsibility for the possible war crimes committed by the downing of Malaysian Airliner MH 17.

WAR CRIMES AND THE DOWNING OF MH 17

War crimes are grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in both international and non-international armed conflicts as outlined in Article 8(2)(a) of the ICC Statute. The provision of Article 8 of the Rome Statute has provided for different categories of war crimes. It starts by defining war crimes as contained in the various provisions of the Geneva Conventions - meaning grave breaches of the Conventions. The second aspect of the provision considers other serious violations of the laws and customs applicable in international armed conflict within the established legal framework of international law as provided in Article 8(2)(b). Thirdly, the provision addresses non-international armed conflict and has made serious violations of Common Article 3 of the Geneva Conventions a war crime. Since the provision of Article 8 of the Rome Statute has spelt out several acts that constitute war crimes, we are only concerned with the acts that relate to targeting a civilian plane during armed conflicts as a war crime.

To begin with, in case of grave breaches of the Geneva Conventions, it is a war crime to wilfully kill a person who is protected under the Geneva Conventions or to cause extensive destruction of protected property, which is not justified by military necessity as contained under Article 8 (2)(a)(i) and (iv) of the ICC Statute. This provision depicts that killing of civilians who are not participating in hostilities as well as destruction of civilian property that has not been used for military purpose as war crimes. Invoking this position of the law, the shooting of MH 17 which is a civilian property not used for military purpose, as well as the killing of the 298 civilian passengers on board clearly constitutes war crimes. Thus, the act of shooting a civilian plane not used for military purpose and the killing or death of civilian passengers on board amount to grave breaches of the Geneva Conventions and therefore constitutes a war crime under Article 8(2)(a) of the ICC Statute.

In an international armed conflict, Article 8 (2)(b)(i) and (ii) provides that intentionally directing attacks against the civilian(s) or civilian objects which are not used for military purpose is a serious violation of the laws and customs applicable in international armed conflicts. According to Article 8 (2)(b)(iv) of the ICC Statute, it is equally a serious violation of laws and customs applicable in international armed conflicts to intentionally launch an attack with the knowledge that such "attack will cause incidental loss of life or injury to civilians or damage to civilian objects.… which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."

It can be asserted that the aforementioned provisions clearly show that directing an attack against civilian(s) or civilian objects, which have not been used for military purpose constitutes a serious violation of the laws and customs

applicable in international armed conflict. MH 17 is a civilian plane that is carrying civilians. Thus, directing an attack against MH 17 with civilians on board constitutes a serious violation of the laws and customs applicable in an international armed conflict, and this constitutes a war crime.

However, it is significant to mention that for a crime to be punishable as a war crime, it has to satisfy not only the *actus reus* of the crime but the requisite mental elements of the offence. The Rome Statute provides that unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge (Detter, 2000). A person is said to have intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events (Article 30(2); Keim, 2014).

While knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. This element of war crime is important in determining the responsibility for the commission of the crime. In this context, it is not yet due to ascertain whether the shooting down of MH 17 was done with the requisite mental element of war crimes. This is in view of the fact that international or criminal investigation on the commission of the crime has not been done.

It is important to further stress that war crimes can only be committed during an armed conflict i.e. the crime must have some nexus with an armed conflict. In the case of *Tadić* cited earlier, the ICTY has made it clear that for an act to constitute a war crime, it must be closely related to the armed conflict as a whole. Likewise, in the case of *Prosecutor v. Kayishima,* Case No. ICTR-95-1-T, 21st May 1999, the Tribunal emphasises the need for “a direct link between crimes committed against these victims and the hostilities.” The ICTY in the case of *Prosecutor v. Kunarac*, *Case No.* IT-96-23/1-A, Judgement, 12 June 2002, has clarified that the mere existence of an armed conflict does not qualify every act of criminality as a war crime. The armed conflict must have influenced and played a significant role in the commission of the offense. However, the Tribunal agrees that it suffices the requirement of the law if “the perpetrator acted in furtherance of or under the guise of the armed conflict.” In other words, it constitutes a war crime if the conduct took place in the context of and was associated with an armed conflict.

Furthermore, for a war crime to be committed, the violation must be directed against protected person under IHL, it must be a breach of customary or treaty IHL binding on the accused, it must be a serious violation that involves grave consequences for the victim and the accused is aware of the existence of an armed conflict.

Applying this position to the case of MH 17, it is obvious that the downing of the airliner was done during an armed conflict.

Whoever might have shot down the plane did so under the pretext that it could be an enemy plane. The armed conflict in eastern Ukraine influences and plays a vital role in shooting down the Malaysian airliner. This conviction can be inferred from the fact that had the situation in eastern Ukraine was a 'peace time', it would be difficult or even impracticable for someone to just shoot down a civilian plane. Obviously, the persons on board were protected under IHL and the downing of the plane has serious consequences on the victims. In this context, the downing of MH 17 satisfied the law in terms of the requirements for war crimes. It is however not clear who bears the responsibility for the crime committed despite the fact that the plane was shot down in the airspace of Ukraine under the control of the Russian separatists.

ISSUES OF RESPONSIBILITY, JURISDICTION AND COMPENSATION

In the first place, international investigation has commenced on the shooting down of MH 17 but the report of the investigation is not yet available to be able to rely on for the purpose of determining responsibility. However, various accusations have been directed towards the Russian separatists in eastern Ukraine since the plane was downed within the territorial airspace under their control (Carroll, 2014). If the allegations are established, the separatists will be responsible for the crime committed. This will raise a question as to the extent of the Russian involvement in the armed conflict. As we have earlier established that where an armed group has received support from a particular state in an armed conflict, the character of the conflict would change to internationalised armed conflict. Meanwhile, if the allegations against the Kiev government turn out to be true, then the Ukrainian government should be held responsible (Pusztai, 2014).

Thus, the issue of state responsibility for acts of its agents either *de facto* or *de jure* agent cannot be denied. In this context, the separatists may be viewed as *de facto* agent of Russia. However, for responsibility to stem from this relationship, the law requires that the separatists are not only paid or financed by Russia and their actions coordinated by Russia, but also that they received specific instructions concerning the commission of the unlawful acts in question. This standard can only be established or denied when a criminal investigation on the downing of MH 17 has been concluded.

It is significant to mention that the principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. According to Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission, if it is proven that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The justification for this rule is to preclude States from

denying international responsibility by making private individuals carry out responsibilities that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility (Sassoli, 2002). In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other hand to disassociate themselves from such conduct when these individuals breach international law. In invoking this assertion, one may be tempted to conclude that the Russian involvement in the affairs of the separatists in eastern Ukraine may confer responsibility on Russia for any breach of international law committed by the separatists.

The next issue of concern is the venue for the prosecution of the perpetrators of the crime. MH 17 is an airliner belonging to Malaysia; it was downed within the territorial airspace of Ukraine under the control of the Russian separatists and the passengers on board made up of mainly (193) Dutch nationals. The act of shooting down of the plane could have been done by Ukrainian nationals or Russians as alleged, who are subject to either Ukrainian or Russian jurisdiction as the case may be (Füllsack, 2015). This is based on trite international criminal law consideration of territoriality of where the offence was committed and the nationality of the perpetrators or victims of the crime (Zemach, 2011). The problem is, however, what will happen to the interest of Malaysia being the owner of the airliner and Dutch government that suffers the highest number of victims? Does it mean that the Malaysian and Dutch governments should move to Ukraine for the purpose of prosecuting the crime?

In order to solve these probable jurisdictional conflicts, it is important to reflect on the nature of the offence committed. Since the crime alleged to have been committed is a war crime, it is subject to universal jurisdiction. Universal jurisdiction is a criminal jurisdiction based solely, on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction (Zemach, 2011). Under normal circumstances, a State assumes criminal jurisdiction only over crimes committed on its territory or by its nationals. However, IHL confers universal jurisdiction over grave breaches on all States. This means that states are required to prosecute war criminals, regardless of their nationality, the nationality of the victim, and where the crime was actually committed (Sassoli *et al.*, 1999). However, universal jurisdiction has no link to territoriality or nationality (of both the perpetrator and the victim) between the State and the conduct of the offender, nor is the State seeking to protect its security or credit (O'Keefe, 2004).

It is significant at this juncture to point out that universal jurisdiction only serves as a substitute for other countries who

would be in a better position to prosecute a crime by stepping in for the state in whose territory the crime was actually committed and has failed to prosecute for whatever reason. In other words, the exercise of universal jurisdiction centres on the inability or failure of the concerned state on whose territory the crime was committed to prosecute the criminals (O'Keefe, 2004). Therefore, it can be submitted that invoking the notion of universal jurisdiction to the crime of downing of MH 17 will solve the probable jurisdictional conflicts or forum inconveniences that may arise. The principle will confer jurisdiction on other States other than Ukraine to prosecute the crime.

More aptly, the crime can be prosecuted in the International Criminal Court (ICC). That is the reason behind allowing the ICC to assume jurisdiction over war crimes, particularly when the state concerned is unwilling or unable to genuinely carry out the investigation or prosecution (PCHR, 2010).

Furthermore, Articles 49, 50, 129 and 146 of the four Geneva Conventions respectively require that in cases of grave breaches of the Conventions, states are 'under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.' The preamble of the ICC statute has called on states to cooperate for the purpose of ensuring the effective criminal prosecution of international crimes. It can be further submitted that the jurisdiction of the ICC is the suitable neutral forum for the prosecution of the crime of downing of MH 17.

Another issue that calls for concern is the issue of claims for compensation by the families of the victims of MH 17. Traditionally, violations of international law and IHL in particular are attributed to States and measures to stop, repress and redress such violations have to be directed against the State responsible for the violations. There was no provision for compensation in case of violation of the international law. Today, however, Article 91 of the Additional Protocol I to the Geneva Conventions of 1949 provides that a Party to the conflict which violates the provisions of the Conventions or of the Protocol shall, if the case demands, be liable to pay compensation. Thus, the families of the victims of MH 17 may claim for compensation against whichever state that is found responsible. If the Russian separatists are responsible for the downing of MH 17 as alleged, it then follows that Russia may equally bear responsibility and may be liable to pay compensation for the families of the victims of the Malaysian plane. Similarly, where the allegation against Ukraine has been established, the Kiev government will be responsible for the crimes committed and may as well pay compensation.

The issue of compensation may also be considered from the perspective of the Iranian Air Flight 655 incident. When the United States Navy shot down the Iranian plane in July 1988, Iran filed a suit against the United States in the International Court of Justice (ICJ). Though the United States failed to admit responsibility and liability for the downing of the plane and has shown no remorse for the wrongful act, the

compensation was paid. The case was settled out of court through non-legal process. The United States agreed to pay compensation of USD 61.8 million to the 243 Iranian passengers on board for Iran to discontinue the case (Ghasemi, 2004). It is important to mention that the United States did not admit liability for the heinous act but it has paid the compensation *ex-gratia* to Iran. Therefore, it can be submitted that the case of MH 17 may equally be settled through similar process, particularly where the report of the investigation shows that legal responsibility cannot be clearly established.

CONCLUSION AND POLICY RECOMMENDATIONS

The conflict in the eastern part of Ukraine has reached the required threshold for an armed conflict. The Russian involvement and support for the separatists in the conflict has internationalised the armed conflict. The downing of Malaysian airliner MH 17 in the territorial airspace of Ukraine under the control of the separatists is indeed a heinous act against humanity. Shooting down of a civilian plane that has nexus with an armed conflict may constitute a war crime under Article 8 of the Rome Statute. The party responsible for the commission of the crime has not been ascertained as international investigation into the incident is still going on. However, there are allegations that the plane might have been shot down by the separatists in eastern Ukraine, an accusation that has been dismissed by the group. Meanwhile, Russian support for the separatists may make Russia responsible should the accusation against the separatists turn out to be true. The prosecution of the crime committed may be done in the ICC where the concerned states fail to prosecute the perpetrators. Despite the recently released preliminary report of the joint investigation committee which highlights the causes of the downing of MH 17, it is suggested that a further independent criminal investigation should be launched into the downing of MH 17 in order to determine the party responsible for the crime in order to initiate criminal prosecution and obtain compensation for the victims' family.

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Admissibility and Jurisdiction before the International Criminal Court Regarding the Boko Haram Situation in Nigeria

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ABSTRACT

Terrorism is nothing new in present situations all over the world. Though there are different political manipulations of its definition, terrorism is a menace that affects the whole world at large. Boko Haram, a terrorist group based mainly in Nigeria started its first attack in 2004, and it has since been responsible for thousands of deaths of both Muslims and Christians in the country. The terrorist group is said to be demanding the adoption of the Islamic system of government and as a result has bombed many churches and schools. In 2011, the terrorist group attacked the United Nations Office in Abuja with the aid of one of its suicide bombers. The terrorist activities of Boko Haram in Nigeria have been under the purview and preliminary criteria known as preliminary investigations as carried out by the Office of the Prosecutor of the International Criminal Court since 2010. The Office of the Prosecutor came out with a report in 2013 that concluded there is a reasonable basis to believe that Boko Haram has been committing crimes against humanity of murder and persecution since July 2009. However, up until date, despite the abduction of over 300 schoolgirls by the terrorist group, the Nigerian government has not been able to bring the girls back or prosecute the perpetrators. When a State party to the Rome Statute has some form of armed conflict going on in its region, a referral may be made to the ICC to intervene. However, it must first be determined whether the crimes committed are those within the court's jurisdiction and also whether the situation is admissible especially with regards to the complementary criteria as provided for in the Rome Statute. This paper will look into the admissibility of the Boko Haram situation and whether the International Criminal Court has jurisdiction over the crimes committed.

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INTRODUCTION

Terrorism is a recurrent or some form of violence directed against human and non-human objects. This violence is usually carried out with the purpose of changing or sustaining at least a certain subjective norm or belief in at least one particular territorial unit or population. It is usually planned in secrecy at underground, unknown and probably ever-changing locations and members of such groups would normally hide their true identity and never disclose their whereabouts in order to protect their space and their violent agendas. In order to sustain their objectives and goals, continuous fear and violence are used (Gibbs 1989).

In United States, terrorist activity is said to encompass series of activities, which are ordinarily unlawful under the laws of the place where they have been committed. Some of these activities include:

> *The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organisation) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; a violent attack upon an internationally protected person...or upon the liberty of such a person; an assassination; the use of any biological agent, chemical agent, or nuclear weapon or device, or explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; a threat, attempt, or conspiracy to do any of the foregoing (Roach 2012) (8 U.S.C).*

Terrorism has also been defined as an intentional and politically-motivated violence perpetrated against non-combatant targets (civilians) by sub-national groups or clandestine agents (22 U.S.C). Therefore, in a situation where the Secretary of State of the United States confirms a group as a Foreign Terrorist Organisation – FTO; the following are the three consequences of being called a FTO. Firstly, the FTO may have its assets frozen; secondly, the FTO members are prohibited from entering the United States, and lastly, anyone who knowingly provides material support or resources to FTO is subject to criminal prosecution. Consequently, the resulting effects following a FTO designation could prevent Boko Haram from exponentially growing and continuing to torment Nigerians and the rest of the world (8 U.S.C) (18 U.S.C).

Christian Much believes that the International Criminal Court would play an important role in combating the surge of terrorism (Much, 2006). If a terrorist group is labelled an FTO, it will help the ICC to monitor its activities through data collected by governmental and non-governmental

organisations rather than if their activities are left to be on its own. After all, what all these terrorist organisations want is attention. The sooner seriously they are taken, the sooner they can be caught and prosecuted. Though terrorism in itself is not a crime under the Rome Statute, terrorists will usually normally commit crimes under the jurisdiction of the ICC in the form of crimes against humanity, genocide and in some cases, war crimes too (Watkins, 2011).

Boko Haram has its base in Nigeria. It has been described as a cultural movement that means 'refuse Western education' that started out as non-violent movement demanding the installation of full Muslim sharia law throughout Nigeria. Boko Haram is officially called Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad [people committed to the propagation of the Prophet's teachings and jihad]. It arose in Maiduguri, Borno, NE Nigeria, and has since spread across the nation's north, where Muslims are the majority and poverty is widespread; it is especially active in the states of Borno, Yobe, and Adamawa in the north east of Nigeria, especially in rural areas. Some have claimed that the frustration with the Nigerian government neglect and corruption has contributed to the influence of the group, which is loosely modelled on the Taliban. Boko Haram also has operated in areas of Cameroon and Niger bordering Northeast Nigeria, but has mainly sought a safe haven and to recruit there (Columbia Electronic Encyclopedia, 2014).

Boko Haram mounted its first attack in 2004 and has since been responsible for varying violence including church burnings in the North and killings of Christians and Muslims alike. Since the middle of 2011, Boko Haram has become more violent, more daring attacks such as on the UN offices in the capital city of Abuja, blowing up government buildings including police stations and attacking Christian churches during the Christmas holidays. Thousands have been killed as a result (American Foreign Policy Interests, 2012). Thereafter, the Boko Haram situation attracted the attention of the ICC through communications made by various NGOs and civil bodies especially making it easy for the ICC to intervene and give preliminary examinations because Nigeria is a State Party to the Rome Statute and has been a member since 27 September 2001.

The preliminary examination of the situation of Nigeria was made public in November 2010. It was initiated by the Prosecutor taking into consideration information on alleged crimes, including information sent by individuals or groups, States and non-governmental organisations, as well as additional information sought by the Office to analyse the seriousness of the allegations. Different groups committed alleged crimes at different times in different regions of Nigeria; however, this paper is interested in the activities of the Boko Haram. This paper seeks to look into the jurisdiction and the admissibility of the Boko Haram situation in Nigeria with regards to the pre-trial processes before the international criminal court. The ICC has been receiving communications (mostly

from non-governmental organisations) from Nigeria since 2005 but never from the Nigeria government. The communications reached 38 in 2011, 59 in 2012 and 67 in 2013 (OTP Report 2013).

THE PROCESS OF PRELIMINARY EXAMINATIONS BY THE OFFICE OF THE PROSECUTOR

The bulk of the process of preliminary examinations is the framework of decisions on jurisdiction and admissibility as it rests on the shoulders of the Prosecutor of the ICC but it is not final. It only helps to kick off the next process, which is the full investigation into a situation. When a situation in a particular country has been referred to the International Criminal Court, the Office of the Prosecutor (OTP) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute to warrant investigation by the Court. For this purpose, OTP analyses all situations brought to its attention based on statutory criteria and the information available.

Article 15 (1) & (2) of the Rome Statute provides that the Prosecutor may establish an investigation proprio motu (on their own) on the basis of information on crimes within the jurisdiction of the Court. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

In order to differentiate the situations that would give rise to an investigation from those that do not, the OTP has a sorting process that consists of 4 consecutive phases, namely:

a. In the first phase, the Office does an initial assessment of all information on alleged crimes received under Article 15 of the Rome Statute (which are called 'article 15 communications') to separate the information on crimes that are outside the jurisdiction of the Court. There are 4 crimes recognised by the Rome Statute and hence the ICC as well; thus, any crimes that do not fall within these four will disqualify such a crime to be prosecuted before the ICC.
b. In phase 2, the Office analyses all information on alleged crimes received or collected to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall under the subject-matter jurisdiction of the Court as per article 5 of the Rome Statute.
c. In phase 3, the Office analyses admissibility in terms of complementarity and gravity as per article 17 of the Rome Statute.
d. In phase 4, having concluded from its preliminary examination that the case is admissible prima facie, the Office, taking into account

the gravity of the crimes and the interests of victims, examines under article 53(1)(c) whether there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. For instance, several NGOs and even some Ugandans felt that since there were negotiations and conciliations going on with the Lord Resistance Army, the Ugandan government was too fast in jumping into laps of the ICC (Keller, 2008).

Article 15(6) states that if after the preliminary examination the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

From the Report on Preliminary Examination activities, 2011, the Office of the Prosecutor as at that time had not received any information with regards to the activities of Boko Haram. However, Nigeria was already being put through the preliminary examination process with regards to the killings that took place between July 2002 and April 2011, which led to the deaths of thousands of people in Nigeria as a result of inter-communal, sectarian and political violence. The OTP from their sources contended that these deaths were unevenly distributed over time and place (OTP 2011).

JURISDICTION AND ADMISSIBILITY

Article 15 (3) – (5) provides that if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case. The refusal of the Pre-Trial Chamber to authorise the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

The above provision shows that the process of determining whether there is jurisdiction and admissibility of a situation before the ICC is a continuous process that starts from the preliminary examinations, through full investigations, up until the pre-trial and finally the trial stage.

Jurisdiction of the ICC comprises of 3 parts and they all share the nemesis of whether a crime within the jurisdiction of the Court has been or is being committed. The first part is about temporal jurisdiction which looks into whether the crimes were committed from the date of entry into force of the Statute, which is from the 1st of July

2002 onwards, the date of entry into force for an acceding State, date specified in a Security Council referral or in a declaration lodged pursuant to article 12(3). The second part of jurisdiction assessment is relating to territorial or personal jurisdiction. Territorial or personal jurisdiction looks into whether crimes alleged were or are still being committed on the territory or by a national of a State Party of the Rome Statute or by a State not Party that has presented a declaration accepting the jurisdiction of the Court, or that it arises in a situation referred by the Security Council. The third part is concerned with material jurisdiction and this directly related to the crimes recognised by the ICC as provided for in the Rome Statute - genocide; crimes against humanity; war crimes; and aggression (OTP 2012).

The ICC will determine whether it has jurisdiction first before it considers the issue of admissibility. Article 19(1) of the Rome Statute provides that the Court shall satisfy itself that it has jurisdiction in any case brought before it. The provision further states that the Court may, on its own motion, determine the admissibility of a case in accordance with article 17 afterwards. It has been contended that the ICC does not get its jurisdiction from the inherent nature of the crimes within its jurisdiction but that it gets its authority from the specific surrendering of jurisdictional competence on the part of either the territorial or the national State of those that ratified the Rome Statute.

Admissibility looks into both complementarity and gravity. Complementarity is clear to a certain extent but not the same can be said of the gravity criterion. In the Ugandan case, the defence argued that since there was already some national proceedings going on in Uganda at the time with regards reconciliation and amnesty for war criminals, the Ugandan Government could be said to have fulfilled their part of willingness to take responsibility for the problems in their country. As a result, the ICC should not take the admissibility of the situation. However, the court ruled in favour of the Ugandan Government because the Ugandan Attorney General insisted that their Government would only look into the case of other suspects and surrender the cases before the ICC to be exclusively dealt with by the ICC (The Prosecutor v. Joseph Kony 2009).

The Report on Preliminary Examinations Activities, 2013 summarised the complementarity principle and the interests of justice in the following words:

> *Complementarity involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office, taking into consideration the Office's policy to focus on those who appear to bear the greatest responsibility for the most serious crimes. Where relevant domestic investigations or prosecutions exist, the Prosecution will assess their genuineness. Gravity includes an assessment of the scale, nature, manner and impact of the alleged crimes committed in the*

situation. The 'interests of justice' is a countervailing consideration. The Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (OTP 2013).

The 2012 report of the Office of the Prosecutor stated that there was a reasonable basis to believe that since July 2009, Boko Haram has committed the following acts constituting crimes against humanity: (i) murder under article 7(1)(a) and (ii) persecution under article 7(1)(h) of the Statute. The report stated that commencing from the July of 2009, the Boko Haram had propelled a widespread and systematic attack in the Northern part of Nigeria that has resulted in the execution and bombardments of more than 1,300 Christian and Muslims civilians in different locations throughout Nigeria including Yobe, Kaduna Borno, Bauchi, Katsina, Gombe and Kano States in the North, as well as Abuja, Kaduna and Plateau States in Central Nigeria. The frequent display of these violent activities shows that the group is well armed with the resources to carry out recurrent widespread and systematic attacks, and this exhibits that the group possesses organisational control and internal coordination to that effect.

These attacks were carried out in order to fulfil the mandate of the Boko Haram leadership, which is to establish an Islamic system of government exclusively in the Northern part of Nigerian notwithstanding the existence of the laws that may be guiding the Christians in the area. Opponents to this goal have been targeted as well. Boko Haram leaders or spokesmen have issued public statements revealing their intention to attack civilians in furtherance of this policy including a January 2012 ultimatum urging Christians to leave Northern Nigeria. The targeting of an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other ground is a constitutive element of the crime of persecution under article 7(1)(OTP 2012).

Article 7 of the Rome Statute provides that crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack and these acts include:

Murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under

international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Rome Statute).

In the 2013 Report on Preliminary Examination activities, the Office of the Prosecutor restated as they had already done in 2012 Report that there was a reasonable basis to believe that crimes against humanity had been committed in Nigeria, namely the acts of murder and persecution attributed to Boko Haram. Therefore, the Prosecutor has decided that the preliminary examination of the situation in Nigeria should cross over to the 3rd stage (admissibility) with a view to assessing whether the national authorities are conducting genuine proceedings in relation to those who appear to bear the greatest responsibility for such crimes and the gravity of such crimes.

However, with the abduction of over 240 school girl whom have been reported to be used as sexual slaves while others were married off without their consent, the crimes of humanity may extend to enslavement, rape, sexual slavery, enforced prostitution and forced pregnancy.

THE BOKO HARAM SITUATION IN NIGERIA

Boko Haram members are alleged to have killed numerous Christian worshipers, police officers and soldiers, as well as local politicians, community leaders and Islamic clerics who oppose the group. The Nigerian Chief of Army Staff stated that Boko Haram is responsible for killing 3,000 persons since the start of its violent campaign. According to Human Rights Watch, more than 1,200 Christian and Muslim civilians have been killed in so many attacks allegedly conducted by Boko Haram. Such attacks were alleged to have taken place in twelve northern and central Nigerian states, as well as in Abuja. It was reported in OTP Report 2012 that on 26 August 2011, Boko Haram attacked the United Nations Headquarters in Abuja with a vehicle-borne suicide bomb, resulting in the deaths dozens of people. There were allegations, so said the Report, that the response of the Nigerian security forces against suspected Boko Haram members has involved the excessive use of force, as well as summary executions of civilians.

As a result of these religious persecutions, Boko Haram has caught the eye of United States government and it has been attributed that there is a newly founded concentration on Boko Haram's operation, which arises from the fact that the United States has always placed religious freedom at the core of human rights and societal stability. Additionally, military leaders have expressed concern that Boko Haram is capable of posing a threat to the United States homeland.

Furthermore, Boko Haram has caught the attention of the United States and Nigerian officials chiefly because of Boko

Haram's recent public message, declaring Boko Haram's intention to carry out a religious cleansing against Christians in Nigeria. Moreover, scholars have suggested that a correlation exists between religious persecution and terrorism in which such intolerance of other non-Muslim religions breeds terrorist groups within that particular country. Numerous governments and non-governmental organisations and world leaders have condemned Boko Haram's vicious attacks on churches and non-Muslims. Because of Boko Haram's deadly targeting of non-Muslims or "infidels", a number of organisations had filed a petition with the United States Secretary of State urging that Boko Haram is pronounced a foreign terrorist organisation. Boko Haram's intense hatred for any other religion or even Islamic sect that does not conform to their radical beliefs was depicted on the Christmas Eve of 2003 when the organisation launched its first brutal attack against non-Muslims. Boko Haram has since evolved into a highly sophisticated, globally linked, suicide-bombing terrorist entity with global aspirations (Nees, 2013).

Human Rights Watch reported that the armed forces of Nigerian and other related governmental parastatals have employed the use of inhumane and degrading treatment, torture and extra-judicial executions of civilians with the hope of combating terrorism in the country. Such acts are not in line with the principles entailed in the Convention Against Torture and the International Convention on Civil and Political Rights, as well as other relevant human rights principles provided in the Universal Declaration of Human Rights (UDHR), all of which Nigeria is party to without reservations. The Convention against Torture states that in all circumstances there shall be no use of torture and it particularly states in its Article 10 that the internal political instability or any other public emergency that a country may be undergoing cannot be used as a form of justification for torture. Reports were also made against the security forces as they were found transferring some suspected members of the Boko Haram to places unknown to the general populace. Despite the provisions of Article 10 of the Convention Against Torture, which requires the Nigerian government to look into the above stated allegations against its armed forces and other security agencies, its government continues to disassociate herself from the allegations of crying foul of yellow journalism. The report of extra-judicial executions such as execution of family members and other forms of mass executions have escalated since 2009. These executions of suspected members of the Boko Haram infringed upon the rights to life, due process, amongst other rights, which can be seen in most international human laws and treaties and are well incorporated into Chapter 4 of the 1999 Constitution of the Nigerian. These reported activities of the Boko Haram members and the Nigerian security agencies also raise allegations of crimes against humanity. The Rome Statute of the International

Criminal Court, which Nigeria has ratified, codifies the substantive elements of crimes against humanity. Articles 7 of the Rome Statute give provisions that rape, persecution, acts of murder, torture, and enforced disappearances are crimes against humanity when as part of a widespread or systematic attack against civilian populations in furtherance of a State or organisational policy or plan. The October 8 attack by Nigerian troops was reported to have targeted civilians and also there were widespread reports of disappearances, torture and extra-judicial executions carried out by the Nigerian government, which could implicate criminal charges against not only the Boko Haram but the Nigerian government as well before the ICC pending the unwillingness of the government to investigate into the situation in general (Addison, 2012).

EFFORTS BY THE NIGERIAN GOVERNMENT TO PROSECUTE THE TERRORISTS

According to the 2013 Report of the OTP Preliminary Examinations, the prosecutor to the International Criminal Court contended that the information available to the OTP indicated that the Nigerian government has been and are presently putting together proceedings against members of Boko Haram for crimes recognised under the Rome Statute. Also, the Nigerian authorities have provided a significant body of information on national proceedings, which the Office is analysing as part of its admissibility assessment (OTP 2013). It would have been that the OTP does not have the cooperation of the Nigerian Government but this is not the case as the OTP frequently visits the Office of the Attorney General of the Federal Republic of Nigeria in order to get further assistance in getting more information about the situation regarding the insurgence of the Boko Haram. Non-governmental organisations, with offices around the country, are also on ground providing the OTP with the necessary information of all happenings regarding the Boko Haram and the evidences provided by the NGOs are corroborated by witnesses, victims are other stakeholders.

Also, a Federal High Court in Lagos headed by Justice Saliu Saidu on the 5th of November 2014, only a few days ago, sentenced a financier of the Boko Haram terrorist group to 10 years' imprisonment with hard labour. The Boko Haram financier was among four suspects secretly tried before the judge by the Department of State Security (DSS). The suspects included Adamu Mohammed, Mohammed Mustapha, Bura Husseni and Mohammed Ibrahim (THISDAY 2014). Also in the same week, November 6, 2014, a Nigerian Senator by the name of Ali Ndume was linked to be a financer of the Boko Haram and was facing criminal charge before a Federal High Court in Abuja.

The major challenge faced by the OTP with regards to prosecuting members of the Boko Haram group is the determination of whether there is a genuine proceeding going on in Nigeria and also the OTP has

to give such a proceeding space to breathe before its genuineness can be determined (Hansen, 2012). The other challenge would be regarding the mechanisms for arrest, if it happens that the OTP has decided to prosecute certain members of the Boko Haram group. This problem of how to arrest perpetrators is a general obstacle that ICC faces in most of its cases and a very topical example is the inability of the ICC to arrest Al-Bashir, the President of Sudan.

CONCLUSION

The general situation in Nigeria came to the ICC in 2005; however, it is uncertain when exactly the particular situation relating to Boko Haram was brought into the preliminary examination process. The 2011 Report on the Preliminary Examination Activities did not make any mention of Boko Haram situation though the terrorist group has been attacking since 2009.

The preliminary examinations started for the Boko Haram situation after 2011. Initially, the court was just considering the crimes against humanity in terms of murder and persecutions; in the 2013 report of the Office of the Prosecutor, it was stated that with the conflict between the Nigerian Armed Forces and the Boko Haram, the probability is that war crimes would have been committed. The abduction of over 240 schoolgirls, crimes of enslavement, rape, sexual slavery, enforced prostitution and forced pregnancy would have to be included in the preliminary examinations of the OTP.

The Office of the Prosecutor normally determines the jurisdiction and admissibility from the preliminary examination stage, notwithstanding the final say or upturn by the Pre-Trial Chambers who will decide whether the prosecutor should go ahead with full investigations or not, which will mean that the ICC has jurisdiction and admissibility over a particular situations once the Pre-Trial Chambers gives a go ahead for a full investigation.

At present, the Office of the Prosecutor is looking into the admissibility stage of the Boko Haram situation. It has already been determined that the International Criminal Court has temporal, territorial and material jurisdiction over the Boko Haram situation. Though the Pre-Trial Chambers can still overturn this assumption, it is unlikely that the report of the prosecutor will be overturned notwithstanding. The 3rd stage of the preliminary examinations will require the fulfilment of the complementarity principle of whether the Nigerian government is conducting genuine proceedings in relation to those most responsible for such crimes, and whether the gravity of such crimes and the interest of the victims are being considered. The Nigerian government may pass the complementarity test of conducting national proceedings against members of Boko Haram but it seems nothing is being done to appease the victims of the crimes. The 2014 Report of the OTP's activities, which is yet to be released, will determine whether the Boko Haram situation will be left to National prosecution or whether the Pre-Trial Chambers will order a full-blown investigation into the matter.

The problem faced by the Office of the Prosecutor is not so much about who the perpetrators of crimes committed under the Rome Statute are in the case of Boko Haram and in most instances; it is that it is impossible for the ICC in general to arrest the perpetrators without the help of the government involved or other foreign security institutions.

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Disclosure of Wrongdoings and Protection of Employee Whistleblower under the Malaysian and Nigerian Law

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ABSTRACT

This article is a doctrinal legal research that employs comparative approach to analyse and explore employee whistleblower protection in Malaysia and Nigeria and under the common law as well. Employee whistleblowers who reported the misconduct of a fellow employee or superior within their organisation frequently face reprisal or retaliation, sometimes at the hands of the employer or the group which they have accused. While the article considered related instruments in the two countries under consideration in the analysis, the focus is on the Whistleblower Protection Act 2010 (WPA, 2010) and the Whistleblower Protection Bill 2011 (2011 Bill) in Malaysia and Nigeria, respectively. The article finds that the bulk of the present regime of whistleblower protection in Malaysia is contained in WPA 2010. The common law applies subject to the Act and other restrictions under the legal system of the country. In the case of Nigeria, on the other hand, as the 2011 Bill is still pending, the common law applies generally in guiding whistleblower protection in the country. The article further finds that the concept of whistleblowing is wider in common law than under the WPA 2010 in Malaysia or the 2011 Bill in Nigeria. The conclusion of the article is that while legislation is desirable for the promotion of whistleblower protection in the countries under consideration to accord protection against the fluid position of common law, the legislation should not be unduly used to limit the scope of the protection such as in terms of defining the authorities to whom the disclosure is to be made as suggested by both the WPA 2010 and the 2011 Bill and classification of persons that can make

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disclosure as in the 2011 Bill and which is not in line with the modern trends in whistleblowers protection.

Keywords: Whistleblower; disclosure of; protection; malpractices

INTRODUCTION

This article examines protection of employee whistleblower for disclosing wrongdoing as contained in the Whistleblower Protection Act 2010 (WPA 2010) in Malaysia and the relevant instruments in Nigeria. It also surveys the position under the common law as applicable body of law in the two countries under consideration. The two countries, one African and the other Asian, were chosen for comparison due to a number of reasons bordering on their similarities and differences. In terms of the similarities, firstly, both countries belong to the common law world and are members of the commonwealth. Secondly, the legal system of both countries is pluralist, shaped by English law, Customary law and the Islamic law. However, the English law is the predominant law as far as the regulation of employment and industrial relations is concerned in the two countries. Thirdly, both countries are emerging economies that aspire to be one of the top players in the world economy in the near future. A country that seeks to be an important player in the world economy should of course ensure, among others, that her policies, laws and practices bearing on labour are robust, effective and efficient enough to attract both local and foreign investors. On the differences, Malaysia and Nigeria have different historical, cultural and socio-economic experiences. Though both countries are federal in structure with written constitutions, Malaysia operates the parliamentary system of government with constitutional monarchy, whereas Nigeria operates the presidential system of government. Unlike Nigeria, Malaysia has never experienced military rule and unitary system of government. Development of employment and industrial relations has been steady though slow in Malaysia compared to Nigeria due to a number of factors. The factors responsible for relatively more rapid development of employment and industrial relations in Nigeria than in Malaysia include ratification of all core International Labour Organisation (ILO) conventions by Nigeria, military intervention in Nigeria, drastic development in the area of employment and industrial relations in Nigeria ever since democracy was restored in the country in 1999. These developments include enactment of the National Industrial Court Act 2006, repeal and replacement of pension and workmen compensation legislations, amendment of Trade Unions legislation and amendment of the Constitution of the Federal Republic of Nigeria 1999 to constitutionally recognise National Industrial Court as a superior court of record. Despite these laudable developments in Nigeria, the country (unlike Malaysia), is yet to have a piece of legislation on the protection of whistleblowers. Such a legislation has a tremendous effect on modern employment and industrial relations.

It is against this background that this article examines employee whistleblower protection in the two countries as part of their employment and industrial relations in a way. The article is concerned with an employee, about his or her legal and moral obligations to disclose or report wrongdoings perpetrated by co-employees or the employer. The wrongdoings may be in forms of non-observance of established rules, regulations, principles and standards in corporate affairs, which may result in fraud and other unlawful conducts and even crimes such as insider-trading, theft and maltreatment of corporate stakeholders including third party stakeholders. Emphasis however is placed on the protection of the employee from adverse treatment or victimisation as a result of the report or disclosure he or she makes.

The objectives of the article are three. The first objective is to explore employee whistleblower protection under the Malaysian and Nigerian laws, as well as the common law as a general law in the two countries. The second objective is to carry out comparative analysis on employee whistleblower protection in Malaysia and Nigeria to bring to light the similarities and differences in the two countries. The third objective is to proffer recommendations for the improvement of employee whistleblower protection in the two countries under consideration.

DEFINITION OF TERMS

The words ‘employee’, ‘whistleblower’, ‘whistleblowing’, ‘disclosure’, ‘wrongdoing’ and ‘protection’ are essential to this discussion. It is imperative to explain these words and others related to them in the context of the discussion. This is to bring to light the ideas they convey to enable proper understanding of the analysis in the paper.

An employee is a counterparty in employer-employee relationship. Under the relationship, the employee provides dependent or subordinate labour for the employer as the other counterparty and receives wages in exchange. This unlike an independent labour provided by a self-employed or an independent contractor under principal-independent contractor relationship for a consideration that bears nomenclatures such as fee or contract sum. The employer and employee relationship is distinguished from any other similar relationship including agency, bailment, trust, sale and partnership relationships based on the civil law distinction between contract of employment or contract of service, which is used to be known as ‘master and servant contract’ on one hand, and contract for services or contract of commission or trust on the other (Hanami, 1979, 31).

Section 2 of the Employment Act 1955 (Act 265) of Malaysia and section 54(1) of the National Industrial Court Act 2006 of Nigeria define the terms ‘employee’ and ‘employer’. However, unlike the Whistleblower Protection Bill 2011 of Nigeria (2011 Bill), the Whistleblower Protection (Act 711) 2010 (WPA 2010) of Malaysia does not define the above two terms. Section 32 of the 2011 Bill defines employee to mean ‘a person who

works for another person, company or organisation or for the Federation and who is paid or entitled to be paid for organisation services rendered but does not include an independent contractor'. Definition of an employee in the bill is perhaps thought necessary because the bill expressly mentions employee as one of the persons qualified to make disclosure of impropriety. Definition of employee in the WPA 2010 is apparently unnecessary because the provisions dealing with persons entitled to make disclosure are not specified. As a corollary, the Bill defines an employer in the same section 32 to include 'an individual, a body corporate or unincorporated of the Federation who or which engages the services of or provides work for any other person and pays for the services, and a person acting on behalf of or on the authority of the employer'.

Regarding whistleblowing, the term has been literally defined as '[exposing] something bad that someone is doing, especially by bringing it to the attention of other people' (Cambridge, 2010, online). A whistleblower is thus 'a person who informs people in authority or the public that the company they work for is doing [something] wrong or illegal' (Oxford 2005, online). There may not be a universally acceptable definition of the terms 'whistleblowing' and 'whistleblower' from the legal point of view. This is because of the uncertainties surrounding them, especially when it comes to determination of circumstances protected by the whistleblowing law. While reference is made to some legally oriented attempts to define the terms to at least have working definitions, it is important to note that what is important is not the definitions of the terms but the definitions of the circumstances and conditions of whistleblowing which enable whistleblowers, particularly employee whistleblowers, the focus of this paper, to be entitled to legal protection as whistleblowers.

Whistleblowing seems to be legally and technically defined in the following statements: 'the reporting of a wrongdoing that needs to be corrected or terminated in order to protect public interest' (Asian Institute of Management, 2006, 15); 'a colloquial term usually applied to the raising of concerns by one member of an organisation about the conduct or competence of another member of the organisation or about the activities of the organisation itself' (Dehn, 2003); 'passing on information from a conviction that it should be passed on despite (not because of) the embarrassment it could cause to those implicated' (Gilan, 2003, 37). Whistleblowing has recently started to be viewed as a culture. It involves 'a culture that encourages the challenge of inappropriate behaviour at all levels' (Cm 6407, Tenth Report, 2005). It is a culture of raising concern by a member of staff about wrongdoing or misdeed taking place in his place of work (Shipman's Inquiry, 2005).

Regarding whistleblowers, they are described as persons (usually workers) who at their own risk, having been 'motivated by a sense of personal, and/or public duty,

may expose what they perceive as specific instances of wrongdoing, which may be within the private and/or public sector' (Gilan, 2003). Broadly speaking, whistleblowers are those persons who speak out publicly or to prescribed authorities concerning wrongdoing detrimental to the public which manifests in any way. The wrongdoing may be in private or public sector. It may be perpetrated by a current or ex-employee of the organisation concerned or even by a member of the public who does not have any relationship with that organisation. The wrongdoing may cut across public wrongs (crimes) and civil wrongs ranging from financial scandal or cheat, corruption or mismanagement to health and safety issues that may bring about decline or total collapse of the organisation or an immeasurable danger to the public, if not checked.

It is instructive to note here from the definitions of 'whistleblowing' and 'whistleblower' given that they tend to focus on employee whistleblower. Other possible whistleblowers are reflected only when the definitions are couched in broad terms. It is also important to note from the definitions that the wrongdoing contemplated may take various forms that are open ended. The wrongdoing is apparently perpetrated by insiders to the organisation. It can also involve outsiders where the insiders connive with them to perpetrate the wrongdoing. Wrongdoing may be harmful to the organisation concerned and/or the general public. Serious wrongdoings or even minor wrongdoings perpetrated over time may result in loss of reputation, competitiveness, diminished productivity and even ultimate failure and collapse on the part of an organisation. The negative impact of wrongdoing on the public may manifest in many forms such as low quality or even harmful goods and services and unemployment with its accompanying social evils.

Indeed, the term 'wrongdoing' is so central to the issue of whistleblowing that it features in attempts to define the terms 'whistleblowing' and 'whistleblowers' including those considered above. The concept of whistleblowing itself is basically about control of wrongdoing. The term 'wrongdoing' is therefore defined in both the WPA 2010 and the 2011 Bill. The instruments however adopt other nomenclatures rather than the term 'wrongdoing'. The term 'improper conduct' is used in section 2 of WPA 2010 as equivalent to the term 'wrongdoing' and central term in the definition of whistleblower to mean 'any conduct which if proved, constitutes a disciplinary offence or a criminal office'. Section 2 of the WPA 2010 therefore defines a 'whistleblower' as 'any person who makes a disclosure of improper conduct to the enforcement agency under section 6'. On the other hand, the equivalent of the term 'improper conduct' in the WPA 2010 is 'impropriety' in the 2011 Bill. Impropriety is defined in section 1(2) of the Bill as 'a conduct which falls within any of the matters specified in subsection (1).' A whistleblower is therefore defined in section 1(3) of the 2011 Bill as 'a person who makes a disclosure of impropriety.'

It is instructive to note that in the definition of whistleblower in both the WPA 2010 and the 2011 Bill, the term 'disclosure' appears. This shows that the term is central to the definition of whistleblower. It is equivalent to the term 'reporting' that features in the non-statutory definitions of 'whistleblowing' and 'whistleblower' as considered earlier. The disclosure or reporting by a whistleblower in the context of whistleblowing is therefore that of wrongdoing, 'improper conduct' or 'impropriety'. As a corollary, the term 'law' used in the title of this topic signifies the legal protection of whistleblowers for whistle-blowing in disclosing or reporting wrongdoing, improper conduct or impropriety as the case may be in the jurisdictions under consideration, namely, Malaysia and Nigeria.

THEORETICAL AND METHODOLOGICAL FRAMEWORK

Whistleblowing policy or mechanism is used by modern organisations as part of their internal control system to prevent or mitigate wrongdoings arising from conflicts of interest so as to achieve good corporate governance practices (Meng & Fook, 2011). Agency theory foresees conflicts of interest in the running of affairs of corporate entities and thus advocates for mechanisms that will ensure that such conflicts are prevented or minimized. Therefore, whistleblowing mechanism, among other corporate mechanisms, is put in place to ensure that wrongdoings arising from conflicts of interest in the running of the affairs of corporate bodies are prevented or mitigated. The classical agency theory foresees conflicts of interest between managers and shareholders of companies. It presumes tension between shareholders and corporate managers and presupposes control mechanisms in the running of companies. The basic assumption of the classical agency theory is that managers will act opportunistically to further their own interest before that of the shareholders (Tsegba, 2011). By the modern approach to agency theory, conflicts of interest do not only arise between shareholders and managers of companies. They also exist among shareholders, particularly between majority and minority shareholders, and between the corporate entity and other stakeholders of the entity such as employees, creditors, customers and even the public at large (Kraakman et al., 2009, 2). Whistleblowing mechanism is designed not only to protect the interest of particular corporate stakeholders such as shareholders or employees but the public interest at large in both private sector and public sector organisations. Disclosure by an employee whistleblower may be about a wrongdoing that is injurious to the public at large as opposed to a wrongdoing against employees as a class of corporate stakeholders or any other particular class of the stakeholders. Employee whistleblowers serve public interest in drawing the attention of the authorities to corporate wrongdoing being perpetrated against public interest so that proper action can be taken to stop it and prevent future occurrence (Apinega, 2015).

This article is a doctrinal legal research that employs comparative approach to examine protection of an employee against disclosure of the employer's corrupt acts or any form of malpractices such as fraud, health and safety violations or any acts that are injurious to certain persons or the organisation in general. The analysis of primary and secondary sources of law from the jurisdictions under consideration, Malaysia and Nigeria; the primary sources are statutes and cases/common law whereas the secondary sources are the articles and text books explaining the primary sources as used in the article.

WHISTLEBLOWING UNDER THE WPA 2010 AND THE 2011 BILL

As highlighted in the preamble to the Act, the WPA 2010 provides for whistleblower protection and for other incidental matters. The preamble describes the Act as "An Act to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector, to protect persons making those disclosures from detrimental action, to provide for the matters disclosed to be investigated and dealt with and to provide for other matters connected therewith". The Act is divided into seven (7) parts: preliminary; administration; whistleblower protection; dealing with disclosure of improper conduct; complaints of detrimental action and remedies; enforcement, offences and penalties; and general.

On the other hand, the preamble to the 2011 Bill describes the bill as a bill for "An Act to provide for the manner in which individuals may in the public interest disclose information that relates to unlawful or other illegal conduct or corrupt practices of others; to provide for the protection against victimisation of persons who make these disclosures; to provide for a fund to reward individuals who make the disclosures and to provide for related matters". The Bill is subdivided into six (6) parts: protected disclosure; procedures for disclosure; action by person who receives disclosure of impropriety; protection of whistleblowers; offences and penalties; and miscellaneous.

However, it should be noted at this juncture that direct and indirect provisions relating to whistleblowers have existed in the Malaysian and Nigerian body of law and practiced long before the enactment of the WPA 2010 and emergence of the 2011 Bill, respectively.

In the case of Malaysia, provisions in the Companies Act 1965 (CA 1965) and Capital Markets and Services Act 2007 (CMSA 2007) illustrate pre-WPA 2010 whistleblower protection in the country. Section 368B(1) of CA 1965 provides that an officer of a company who has reasonable belief of any matter which may or will constitute a breach of CA 1965 or its regulations may report the matter in writing to the Registrar of Companies (the Registrar). The company concerned is prohibited by section 368B(2) from removing, demoting, discriminating

or interfering with the officer's lawful employment due to the report the officer made to the Registrar. Legal action or tribunal process cannot be taken against an officer who makes a report to the Registrar in good faith. The CMSA 2007 contains similar provisions in section 321. However, the provisions in section 321 of the CMSA 2007 limits the protection to a chief executive, internal auditor, company secretary or any officer responsible for preparing or approving financial statements or information who makes the disclosure to the Securities Commission or the stock exchange of any information relating to the breach of any provision in the securities law or rules of the stock exchange or any matter which adversely affects the financial position of a listed corporation to a material extent and other provisions in other legislations on whistleblower protection are now complemented for example, sections 320 and 321 of the Capital Market and Services Act 2007 are now supplemented by the WPA 2010.

On the other hand, in the case of Nigeria, whistleblowing provisions have existed in one form or the other. The provisions of the Freedom of Information Act 2011 (FIA 2011) and that of some codes of corporate governance in the country bear on whistleblowing. Section 28 of the FIA 2011 provides that: (1) Notwithstanding anything contained in the Criminal Code, Penal Code, the Official Secrets Act, or any other enactment, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, and no proceedings shall lie against such persons thereof, for the disclosure in good faith of any information, or any part thereof pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act, if care is taken to give the required notice. (2) Nothing contained in the Criminal Code or the Official Secrets Act shall prejudicially affect any public officer who, without authorisation discloses to any person, any information which he reasonably believes to show: (a) a violation of any law, rule or regulation; (b) mismanagement, gross waste of funds, fraud, and abuse of authority; or (c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act. (3) No civil or criminal proceedings shall lie against any person receiving the information or further disclosing it.

It is clear from the above section 28 of the FIA 2011 that the protection provided is limited to public officers and to the disciplinary or judicial actions they may be otherwise liable under relevant instruments. Reprisal or retaliatory actions by employers or senior officers against the public officers are not envisaged by the section or the FIA 2011 as a whole. It is the retaliatory actions that place in forms of harassment, discrimination and other similar acts that are contemplated under whistleblower policy or mechanism.

While the FIA 2011 provides for some limited whistleblower protection and in an

indirect way, article 6.1.12 of Central Bank of Nigeria Code of Corporate Governance for Banks in Nigeria Post Consolidation 2006 and article 32 of Code of Corporate Governance for Public Companies in Nigeria 2011 (SEC Code 2011) expressly provide for whistleblowing policy. For example, article 32.1 of the SEC Code 2011 provides that "companies should have a whistleblowing policy which should be known to employees, stakeholders such as contractors, shareholders, job applicants and the general public. It is the responsibility of the Board to implement such a policy and to establish a whistleblowing mechanism for reporting any illegal or substantial unethical behaviour". By article 32.2, "the whistleblowing mechanism should be accorded priority and the Board should also reaffirm continually its support for and commitment to the company's whistleblower protection mechanism". Article 32.3 further requires that "the whistleblowing mechanism should include a dedicated "hot-line" or e-mail system which could be used anonymously to report unethical practices. A designated senior level officer should review the reported cases and initiate appropriate action, if necessary at the level of the Board or CEO/ MD to redress the situation. By article 32.4, "the designated senior level officer assigned to review reported cases should provide the chairman of the audit committee with a summary of reported cases, cases investigated, the process of investigation and the result of the investigation".

It is instructive to note that the above article 32 which provides for whistleblowing policy in the SEC Code 2011 merely makes recommendation for companies to have whistleblowing policies and establish and maintain whistleblowing mechanisms. The article is silent on whistleblower protection against reprisals or retaliatory actions by employers or senior officers of the companies let alone the agency to which the whistleblower may report to where he or she suffers victimisation.

It is pertinent to consider the following questions:

(i) the person who can make disclosure of wrongdoing;
(ii) the basis to make disclosure; and
(iii) conditions for whistleblowing protection.

In relation to the above question (i), the WPA 2010 does not limit who can make disclosures. This suggests that any person can make a disclosure provided that he or she satisfies the conditions discussed under question (ii). The 2011 Bill however, does make classifications as to persons who can make the disclosure. Section 2 of the Bill provides that "disclosure of impropriety may be made-(a) by an employee in respect of an employer,(b) by an employee in respect of another employee, or (c) by a person in respect of another person, or an institution". It can be said that this classification by the 2011 Bill to single out employees in items (a) and (b) is not necessary since item (c) suggests that any person can make a disclosure. Perhaps the classification is deemed

necessary to emphasize the significant role of employees in whistleblowing as insiders are the ones presumed to be better informed about any wrongdoings that may be perpetrated in their organisations, either by co-employees or some other persons. The non-classification in the WPA 2010 is in line with modern trends. Many definitions relating to whistleblowing and whistleblowers including some of those the authors considered in part two of this paper suggests that the person reporting or disclosing the wrongdoing to be employee or ex-employee of the organisation concerned and not a journalist or even ordinary member of the society. The modern approach as reflected in many whistleblowing protection statutes across jurisdictions is to consider any person a whistleblower by his or her actions, not necessarily identified by the organisation concerned in any way (Meng & Fook, 2011).

Meanwhile, in answering the second question on the condition of making disclosure, section 6 of the WPA 2010 provides that:

> "(1) A person may make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct: Provided that such disclosure is not specifically prohibited by any written law. (2) A disclosure of improper conduct under subsection (1) may also be made: (a) although the person making the disclosure is not able to identify a particular person to which the disclosure relates; (b) although the improper conduct has occurred before the commencement of this Act; (c) in respect of information acquired by him while he was an officer of a public body or an officer of a private body; or (d) of any improper conduct of a person while that person was an officer of a public body or an officer of a private body. (3) A disclosure of improper conduct under subsection (1) may be made orally or in writing provided that the authorized officer, upon receiving any disclosure made orally, shall as soon as it is practicable, reduce it into writing. (4) A disclosure made in relation to a member of Parliament or a State Legislative Assembly shall not amount to a breach of privilege. (5) Any provision in any contract of employment shall be void in so far as it purports to preclude the making of a disclosure of improper conduct.

It would be appropriate to set out herein the counterpart provisions in the 2011 Bill and thereafter discuss the two sets of provisions together. Section 1(1) of the Bill provides that:

> "A person may make a disclosure of information where that person has reasonable cause to believe that the information tends to show- (a) an economic crime has been committed, is about to be committed or is likely to be committed; (b) another person has not complied with a law or is in the process of breaking a law or is likely to break

a law which imposes an obligation on that person; (c) a miscarriage of justice has occurred, is occurring or is likely to occur; (d) in a public institution there has been, there is or there is likely to be waste, misappropriation or mismanagement of public resources; (e) the environment has been degraded, is being degraded or is likely to be degraded; or (f) the health or safety of an individual or a community is endangered, has been endangered or is likely to be endangered."

Both the provisions of the WPA 2010 and the 2011 Bill are detailed and extensive. The basis for making disclosure in the WPA 2010 as stated above is "reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct" and in the 2011 Bill as also stated above is "reasonable cause to belief". The phrases "reasonable belief" and "reasonable cause to believe" mean the same thing. Whether or not disclosure can be made in a given circumstances has been made open to subjectivity. It is for the court to ultimately determine whether or not there is ground for making disclosure in a given case. Unfortunately, there are no direct judicial authorities explaining the phrases in the context of whistleblowing in the jurisdictions under consideration namely, Malaysia and Nigeria. However, cases decided in other contexts determining similar phrases would be useful. For example, cases decided in determining what constitutes "reasonable suspicion" to allow an arrest in the context of criminal law would be useful. Cases considered in the discussion below on the position of common law would also be relevant. In a nutshell, to justify disclosure in all the circumstances highlighted in the above two instruments, the basis is "reasonable belief" or "reasonable cause to believe", respectively.

In relation to question (iii) above, it is a condition for the enjoyment of whistleblower protection under the WPA 2010 and the 2011 Bill by virtue of section 2 and section 3 respectively that the report of the wrongdoing must be made to the appropriate authorities.

Upon satisfaction of the requirements discussed above relating to corporate wrongdoing and its disclosure, the whistleblower of a corporate wrongdoing would be entitled to whistleblower protection under the WPA 2010 and the 2011 Bill. By the provisions of section 2 of the WPA 2010, it is a protection against detrimental action that includes: (a) action causing injury, loss or damage; (b) intimidation or harassment; (c) interference with the lawful employment or livelihood of any person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person's employment, career, profession, trade or business or the taking of disciplinary action; and (d) a threat to take any of the actions referred to in paragraphs (a) to (c)". On the other hand, sections 8, 9 and 11 of the 2011 Bill provides for protection of whistleblowers to include protection

against victimization, court actions and application to court for assistance. The basic concern of most whistleblowers is how they can be protected against reprisals by their employers, reprisals in the form of unfair dismissal, job reassignment, pay cuts or loss of promotion. The WPA 2010 envisages such reprisals and thus provides that a worker should not be subjected to any detriment by reason of his disclosure as highlighted above.

THE COMMON LAW POSITION

The common law perceives the employer and employee relationship as 'fiduciary' in nature. There is an implied duty of fidelity and loyalty and secrecy owed by every employee to his employer. It requires that the employee must have undivided or utmost loyalty to the employer. By reasons of the fiduciary relations, the employee is required to render good and faithful service to the employer or duty of fidelity - a term which was recognised by the English Court of Appeal (*Lamb v Evans*, 1893). Since its inception, the duty of fidelity had been applied in many different circumstances. For example, the duty of the employee to render faithful and loyal service towards the employer; the duty to obey the lawful and legitimate instructions of the employer; duty to exert reasonable degree of competence and skill; duty to protect employer's property and exercising trust placed on him by the employer; the duty not to dishonestly secure benefits at the employer's expense; the duty not to accept commission, bribe and not to work in the spare time with a competitor of the original employer (Ashgar Ali, 2005, xxi). The employee is also under a duty not to disclose confidential information acquired during the course of employment (Agomo, 2011, 122; Ahmad, 2012, 57-60).

Apart from the above, it is also a fundamental duty for the employee to obey all the lawful and reasonable orders and instructions of the employer. The employee is not entitled to disobey the order of his superior. Any refusal or disobedience of an order or instruction of a superior "will bring a chaotic situation to any organization in terms of discipline, performance as well as industrial peace (*Ngeow Voon Yean's v Sungei Wang Plaza Sdn Bhd & Anor*, 2004). "Wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally" (*Laws v London Chronicle (Indicator Newspapers) Ltd.,* 1959).

However, a dismissal allegedly on grounds of the employee's refusal or failure to obey an illegal order of the superior would be deemed unlawful. In *JT International Trading Sdn. Bhd. v Mat Kamel Jusoh & Ors*, it was stated: "Obedience to the orders of a supervisor is not without limits and hence it is not a defence for an employee to carry out any act instructed by a supervisor that is illegal or unlawful". For example, in *Morrish v Henlys (Folkestone) Ltd (1973),*

the refusal to obey the superior order to falsify the account books at the garage where he worked was held not to be in breach of the contract. Again, in *Gregory v Ford* (1951)*,* the refusal of the employee to take on the road a vehicle not covered by third party insurance was again held not to be in breach of the contract. It must be noted that in relation to an employee who was sick, he will only be excused from performing orders rendered impossible by the illness (*Marshall v Alexander Sloan & Co Ltd.,* 1981).

Reverting back to the duty of fidelity, and in the context of confidential information, the duty of fidelity requires an employee not to disclose confidential information of the employer to a third party nor use the information obtained in the course of his or her employment to the detriment of the employer. The contract of employment would normally contain provision restraining the employee from misusing or disclosing confidential information of the company, its dealings, transactions and financial matters after the employment relationship has ended (*Fong Kah Chan v Ibuzawa Corporation Sdn. Bhd.*, 2010).The above is also implied in the contract of employment (*Schmidt Scientific Sdn Bhd v Ong Han Suan*, 1997). In other words, it may be expressed or implied in the contract of employment that the employee shall not reveal any of the employer's confidential information or trade secret to any third party without prior approval in writing from the company (*Faccenda Chicken Ltd v Fourler*, 1987; *Merry Weather v Moore*, 1892; *Universal Thermosensors Ltd v Hibben & Others*, 1992]). The employer has the right to restrain an employee (*Patrick Chin Beng Chew v Time Dotcom Berhad*, 2009) or its former employee from misusing the confidential information acquired while in employment for his own benefit or divulging the confidential information to others (*Chuk Chin Leong v Milimewa Superstore Sdn Bhd* [2009; *Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd* [1984] 1 CLJ 325; *Tiu Shi Kian & Anor v Red Rose Restaurant SdnBhd* [1984] 1 CLJ 325 *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32).

Any violation thereof would enable the employer to obtain legal redress and this includes an injunction to restrain the employee from disclosing or disseminating the employer's confidential business information and trade secrets. It is worth mentioning that the information that the employer sought to be protected must be confidential in nature. "What makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process" (*Saltman Engineering Co. Ltd, and Others v Campbell Engineering Co. Ltd.*, 1963). In relation to the obligation of a recipient of information, Megarry J in *Coco v Clark* (1969) noted that "if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would

have realised that upon the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence".

It must be added that the employees' duty of fidelity or the contractual duty of confidentiality may be lifted in very exceptional circumstances for example where the disclosure is made in the interest of the public. Information concerning wrongdoings in the work place such as pilfering or misusing company's funds and gross mismanagement, by the company's senior executive, may be disclosed when the employee has reasonable grounds to believe that such wrong has been committed. This exception applies notwithstanding it is not expressly stated in the contract of employment (*Initial Services Ltd v. Putterill and Anor*, 1968). In *Gartside v Outram (1856),* Wood VC states that "there is no confidence as to the disclosure of inequity". However, certain requirements has to be observed before the disclosure could be made, i.e. the disclosure is done in good faith, with a reasonable belief that the information to be disclosed is substantially true and that the disclosure must be done to the right person or body in the organisation for example, health and safety issues to the health and safety executive. The employees are encouraged to follow their organisation's internal procedures for reporting of a wrongdoing.

It is worth noting that in *Houlihan v Douglas College Students' Society* (2002), a Canadian case, it was held inter alia, that an employee owes a general duty to the employer to report the fellow employee's wrongdoing. In that case, the manager was found to be in breach of her duty of faithfulness when she failed to disclose to the employer of a suspected theft by a subordinate employee. In particular, it was stated that "by keeping silent about acts that may amount to dishonesty so as to protect other employees, she misled her employer and breached the faith interest to the work relationship". An employee who comes forward reporting a fellow employee's wrongdoing must be treated fairly and protected from reprisals such as dismissal, lay-offs, suspension, demotion or transfer, discontinuation or elimination of a job, change of work location, reduction in wages, changes in hours of work or a reprimand, among others.

CONCLUSION

It is undeniable fact that whistleblowing plays a positive function in enhancing accountability, transparency and good governance in any organization and the elaborate legislative regimes is aimed at deterring reprisals. In Malaysia the WPA 2010 is the applicable law as far as whistleblowers protection is concerned. The applicable rules in common law will apply in the country subject to the WPA 2010. Iin the case of Nigeria, however, the rules of applicable common law in the country apply in relation to the subject as the 2011 Bill is yet to be passed into law. The WPA 2010 and the 2011 Bill seek to concretize whistleblowers protection in the respective countries including in

relation to employees. However, defining the authorities to whom the disclosure is to be made as in both the WPA 2010 and the 2011 Bill and classification of persons that can make disclosure as in the 2011 Bill suggest restrictions on the protection. While legislations are desirable for the promotion of whistleblower protection and to address the fluid position of the common law on the issue, they should not be unduly used to limit the scope of the protection. We therefore recommend review of the WPA 2010 to remove the unnecessary restrictions and the passage of revised 2011 Bill that is free from restrictions including unnecessary classification of persons that can make disclosures which is not in line with the modern trends in whistleblower protection.

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Criminal Liability for Breach of Fiduciary Duty: A Case of Criminal Breach of Trust by the Personal Representative of the Deceased's Estate

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ABSTRACT

The governing law on the administration of estate in Malaysia requires an appointment of a personal representative before a deceased's estate can be dealt with. The personal representative acts as a fiduciary and is empowered to take possession and control over of the estate. However, in the hands of an unscrupulous personal representative, the estate might be dishonestly used or misappropriated. In such a case, the personal representative could be charged for criminal breach of trust, as provided by the Malaysian Penal Code and would therefore be punished with imprisonment, whipping and fine. This article aims to examine whether such punishment is adequate in regulating the conducts of the personal representative and remedying the estate beneficiaries against the misconducts of such personal representative. The study adopts a doctrinal analysis by examining the existing primary and secondary materials including statutory provisions as provided in the Probate and Administration Act 1959 (Act 97) and the Penal Code (Act 574), case law and other legal and non-legal literature relating to the adequacy of the relevant law. The article finds that once the estate has been misappropriated, charging the personal representative and punishing him for criminal breach of trust are inadequate and will not give much benefit to the estate beneficiaries. The punishment should be extended to depriving the personal representative of his own property so that the rights of the estate beneficiaries as the vulnerable party are better protected.

Keywords: Criminal breach of trust, estate beneficiaries, deceased's estate, breach of fiduciary duty, personal representative, remedy

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INTRODUCTION

The administration of a deceased's estate can be a trying process especially for those grieving. This is due to the fact that before the estate could be distributed to the beneficiaries, it has to be managed and administered for the purpose of paying all debts and liabilities of the deceased. Estate administration, as perceived by the Malaysian law, incorporates the need for the appointment of a personal representative. Once appointed, the personal representative is charged with great trust to ensure that the rights of the estate beneficiaries are well protected and preserved. In this context, the personal representative's duties and estate beneficiaries' rights can be said as to be akin to two sides of the same coin. The personal representative owes duties to uphold the beneficial interests of the beneficiaries. He is assigned with the tasks of gathering and taking possession and control of the assets of the estate, protecting and prudently investing those assets during administration and identifying the enforceable and payable debts and obligations of the deceased person. Sidhu (2005) stated that the main duties of a personal representative are to collect all debts due to the estate, pay all the debts and satisfy all the liabilities of the estate, and convert unauthorised investments into authorised ones.

The capacity to hold property is co-extensive with the ability of the personal representative to become a trustee and a fiduciary to the deceased's estate beneficiaries (Raman, 2012; Sidhu, 2005; Sundrum, 2012), and is therefore duty bound to observe fiduciary duties in carrying out his duties. Acting as a trustee basically means that the personal representative must act in a fiduciary capacity by putting the interest of the estate beneficiaries beyond his own interest (Ahmad & Andrews, 2005; George, 2005; Haley &McMurtry, 2011; Hingun & Ahmad, 2013). Being arrayed with twofold character of trusteeship and fiduciary, the misconducts of unscrupulous personal representative would make him subject to potential liabilities and accountabilities. As a fiduciary serving as an executor or a trustee at that particular time, the notion of the beneficiaries' vulnerability at the hands of the personal representative *cum* fiduciary is of an essence. Finn (1989) and Shepherd (1981) suggested that a person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or in their joint interest to the exclusion of his own several interests.

In carrying out all those duties, the personal representative is vested with wide-ranging power to deal with the deceased's estate. Undeniably, in the hands of an unscrupulous personal representative, the estate might be misappropriated or misused. The estate beneficiaries, on the other hand, are powerless in assuming control or ensuring comprehensive monitoring over this matter due to their lack of authority to deal with such estate as they actually stand at the mercy of the personal representative (Nor Azlina & Akmal Hidayah, 2013). The

outcome of this disparity in power relations creates the likelihood that the personal representative may abuse his position for personal gain or gain of third parties. Hence, the adequacy of the governing law in remedying the estate beneficiaries against the acts of unscrupulous personal representative needs to be examined so that the rights of the estate beneficiaries would not be adversely affected.

METHODOLOGY

With enormous powers conferred by the law, the personal representative steps into the shoes of the deceased and takes over the deceased's rights as the owner of the property. It is obvious that whenever one person has an effective control of property but is required to act for the benefit of another, there is a possibility that he will misuse the power that he holds (Pearce, Stevens, & Barr, 2010). Thus, one of the most common areas of conflict in the administration of estate is the failure of the personal representative to properly administer the estate and discharge his office accordingly.

In this regard, it is often perceived that a breach of trust or misappropriation of property by the personal representative is a civil matter, which is actually an inaccurate perception. This is because the Malaysian Penal Code has illustrated that the misconducts of a personal representative may also amount to a criminal breach of trust. In such a case, the personal representative is not only liable under civil action but could also be charged for criminal breach of trust as provided by the Penal Code.

Hence, this article seeks to examine the offence of criminal breach of trust by the personal representative in the administration of the deceased's estate. The discussion includes an analysis of the powers and duties of the personal representative, the personal representative as fiduciary, the offence of criminal breach of trust and the adequacy of its punishment in remedying the estate beneficiaries. The article excludes the discussion on the method of estate distribution either by will or Distribution Act 1958 and the rules of *faraid* for the non-Muslims and Muslims respectively as the offence of criminal breach of trust is normally committed before the deceased's estate could actually be distributed.

For the purpose of the discussion, the article adopts the doctrinal analysis by examining the existing primary and secondary materials including statutory provisions as provided by the Probate and Administration Act 1959 (Act 97) and the Penal Code (Act 574), as well as case law and other legal and non-legal literatures relating to the case of criminal breach of trust by the personal representative to the deceased's estate.

DISCUSSION

The area of administration of estate in West Malaysia is currently governed by various statutes of general application that are applicable to both Muslims and non-Muslims, namely, the Rules of Court 2012, Probate and Administration Act 1959, Small Estates (Distribution) Act 1955 and

Public Trust Corporation Act 1995. The jurisdiction to deal with the administration of estate lies with three different backgrounds of administrative bodies, namely, the High Court, the Small Estate Distribution Section under the Department of Director General of Lands and Mines and the Public Trust Corporation, depending on the type of estate left by the deceased.

The administration of estate by the High Court involves the grants of representation to the two classes of representatives, namely, executor and administrator. Probate and Administration Act 1959, the principal statute affecting estate administration in Malaysia, provides that:

> *"personal representatives means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the Court"*.

The difference of the two classes, namely, executor and administrator, is based on the nature of their appointment. Executor is normally appointed by the testator in the latter's last will to administer the estate. Administrator on the other hand is a person appointed by the court in the event of intestacy, or where the deceased dies without leaving any will. Nevertheless, the phrase 'personal representatives' essentially covers both executors and administrators (Hayton *et al*., 2005; Akmal Hidayah, 2012). In academic writing, executors and administrators in many occasions have been collectively described as the personal representatives of a deceased's estate (*United Asian Bank Bhd v Personal Representatives of Roshammah (decd)* [1994] 3 MLJ 327). It is so as both parties play the same role in the administration of the deceased's estate and owe duties to the estate beneficiaries.

In cases of administration of small estates, where the estate consists wholly or partly of immovable property and does not exceed two million ringgit in total value, section 13(4) of the Small Estates (Distribution) Act 1955 empowers the Land Administrator to grant letters of administration to such person or persons as he thinks fit, subject to such security as he may require and may in his discretion dispense with security. The grant of letters of administration may be made for the purpose of collecting and preserving the deceased's assets or in cases of insolvent estates (section 13 (7), Small Estates Distribution Act 1955). The grant may also be made where the immovable properties of the deceased do not have titles, or where there are only documents evidencing title or beneficial interest or equitable interest in land.

As for the administration of estates by the Public Trust Corporation, it is governed by the Public Trust Corporation Act 1995 where under this Act, the offices of Public Trustee and Official Administrator ceased to exist and the property, rights

and liabilities of the Public Trustee and Official Administrator are now vested in a Corporation known as Amanah Raya Berhad. The Corporation is empowered to administer the estates in its capacity as one of the administrative bodies. By virtue of section 17(1) of the Act, if a person dies testate or intestates, leaving only movable property and that the total value of the property does not exceed six hundred thousand ringgit, a summary administration in respect of the property may be made by the Corporation. On the other hand, the Corporation may also be appointed as a personal representative to the deceased's estate and be granted probates of will or letters of administration by the Court.

The article predicates that although the term 'personal representative' normally refers to the personal representative as appointed by the High Court, the offence of criminal breach of trust, as provided by the Penal Code, should also be extended to the administration granted by the Land Administrator in cases of small estate and the appointment of Amanah Raya Berhad as the personal representative in any case the representative fails to discharge the office accordingly.

Powers and duties of the personal representative

The primary power of a personal representative is to dispose of property. Section 60(3) of Probate and Administration Act 1959 states that a personal representative may charge, mortgage or otherwise dispose of all or any property vested in him as he may think proper to do so. In *Ong Thye Peng v. Loo Choo Teng&Ors* [2008] 1 CLJ 121, the court remarked that this provision concerned with the manner of disposal of the property of a deceased person by his personal representative. Furthermore, in *Lau Yoke Hee& Anor V. Ting Liang Teng & Anor* [2005] 3 CLJ 770, the court held that the personal representative can dispose of property vested in him without the beneficiaries' consents. It can also be seen that the Probate and Administration Act 1959 confers vast powers upon the personal representative to administer the deceased's estate. For instance, the personal representative is granted with powers to sue in respect of all causes of action that survive the deceased. The personal representative may also exercise the same power of recovering debts due to the deceased at the time of his death as the deceased had when living.

Other powers and duties incorporated in the Probate and Administration Act 1959 also include the power to sell any immovable property, duty to keep an inventory of the deceased estate, duty to pay for debts, power to appropriate any part of the property, power to appoint trustees of minor's estate and power to postpone distribution of the deceased estate before the expiration of one year from the death. In discharging the duties, the personal representative must necessarily act with due diligence to take possession of all property of the deceased and account for any property in respect of which possession has not been made possible. He must also

assume a responsibility which he must discharge with due diligence, by making the fullest inquiries and by taking all steps that are necessary and reasonable to ascertain the total values of the deceased's estate.

In the course of managing the estate, the personal representative is also considered as a trustee to hold the estate on trust on behalf of the beneficiaries. By being a trustee, the personal representative holds a fiduciary duty which means that he is regarded by law to be a person who has undertaken an obligation of loyalty to another, namely, the beneficiaries, and is compelled to put that other person's interest before his or her own which gives rise to a relationship of trust and confidence. When the deceased's estate is under the personal representative control, he has the power of owner *vis-a-vis* third parties, but unlike a genuine owner he is not entitled to apply the estate for his own benefit. He has a duty to hold the deceased's estate for the estate beneficiaries and distribute it to them accordingly. Oakley (1997) suggested four characteristics of fiduciary relationship, which in fact is the basis of the relationship between the fiduciary and the beneficiaries, namely, an undertaking by the alleged fiduciary; reliance placed on the alleged fiduciary by the other party, property which is put under the control of the alleged fiduciary; and vulnerability of the other party to the alleged fiduciary.

Personal representative as a fiduciary

A personal representative is held to the highest degree of good faith in performing his duties and owes fiduciary responsibility to the estate beneficiaries. The question on whether a personal representative receives and holds the deceased's property in a fiduciary capacity has been considered by several Malaysian cases. In *Guindarajoo Vegadason V. Satgunasingam Balasingam* [2014] 1 LNS 866, for instance, the court held that an administrator is appointed by the court to be the guardian of the estate and he is in a fiduciary position with regards to the assets that come into his possession by virtue of his office. His duty is not only to preserve them and deal with them in accordance with the law but also to apply them in the due course of administration for the benefit of the creditors, legatees of various sorts and the residuary beneficiaries. The court referred to the decision in the case of *State of Gujerat v. Jaswantlal Nathalal* [1968] SCR 2 408 where the Supreme Court of India held that the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. It was further held that the administrator and trustee of the properties of the estate owed a fiduciary duty to the legal beneficiaries to the said estate, ie, the administrator/trustee and legal beneficiaries' relationship (*Loh Cheng Leong &Ors v. Tan BengKheng&Ors* [2012] 1 LNS 582). Hence, executors and trustees of the estate of the deceased were in a fiduciary relationship *vis-a-vis* the beneficiaries.

In *Koh Yook Tin (Suing as Executor to the Estate of Lim Chuak @ Lim Kwee*

Kee, deceased) v. Koh Kim Leng @ Hoo Kim Leng & Anor [2013] 1 LNS 1088, the court upheld that personal representative acted as trustee owed a fiduciary duty to the estate of the deceased, the plaintiff and other shareholders. The court was guided *interalia* by the case of *Malaysian Assurance Alliance Bhd v. Anthony Kulanthai Marie Joseph* [2011] 1 CLJ 15, where the Court held that where a person is in possession of trust property which he knows does not belong to him, the law regards him as a constructive trustee. A constructive trust is simply a relationship created by equity in the interest of conscience. Therefore, it can be said that personal representative in discharging his duty is the only person authorised to deal with deceased's estate for the benefit of beneficiaries. The element of entrustment exists after the extraction of the letters of representation by the personal representative from the appropriate administrative bodies as he is perceived by the law to step into the deceased's shoes (Akmal Hidayah & Nor Azlina, 2014).

The beneficiaries' vulnerability curtails completely from their dependency upon their fiduciary or utmost good faith towards the former's best interest within the confines of fiduciary relationships (Rotman, 1996). Vulnerability is the major focus as this doctrine is premised upon the notion that beneficiaries are generally inferior in power *vis-à-vis* their fiduciary and that fiduciary law serves to displeasure this disparity by imposing strict duties upon fiduciary to act in the best interests of the beneficiaries. It is often impossible to stop those people who are dishonest from taking advantage of the opportunities for abuse that their positions bring (Noor & Halim, 2013). However, when a fiduciary fails to perform his duties, the beneficiaries are eligible to bring claims against him for breach of duty, and wherever appropriate, to obtain a remedy (Rotman, 2012).

The offence of criminal breach of trust under the Penal Code

Criminal breach of trust is clearly defined in section 405 of the Penal Code, which reads as follows:

> *"Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits 'criminal breach of trust".*

The provision describes the person who may be guilty as one being in any manner entrusted with property or dominion over it. If that person dishonestly misappropriates the property, he or she commits a criminal breach of trust. In other words, a criminal breach of trust may be well-defined as the dishonest appropriation of another's property by a person to whom it has been entrusted, or into whose hands it has legally

come. The ownership or beneficial interest in the property in respect of which the so called criminal breach of trust has been committed, must be in some person other than the accused, and the latter must hold it on account of some person or in some way for his benefit.

The essential ingredients with regard to section 405 of the Penal Code have been stated by Wan Suleiman FJ in *PP v Yeoh Teck Chye* [1981] 2 MLJ 176 that for a person to be guilty of the offence of criminal breach of trust, there must be a proof that the accused has been entrusted with property or dominion over property and that he should dishonestly misappropriate or convert the property to his own use or dishonestly use or dispose of the property or wilfully suffer any other person to do so in violation of, any direction of law prescribing the manner in which such trust is to be discharged or of any legal contract made touching the discharge of such trust. A trust here may be defined as any arrangement by which one person is authorized to deal with property for the benefit of another. The person who is entrusted with certain property is entrusted directly with the said property, that is to say, delivered to him with specific purpose where the element of possession exists.

The terms 'dishonestly' and 'wrongful gain and wrongful loss' are explained in section 24 and section 23 of the Penal Code, respectively. Section 24 of the Penal Code provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain is said to do that thing dishonestly. The section further explains that, in relation to the offence of criminal misappropriation or criminal breach of trust, it is immaterial whether there was an intention to defraud or to deceive any person. A wrongful gain simply means gain by unlawful means of property to which the person gaining is not legally entitled, whereas wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled (Section 23, Penal Code). Therefore, a person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property. A person is said to do a thing fraudulently if he does that thing with the intention to defraud, but not otherwise (Section 25, Penal Code).

It has been considered in *Sathiadas v PP* [1970] 2 MLJ 241, where the court in the case held that the gist of this crime is entrustment and dishonest misappropriation. Loss as a consequence of the act is not a factor; it is the act itself which amounts to this offence. In essence, the offence of criminal breach of trust is an offence relating to property and its commission is directed against the beneficial owner of that property. So, there can be no criminal breach of trust where the beneficial owner consents to the use of the property in a particular way. That consent of the beneficial owner is a complete

defence to the offence of criminal breach of trust and is to be found in the words "in violation of any legal contract, express or implied, which he has made touching the discharge of such trust".

Criminal breach of trust by the personal representative

It is interesting to note that one of the illustrations to Section 405 of the Penal Code expressly illustrates the conduct of fraudulent personal representative as criminal breach of trust. The illustration of the section is as follows:

> *A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.*

The law recognises illustration appended to a particular section as an aid to statutory interpretation as it may give examples to illustrate the working of its provisions (Wan Arfah, 2011). The Privy Council in *Mohamed Syedol Ariffin v Yeoh Ooi Gark* [1916] 1 MC 165, an appeal from Straits Settlement stated that it is the duty of a court to accept, if that can be done, illustration appended to a section as relevant in the interpretation of the text, and that it would require a very special case to justify their rejection on the ground of their assumed inconsistency to the section themselves.

The law requires that before criminal breach of trust is established it must be shown that the person charged has been entrusted with property or with dominion over property and that he has been guilty of breach of trust using the latter phrase loosely. There must be an element of entrustment and therefore the person accused must be shown to hold the property in a fiduciary capacity. In cases of estate administration, the element of entrustment is satisfied as a personal representative acting as a trustee is held to hold the deceased's estate in a fiduciary capacity. A trust relationship is a classic example of a relationship, fiduciary in character. According to McGhee (2010), a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties. Riddall (1996) illustrated the constructive trust as a remedial device employed to correct unjust enrichment. It does not only implicate the act of taking title to property from one person whose title unjustly enriches him but also extends to the act of transferring the property to another who has been unjustly deprived of it.

Punishment for criminal breach of trust

The offence of criminal breach of trust is generally punishable under section 406 of the Penal Code. The section provides that:

> *"Whoever commits criminal breach of trust shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine".*

However, the Penal Code also provides for stiffer punishment for persons who hold positions of higher degree of trust and confidence (Ariffin, 2013; Seng, 1994) specifically person who works in his capacity as a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent (Section 409, Penal Code).

The "agent" was quite exhaustively defined in section 402A of the Penal Code. The section states that for the purposes of sections 405, 406, 407, 408. 409 of the Penal Code, unless the contrary appears from the context, an agent includes any corporation or other person acting or having been acting or desirous or intending to act for on behalf of any company or other person. There is a long list of other person which include partner, co-owner, clerk, servant, employee, banker, broker, auctioneer, architect, clerk of works, engineer, advocate and solicitor, accountant, auditor, surveyor, buyer, salesman, trustee executor, administrator, liquidator, trustee within the meaning of any Act relating to trusteeship or bankruptcy, receiver, director, manager or other officer of any company, club, partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not (*Aishah Mohamed Rose & Anor* v *PP* [2014] 1 LNS 957). The punishments specified for each group of persons are summarised in Table 1.

TABLE 1
Punishment for Criminal Breach of Trust under the Penal Code

Penal Code provision	Who?	**Punishments**
Section 406	Any person	Imprisonment for a term which shall not be less than 1 year and not more than 10 years and with whipping, and shall also be liable to fine.
Section 407	Carrier	
Section 408	clerk or servant	
Section 409	public servant/ agent	Imprisonment for a term which shall not be less than 2 years and not more than 20 years and with whipping, and shall also be liable to fine.

Adequacy of Punishment for Criminal Breach of Trust by the Personal Representative

It is undeniable that the principal objective of criminal law is to punish an offender. It is one of the functions of law under penal technique. This technique prohibits kinds of antisocial conduct, much of which are also prohibited by moral rules as well as providing the machinery of law enforcement, from the police force, through the courts exercising criminal jurisdiction, to the prison service. It is one method to experiencing moral disgrace for being convicted of a crime and is one of the principal preventive mechanisms of the penal mode.

Unfortunately, this is not similarly significant for estate administration cases. This is because the existing punishment of imprisonment, whipping and fine as prescribed by the Penal Code is only sufficient to fulfil the preventive and

punitive penal function of the law. It is still far from achieving its grievance remedial function that provides for the enforcement of remedial award such as compensation. McLeod (2012) has earlier suggested that it is necessary for the policy-makers to look for the availability of punitive or exemplary damages in certain types of civil cases or the possibility of courts making compensation orders while exercising their criminal jurisdiction, both which clearly mix the grievance remedial function and punitive function. For this purpose, it is suggested that reference to section 66 of the Probate and Administration Act 1959 would be relevant. The section provides for the liability and accountability of the personal representative in cases where he wastes or converts to his own use any part of the estate. If he dies, such liability is extended to his personal representative who shall be liable and chargeable in respect of the waste or conversion, to the extent of the available assets of the defaulter, in the same manner as the defaulter would have been, if living.

CONCLUSION

From the discussion, it could be established that whilst the offence of criminal breach of trust also includes the misappropriation of the deceased's estate by the personal representative, its punishment is still inadequate and will not give much benefit to the estate beneficiaries. Hence, there is a need for another mechanism to compensate the estate beneficiaries for their loss resulting from the dishonest conducts of the personal representative from the criminal law perspective. The punishment under the current criminal breach of trust may successfully operate to regulate the conducts of the personal representative but is not sufficient to remedy the estate beneficiaries against the misconducts of such personal representative. It is therefore recommended that, a dishonest personal representative while being convicted for an offence of criminal breach of trust, there is a need to extend the punishment to deprive the personal representative of his own property through criminal forfeiture process equally been used in other criminal offences such as money laundering and drugs trafficking so that the rights of the estate beneficiaries as the vulnerable party are better protected. This is because, once the estate has been wasted or misappropriated, charging the personal representatives with criminal breach of trust under the current legal provision would not give much benefit to the estate beneficiaries as at this stage, the latter might have been left with nothing to be benefited from the deceased's estate.

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Combating Child Pornography in Digital Era: Is Malaysian Law Adequate to Meet the Digital Challenge?

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ABSTRACT

Information Communication Technology (ICT) facilitates abuse and exploitation of children online, especially child pornography. A study conducted by the Internet Watch Foundation showed that ICT is responsible for the mushrooming of child pornography into a fast growing business and there is evidence to show that the victims of this abuse are getting much younger. Realising the severity of the threat, various conventions and conferences have been held to address the issue and discuss the methods in combating the problem. For example, the Cybercrime Convention criminalises all related acts of creating, producing, disseminating and possessing of any child abuse images. Similarly, various initiatives have been adopted to combat commercial and non-commercial sexual exploitation of children, particularly the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC). At the national level, countries such as the UK, US and South Korea have enhanced their laws and legal mechanism to safeguard children against these ICT facilitated crimes in line with the international conventions. Based on a comparative analysis, this paper aims to highlight the threat and how the three countries are addressing the problem and analyses the legal position in Malaysia in addressing and combating the use of ICT to commit crimes against children.

Keywords: Child pornography, online risks, online violence, abuse and exploitation, ICT crimes against children

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INTRODUCTION

Rapid technological advancement in ICT has created opportunities for criminals and individuals with mala fide intention to continuously misuse ICT to abuse, harm and exploit children. ICT provides access

for criminals to firstly contact, engage and 'be-friended' children, secondly exploit the children's innocence and ignorance of the threats or risks of ICT and thirdly collaborate to organise crimes that exploit and abuse children particularly in child pornography. Even though the Convention on the Rights of A Child (UNCRC) imposes responsibility on the member states to protect the rights of children, others especially parents, society, community and the children themselves also have a role to play in ensuring that the children are safe from harm, abuse and exploitation in the real and the virtual world. This paper analyses the approach of other countries or jurisdictions in addressing the issue and also looks at the adequacy of the Malaysian law in addressing and combating the use of ICT to commit crimes against children in Malaysia in this digital age. In particular, this paper focuses on a discussion relating to child pornography or child abuse materials only.

CHILD ABUSE MATERIALS OR CHILD PORNOGRAPHY

Child pornography is considered a heinous crime against children and ICT contributes towards the mushrooming of online child pornography. A report conducted by the Internet Watch Foundation in 2008 found there were 1,536 individual child abuse domains available on the internet and 58 percent were hosted in the United States. It also reported that child pornography is a fast growing business due to the demand in commercial websites for child abuse materials (IWF Annual Report, 2008). In addition, a study conducted by the National Centre for Missing and Exploited Children indicated that 83 percent of the abuse materials in the possession of arrested child pornography perpetrator contained images involving children between the ages 6 and 12, with 39 percent comprising of images of children between ages of 3 and 5, and 19% had images of infants and toddlers under age of 3. This study indicated that the victims are getting younger and the abuses are getting severe and horrid.

Fear for the safety of child victims is alarming. As a result, child pornography is regarded as an international crime and has become an international concern in various international congresses, namely:

1. World Congress on the Commercial and Exploitation of Children in Stockholm 1996;
2. Vienna International Conference on Combating Child Pornography, 1999
3. World Congress on the Commercial Exploitation of Children, Yokohama, 2001
4. World Congress on the Commercial Exploitation of Children, Rio de Janeiro, 2008

From these conferences, protection of children against this crime has been codified in various international human rights treaties governing child pornography, namely:

1. Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography, 2000 (OPSC);

2. Convention on Cybercrime or Budapest Convention, 2001
3. Council of Europe Convention on the Protection for Children against Sexual Exploitation and Sexual Abuse or Lanzarote Convention, 2007

CRIMINALISING ONLINE CHILD PORNOGRAPHY

Efforts have been made to criminalise child pornography at international, regional and national levels. Article 2 of the OPSC defines child pornography as any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. This definition covers both online and other forms of child pornography. Meanwhile, Article 3 of OPSC imposes obligations to State Parties to criminalise producing, distributing, disseminating, importing, exporting, offering, selling or possessing of child pornography as defined in Art 2. Art 3(1)(c) of the OPSC also obliges state parties to punish the possession of child pornography, especially for the purposes of producing, distributing, disseminating, importing, exporting, offering or selling. Being aware of the widespread distribution and accessibility of child pornography through the Internet, the Committee on the Rights of the Child has made specific recommendations regarding the adoption of legislation on the obligations of ISPs in relation to child pornography. Other concerns include ensuring convicted offenders to not continue exploiting children once they have served the sentence and the need to establish monitoring and surveillance mechanisms including a registry of the sex offenders.

The Budapest Convention makes online child pornography a crime. Article 9 (1) mandated State Party to adopt legislation that criminalises the conduct of producing child pornography for the purpose of distribution through a computer system, offering or making available child pornography through a computer system, procuring child pornography through a computer system and possessing child pornography in a computer system or on a computer data storage medium. For this purpose, the Convention defines child pornography to include a minor engaged in sexually explicit conduct, a person appearing to be a minor engaged in sexually explicit conduct and realistic images representing a minor engaged in sexually explicit conduct. The Convention categorises offences related to child pornography as content related offences. This makes both the activity involved in child pornography and the product of such activity a criminal offence. The Lanzarote Convention also criminalises all activities and conduct relating to child pornography but added ‘knowingly obtaining access, through information and communication technologies to child pornography’ as a crime. The Convention refers the term ‘child pornography’ as ‘any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes” [Art 20 (2)]

At the regional level, the European Commission, for example, has issued a new directive 2011/92/EU to combat sexual exploitation and child pornography to replace Council framework Decision 2004/68/JHA. The new directive follows the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007 or Lanzarote Convention. The EU regard enforcement as one of the important mechanisms to combat child pornography measure and adopt several measures including creating a special unit to combat child pornography within the law enforcement service of the Member States. The Unit uses different channels of police cooperation, in particular Interpol, Europol and sets up the contact point in the Member States to combat cybercrime, which are operational 24 hours a day and to venture into the possibility of obliging internet service providers to retain traffic-related data and to set up their own control system (Europol, 2010).

Apart of the legislative approach, EU also adopts a resolution to prevent the dissemination of illegal contents on the internet especially child pornography. On this matter, the EU has issued a directive on the Communication on Illegal and Harmful Content (Content Directive) on the Internet and a Green Paper on the Protection of minors and human. The Content Directive provides a policy to fight against harmful and illegal contents on the Internet that also include child abuse materials.

Efforts to combat and criminalise online child pornography have also taken place at the national level where countries such as the UK, US and South Korea have improved and extended the scope of their existing law to address this particular issue. In these three jurisdictions, all activities and conduct involved in producing, disseminating and possessing child abused materials are criminalised and definition of child pornography has been extended to include computer graphic images of a child.

Criminalising the activities involved in online child pornography in line with the requirement of the OPSC and the Cybercrime Conventions

a. The UK Approach

The UK has amended the existing laws governing child pornography to address the challenges of technology and incorporated the international standard laid down by the Cybercrime Convention into their laws. As a result, the Protection of Children Act 1978 has been amended to effect the criminalisation of taking, making, distributing and possession of child pornography. With the above development, UK legislated against the production, possession and distribution of child pornography in whatever form. The application of the laws can be seen in various cases. In *R v Bowden* [2000] 1 Cr App R (S) 26 and *R v Jayson* CA [2002] EWCA Crim. 683, the court held that downloading an image of a child from the internet amounts to ‘making’ a photograph,

which is an offence contrary to Section 1 of the Protection of Child Act. The act of downloading causes the image to exist on the screen, which therefore becomes a photograph. In *R v Fellows and Arnold* [1977] 1 CR App R 244, the 1st Appellant had uploaded and stored child sexual abuse images on his employer's computer that enabled users to both display and print the images. Those who have the password could access those images. The password also allowed them to access the archive and assisted in the growth of the archives in which the 2nd defendant was one of them. Both were charged under the Protection of Child Act 1978, the Obscene Publications Act 1959 and the Criminal Justice and Public Order Act 1988. The Court in this case held that a file on a database, which can be displayed on screen and printed out, constitutes a copy of a photograph and uploading such images constitutes possession with a view to their being distributed or shown. However, in relation to possession of an indecent image of a child, some knowledge of its existence was held to be necessary as illustrated in the case of *Atkins v Director of Public Prosecution and Goodland v Director of Public Prosecutions* [2000] 2 Cr App R 248 (QB). Nevertheless, in the case of *R v Harrison* [2008], viewing a child abuse image on a pop-up advertisement amounts to criminal offence if the defendant knew that the images would pop up and once viewed was automatically saved. This is because the pop up left automatic traces on users' computers. Accordingly, the law in the UK criminalises all activities involved in the production, distribution and possession of child pornography in whatever form and the court plays an important role in applying the laws to cover online and offline child pornographic materials.

b. The US Approach

In the US, child pornography is regarded as an obscene expression of speech that is not protected under the First Amendment. It is a crime under the 18th United States Code, a federal law that prohibits the production, distribution, reception and possession of an image of child pornography under Section 2252 of the Code. Production of child pornography is made illegal under Section 2251 and this includes the act "to persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct for purposes of producing visual depictions of that conduct." Further, the federal law prosecutes any individual who attempts or conspires to commit a child pornography offense and those who knowingly produce, receive, transport, ship or distribute child pornography with the intent to import or transmit the visual depiction into the United States. The law also provides severe statutory penalties to any violation of the above law by fines or imprisonment between 5 years to 30 years, respectively. It also imposes life imprisonment for offense occurring in the following situations: (i) the images are violent, sadistic, or masochistic in nature, (ii) the minor was sexually abused, or (iii) the offender has prior convictions for child sexual exploitation.

Apart from the above, the US Congress has passed several laws specifically criminalising sexual exploitation of children:

1. Protection of Children Against Sexual Exploitation Act 1978 that criminalises live performance and visual depictions of children engaged or engaging in whatever form;
2. Child Protection Act 1984 that criminalises production or trafficking of non-commercial child pornography in whatever form;
3. Child Pornography and Obscenity Enforcement Act 1988 criminalise distribution and advertisement of child pornography through the use of computer;

In the case of *Osborne v Ohio* 495 U.S 103 (1990), the court criminalised the possession including private possession and private use of child pornography. The court held that private possession of child pornography was not protected under the First Amendment and that mere possession of child pornography should be illegal because paedophiles may use it to seduce new victims or convince children to submit to sexual violation and sexual solicitation or grooming of children.

Concerned with the availability and accessibility of the content online, the US has enacted the Children Internet Protection Act (CIPA) that imposes mandatory filtering and blocking of such pornographic, obscene and indecent materials in schools, libraries and educational establishment that receive federal funding for internet access.

Similar to the UK, the US also criminalises the processes involved in the production distribution and possession of child pornography in whatever form. The US law severely punishes those who seduce children to get involved in child pornography and any attempt to import into the country of any such visual depiction. As in the UK, there exist several laws that specifically address the criminalisation of child pornography in any manner and forms.

c. The Korean approach

In South Korea, the Act on Protection of Children and Juvenile from Sexual abuse criminalises production, import and export of obscene materials, sale, rental or distribution, as well as possession of child pornographic materials under Article 8. The provision criminalises distribution including possession of child and juvenile pornography and any violation shall be punished by imprisonment with prison labour for a specific period stated under the respective sub-provisions. For possession of child and juvenile pornography, the punishment is imprisonment with prison labour for not more than seven years.

Pornography and child pornography is considered as harmful materials and the Juvenile Protection Act protects children from harmful act, abuse and violence by regulating the distribution of harmful materials in print, broadcast and online media. Article 53(3) of the Telecommunication Business Act (TBA) regards child pornography as harmful and illegal online content; in order to

monitor this issue, the Act established the Information Communication Ethics Committee (ICEC) to operate a centre for reporting harmful online communication and make recommendation to the ISPs to remove the content. The Act gave power to ICEC to monitor Internet discussion and contacted system operators to get the information deleted. In 2001, the ICEC introduced the Internet Content Filtering Ordinance to filter Internet content which requires ISPS to filter access to a list of websites determined by the ICEC and requires Internet access facilities like libraries and *PC Bang*or Internet café to install filtering software to protect youth. ICEC also introduced Internet Content Media Rating system that provides criteria for indecent, as well as violence sites as measures, to prevent child pornography and cyber sexual violence. In 2008, the Korean Communication Standard Commission (KCSC) took over the role of ICEC and carried out further tasks of issuing warning to Internet users who attempted to access to any of such materials or content on the Internet. In addition to filtering and rating, the Act on Promotion of Communication Network Utilization and Data Protection (CNA) under Article 42 requires labelling of media materials harmful to juveniles as measure to protect children online. The Act imposed a duty on the Ministry of Information and Communication to develop appropriate measures to ensure development and dissemination of contents screening software, the development and dissemination of juvenile protection technology and develop education and publicity for juvenile protection. Pursuant to this, 'Nuri Cops' has been appointed among the public to clean up and patrol the Internet by deleting child pornographic images as one of the mechanism to protect children online.

As seen above, the UK, the US and the South Korea have adopted legal mechanism to combat child pornography online and offline. Each country has domestic laws that criminalise all activities relating to the production, distribution and possession of child pornography in whatever form. The courts also play an important role in interpreting the laws and extending the application to criminalise possession of child pornography from offline to online. Apart from using criminal laws and laws protecting children to make child pornography a crime, content regulation is also used to protect children from this crime. Child pornography materials are considered illegal and thus filtering is required by the laws to protect children, as seen in the US and in the South Korea. In South Korea, rating and media labelling are introduced by the law as important protective measures that require the government and the industries to work in tandem to ensure children and juvenile are protected from any harm, abuse and violence both online and offline. In the UK, however, there is no specific statute imposing filtering, rating and labelling; the country nevertheless employs self-regulation and parental control as mechanism to protect children online.

d. Malaysia

In comparison with the above jurisdictions, Malaysia regards all pornography as illegal and thus does not have any specific law criminalising child pornography. The laws are scattered and govern all types of pornography under the category of obscene, indecent and offensive materials. The Printing Presses and Publications Act 1998 (PPPA), the Film Censorship Act 2002 (FCA) and Penal Code clearly prohibit obscene and offensive materials in relation to print medium and film, whereas indecent, obscene and offensive online contents are governed by the Communication and Multimedia Act 1998 (CMA) and Consumer Content Code (CCC). However, it is unfortunate that the Computer Crimes Act 1997 (CCA) does not address this particular issue since child pornography is considered as a computer crime against children online.

In relation to criminalising the activities involved in producing obscene films, Section 4 of the PPPA prohibits production or printing of obscene publication or documents from any printing press or machine. Sec 2 of the PPPA defines "publication" to include:

i. A document, newspaper, book and periodical;
ii. All written or printed matter and everything whether of a nature familiar to written or printed matter or not containing any visible representation;
iii. Anything which by its form, shape or in any manner is capable of suggesting words or ideas; and
iv. An audio recording.

The term "publication" only refers to what can be published rather than the process and activities involved in publication in contrast to the definition of "publication" under section 1(3) of UK Obscene Publication Act 1959 and the Criminal Justice and Public Order Act 1994 (UK), where the term 'publication' includes distributing, circulating, selling, transmission of a document and electronic file, image or data." As a result, the offence under PPPA focuses merely on production of obscene printed materials and does not include Internet publication.

Section 5 of the Film Censorship Act makes it an offence to possess, have in custody, control or ownership or circulate, exhibit, distribute, display, manufacture, produce, sell or hire any film or film publicity material which is obscene or otherwise against public decency. The provision imposes a fine between RM10,000 – RM50,000 or to imprisonment for a term not exceeding five years or both to those who are found guilty to commit such offence. The Act, however, limits its application to a film which is defined to "include original or duplicate of the whole or any part of a cinematograph film; and a video, diskette, laser disc, compact disc, hard disc and other record of a sequence of visual images, being a record capable of being used as a means of showing that sequence as a moving

picture, whether or not accompanied by sound." The focus is more on a film in its physical medium for censorship purposes rather than digital film on the Internet. The application of this Act to obscene materials on the Internet is further limited by the non-application provision under sub section 3 which states, "This Act shall not be construed as permitting the censorship of any film or film publicity material published, displayed, circulated, exhibited, distributed or transmitted over the Internet or over the intranet." Therefore, the Act has its limitation and does not specifically criminalise the activities relating to online child pornography and obscene materials online.

Apart from the PPPA and the Film Censorship Act, the Penal Code also makes it an offence to sell, distribute and circulate obscene books. Section 292 provides "whoever sells, lets to hire, distribute, publicly exhibit, circulate in whatever manner or for the purpose of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever", etc. shall be punished with imprisonment for a term which may extend to three years or with fine or with both." The words used in this provision refer to physical obscene materials rather than to online materials. Thus, in contrast to the law in the UK, the US and the South Korean, the Malaysian statutes, as seen above, do not specifically criminalise the production, offering, distributing and possessing of online child pornography.

In relation to online pornography, Sections 211 and 233 of the Communication and Multimedia Act 1998 make it an offence to provide, makes, create and initiate transmission of contents which are obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person. These provisions are of general application and do not specifically regulate child abused content as required under the OPSC.

Nevertheless, section 31 of the Child Act 2001 clearly prohibits sexual abuse of children, while section 43 makes it an offence to sell, buy, let for hire, obtain possession, detain, advertise of a child for the purposes of prostitution. These provisions, however, merely focus on physical abuse and exploitation that may require judicial activism from the court and prosecutor creativity to extend the application to an online environment.

Recent developments, however, have seen a new approach in addressing and combating the issue of online pornography or indecent images. Several of the above Acts that were used to govern print and film pornography have been applied to address online crimes in relation to posting, distributing and possessing of indecent photographs online and on website. In the case of *Tan Jye Yee & Anor v Pendakwa Raya* [2014] 6 MLJ 609, the appellant has been charged inter alia under section 5(1) of the Film Censorship Act 2002 for obscene publication in their Tumblr. The charge is

yet to be materialised since he has escaped to another jurisdiction. The provision also prohibits possession of obscene materials. In 2010, Shahrom Mahdi a security guard was charged under section 292 of the Penal Code for uploading pornographic pictures and disseminating them on six websites. He pleaded guilty to the charges and was convicted (Bernama, 2010). In 2013, Fila Syahida Zulkipli was charged under section 292 of the Penal Code by the Mukah Magistrates Court. She pleaded guilty to recording an obscene video of a 15-year-old girl using her mobile phone and was fined for producing the obscene video (The Borneopost.com, 2013).

The issue on adequacy of the Malaysian law to address child pornography has become a hot topic recently when a Malaysian student, Nur Fitri Azmeer Nordin, was charged and convicted in the UK court for possessing, making and distributing pornographic images of children. Observation indicated that what is lacking in our law is criminalising possession of indecent or obscene images. Even though Section 292 of the Penal Code and Section 5 of the Film Censorship Act do mention about possession of obscene materials, the provision may not be adequate to address the issue unless the law is specifically extended to include online child pornography materials and images. On this aspect, the case of Shahrom Mahdi and Fila Syahida should be used as a stepping stone to criminalise possession and production of online child pornography in Malaysia, as required by the OPSC.

Challenges in Defining Image to Suit Digital Environment

Another issue challenging the law on online pornography is the definition of child pornography 'image', particularly computer-generated image and manipulated photograph. A clear definition is important since it involves criminal prosecution. The position in the UK, the US and South Korea is further discussed below.

In the UK, the Coroners and Justice Act 2009 define 'image' to include pseudo photograph as solution to solve the issue involving 'publication' of the child abuse in that format. To this effect, the Protection of Children Act 1978 (which was amended by the Criminal Justice and Public Order Act 1996) defines pseudo-photograph as an image, whether made by computer graphics or otherwise howsoever, which appears to be a photograph. Section 7 of Act 1978 further explains that "if the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child…notwithstanding that some of the physical characteristics shown are those of an adult". The provision also indicates that "references to an indecent pseudo-photograph include – a copy of an indecent pseudo-photograph and a data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph." In general, the Act criminalises any images showing sexual abuse of children on the basis that photograph of that nature is a record of the abuse of an actual child.

With such definition, any act of producing, publishing or publication, disseminating and possessing of such indecent pseudo-photograph of a child or child abused materials is a crime under the Act.

In relation to the term 'publication', the Obscene Publication Act 1959 defines the term 'publication' to include distributing, circulating, selling, letting, giving, lending, showing, playing, projecting or broadcasting of such image. Thus, publication of an indecent or obscene image involving a child in whatever form is an offence under this Act. The definition of publication is further defined under the Criminal Justice Act and Public Order 1996 to include data stored electronically and transmission of that data. Thus, any such acts and processes involving child abused images including computer generated child pornography or pseudo-photographs are criminalised.

In the US, images of child pornography are not protected under the First Amendment rights. Section 2256 of Title 18, United States Code, defines child pornography as any visual depiction of sexually explicit conduct involving a minor (someone under 18 years of age). The term "visual depictions" include photographs, videos, digital or computer generated images indistinguishable from an actual minor and images created, adapted, or modified, but appear to depict an identifiable, actual minor. In addition, undeveloped film, undeveloped videotape and electronically stored data that can be converted into visual images of child pornography are also deemed illegal visual depictions under the federal law. As a result, the US Child Pornography Protection Act 1996 was amended to further extend the definition of child pornography to include 'virtual image' i.e. image of a minor that was created through the use of technology, pseudo photograph or depiction of image 'appeared' to be a minor. The Act also defines 'sexually explicit' to include 'actual or simulated visual depictions which convey the impression that they contain sexually explicit depictions of minors'. These two amendments facilitate and expedite the prosecution of such cases in court and ease the burden of proving whether the pornographic image in question depicted an actual act or real victim.

In South Korea, Article 2 of the Act on Protection of Children and Juvenile from Sexual Abuse defines the term "child or juvenile pornography" as the depiction of children or juveniles doing an act specified in subparagraph 4 or engaging in any other sexual act in the form of film, video, game software, or picture or image displayed on computers and other communication media. In 2011, the National Assembly revised the above Act to cover 'creations of persons who can be perceived as minors in sexual situations'. The law was revised after the occurrence of a series of high profile cases of child rape and murder. Nevertheless, the law was criticised as it has the effect of treating imaginary acts of sexual contact with a child as the same as authentic sexual abuse where the actor may face a minimum of five years sentence and be registered as sex offender.

There is no specific definition of child pornography by any Act in Malaysia but the Content Code regards child pornography as obscene contents that include “depiction of any part of the body of a minor in what might be reasonably considered a sexual context and any written material or visual and/or audio representation that reflects sexual activity, whether explicit or not with a minor is strictly prohibited.” The Content Code prohibits any form of child pornography. The Child Act 2001 regarded child pornography as sexual abuse, an offence under Section 17 of the Child Act. The Act recognises that a child who is sexually abused if he has taken part, whether as a participant or an observer, in any activity which is sexual in nature for the purposes of (i) any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance, or (ii) sexual exploitation by any person for that person’s or another person’s sexual gratification is a child in need of care and protection. A child who is being induced to perform any sexual act, or is in any physical or social environment, which may lead to the performance of such act should be protected and be out into rehabilitation. Section 31 of the same Act makes it an offence to those who, being a person having the care of a child sexually abuses the child or causes or permits him or her to be so, abused and could be liable to a fine not exceeding RM20,000 or to imprisonment for a term not exceeding ten years or both. Apart from the Child Act, the Penal Code particularly section 292 also criminalised child pornography within the ambits of obscenity laws. The law thus needs to be stretched out to cover online child pornography. In contrast, the law in the UK, the US and South Korea provide reasonably clear definitions of child pornography and extend the definitions to cover online pornography and make prosecution of this heinous crime more effective.

FINDINGS

From the above discussions, this article highlights the following findings on the adequacy of Malaysian laws to combat online child pornography. Firstly, the processes and activities involving making, producing, disseminating, selling of pornographic materials in the offline world are criminalised, as seen in Section 292 of the Penal Code and Section 5 (1) of the Films Censorship Act but the CMA, particularly section 211, limits the processes and activities only to the term ‘provide’. Therefore, it does not criminalise the processes and activities of creating, uploading, downloading, transmitting, posting, transferring, receiving, viewing and possessing of the prohibited materials, as it is clearly provided in the laws in the UK, the US and South Korea. This could be due to the focus of the Act which is ‘content of the communication’ and ‘use of multimedia’. Nevertheless, it is argued that pornography constitutes illegal online contents and producing and posting of such contents may constitute abuse particularly

when peer-to-peer communication is involved. Peer-to-peer communication has been identified as one of the modus operandi for the mushrooming of child pornography. Thus, even though the CMA defines 'communication' as any means, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form of any combination of those forms, it alone does not make each process or activity as stated above a crime.

Secondly, there is no clear legal definition on the terms pornography, child pornography, obscenity and indecency provided by the statutes. This may lead to difficulty to synchronise the application of the laws to cover all forms of pornography. Although the Content Code provides definition of the above terms, it is only used as a reference or a guideline for self-regulatory mechanism by online content providers. It does not have the binding effect and does not cover individuals involved in creating, producing, disseminating, viewing and possession of the materials. The Content Code limits its application to IASP that has agreed to be bound by it and does not apply to all Internet users.

Third, the non-censorship policy over Internet under the CMA, the Bill of Guarantee and the Film Censorship Act 2001 has the effect of allowing access to pornographic materials and websites. Such offensive materials and website are accessible to youth, especially in the absence of mechanism to filter access to online contents, parental guidance and control mechanism, as well as lack of self-resilience among the youth. This non-censorship policy could be seen as the root to all evils that could endanger the well-being and positive development of children in Malaysia. In this regard, filtering mechanism at school should be imposed as practiced in the three jurisdictions.

In relation to online contents, the CMA makes it an offence to provide indecent, obscene and offensive contents with the 'intent to annoy, abuse, threaten or harass any person'. The provision seems to indicate that in the absence of the above elements, providing such contents may not be illegal. This is not consistent with the requirement for physical content under the Film Censorship Act and the Penal Code. Finally, prosecuting cases under the CMA for online pornography will strengthen the applicability of the law through judicial interpretation and through this manner, the law could adapt to the advance in technology and the technical process. Most of the cases brought at the lower court were unreported even though the courts have relied and extended the application of the Penal Code and Film Censorship Act to cover online matters. In the UK, for example, the courts have, in several cases, extended the interpretation of 'photograph' to include computerised images and pseudo/virtual photographs. Thus, any database consisting of such images is caught under the UK Protection of Children Act 1978, UK Obscene Publication Act 1959 and UK Criminal Justice and Public Act 1988.

CONCLUSION

ICT crimes against children are on the rise; thus, appropriate laws are needed to protect children from being the victims. In Malaysia, the existing laws are still far reaching to meet the challenges of ICT facilitated crimes against children. In particular, the laws governing pornography should be clear and adequately comprehensive to cover both online and offline pornography and the laws should form an integrated system that criminalises child pornography. In this regards, the Penal Code, CMA and CCA should specifically criminalise online child pornography in line with the requirement of OPSC. Further, the Child Act 2001, being the main Act to protect children, needs to integrate physical and online abuse offences together to give full protection for children in this digital era. In order to curb distribution of child abused materials through file sharing, prohibition should cover peer to peer sharing, emailing and social networking. In addition, collaboration with the Banks is also important to eliminate the demands towards pornography, especially child pornography. The courts, particularly the higher courts, should be given the opportunity to further interpret the application, terminology and forms under the various statutes governing pornography, obscene, indecent and offensive materials. Lastly, the Malaysian Content Code should be made mandatory or alternatively be made as mandatory reference in relation to issues involving pornography, obscene, indecent and offensive materials.

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Authentication of Electronic Evidence in Cybercrime Cases Based on Malaysian Laws

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ABSTRACT

Electronic evidence is one of the many forms of documentary evidence. It is stored and retrievable from electronic devices such as computers and smartphones, particularly in the their hard disks or memory banks. However, due to the fragile nature of electronic evidences, it is prone or susceptible to damage or alteration, as well as destruction due to improper handling or safe keeping. Since it can easily be tampered with or self-deteriorate, establishing the authenticity and reliability of electronic evidence is a technical task. Meanwhile, states of affairs would cause such electronic evidence to be inadmissible or carries low or no weightage whatsoever by the court, thus undermining the prosecution's or the plaintiff's case, as the case may be. In order to ensure such evidence is admissible and carry the expected weightage, relevant parties must first prove the authenticity of such evidence and subsequently on its reliability and relevancy. Nevertheless, in cybercrime cases, proving the crime is actually a technical challenge, where the responsible personnel are required to understand what is electronic evidence, how to extract and preserve the originality of such evidence and the laws governing electronic evidence, as well as cybercrimes. This article attempts to explain the scope of electronic evidence in relation to criminal cases such as in cybercrimes, as far as its admissibility and weightage are concerned. The discussion will be based on Malaysian and common laws.

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INTRODUCTION

Electronic evidence is not a recent thing. It has been around for quite sometime in

the form of black box in aircraft, closed-circuit television (CCTV) in buildings and premises, at traffic junctions, desktop computers, laptops and smartphones. The contents stored in the hard disk and memory card (internal storage), whether they are in smartphones, televisions or computers, are generally known as electronic evidence. The same may be extractable and readable through their appropriate devices or in intricate situations, expert opinion is allowed to be given. Nowadays, with their portability and efficiency, and further advancement that electronic gadgets bring, whereby anyone is able to communicate with ease and speed, our dependency in the day-to-day affairs to electronic gadgets cannot be denied. It could improve and enhance the quality of life. However, with the advantages that the gadgets bring where anyone is able to communicate across geographical boundaries in real time, conduct business and transaction without physical presence, it also brings along with it disadvantages. It has also given criminals the opportunity to perpetrate their crimes through the internet (O'Donnell & Milner, 2009). These crimes are known as cybercrimes. All cybercriminal activities can be traced and trailed if one knows the technical nature of electronic evidence and how gadgets such as computers and smartphones operate. However, the downside of electronic evidence is that it can be easily altered and manipulated (Kuntze & Rudolph, 2011).

THE BRIEF LAW ON ADMISSIBILITY OF DOCUMENTARY EVIDENCE

Sections 45 to 51 of the Malaysian Evidence Act 1950 (MEA) are provisions whereby expert opinion as to the contents of those electronic evidence are legally relevant in cases where the court could not form an opinion in matters of art, science or foreign laws. Electronic evidence is also documentary evidence whereby prove must be by primary evidence as required by Sections 61 and 64 of MEA, unless exceptions apply under Section 65 of MEA. Under Section 65 of MEA, secondary evidence may be adduced, provided the person adducing it lays down the legal foundation as to why primary evidence is not available after having made a diligent search to procure the same. Electronic evidence, being also documentary evidence, must also be proven in terms of its authenticity in a manner provided under Sections 67 to 73 of MEA. Furthermore, for a document generated by computer, under Section 90A MEA (subject to its relevancy, best evidence rule and authentication), certification by the person in charge or managing the computer in its ordinary use and that the computer is in good working order, renders the document admissible. Section 90A considers computer generated documents (CGD) as primary evidence and also as an exception to the rule against hearsay.

CYBERCRIMES

To date, there is no standard definition of cybercrime. The terms "cybercrime,"

"computer crime", "Information Technology crime,", "high-tech crime", "internet crime" and "information Age Crime" are often used interchangeably (Clancy, 2011) to refer to the two major offences either computer as a target and traditional offences by means of computer or computer as a tool (Goodman, 1997). There are also computers that function as a container or storage of a valuable data on the crimes (Clancy, 2011). For example, when a blackmailer uses a computer to generate blackmail letters or email exchanges (Brenner & Goodman, 2002), the computer will keep and store the data. Cybercrimes could be understood as crimes that involve computer, computer system and other electronic devices either as a medium in which computers and electronic devices that are connected to the Internet or computer networks are used as the instrument to commit crime or as a target in which the computer or electronic devices are used to access data stored in the electronic devices (Kam Wai, 2006). Cybercrime activities also include those of 'traditional crimes', where criminals have found new ways in executing their criminal activities through the Internet by means of computer and other electronic devices (Stefan, 2011) and true cybercrimes which done using the technology (Brenner, 2007). Therefore, cybercrimes could be defined as "any activities that can bring harm by network technology for the purpose of manipulation of information or gain either by using computers or electronic devices as a tool, target or container" (Clancy, 2011).

Cybercrime differs from traditional crime by means of how the crimes are orchestrated. The main criterion that differentiates cybercrime and traditional crime is that the cybercrime is committed through an electronic device (Kam Wai, 2006), be it a desktop computer or a notebook, a cellular phone, tablet, etc. Another criterion is that criminal activities are committed remotely (Internet) compared to traditional crimes that require criminal's physical presence. Since cybercrime could be committed remotely, and there are no geographical and political boundaries in the cyber world, a cybercrime could also be transnational, since it affects not only one nation but several nations, making identification of crime scene location a difficult task. Meanwhile, Garfinkel (2009) states that cybercrime is a crime where the crime scene is `invisible'. It can be a heaven to cybercriminals because the percentage being caught of their cybercrimes is relatively small. Gabrys (2002) mentioned that there is less than a 1:20,000 chance of cybercriminals being caught and there is less than a 1:22,000 chance that the cybercriminals will go to prison. The reason being cybercriminals committed cybercrimes remotely without their physical present. However, there are electronic trails known as electronic evidence. Getting this electronic evidence is a technical challenge which investigators, defence counsel judges and lawyer must be familiar with, or they would face the problem in making decisions on it (Rockwood, 2005).

NATURE OF ELECTRONIC EVIDENCE

Electronic evidence is any data associated with electronic devices, whether created, stored, manipulated or transmitted in digital format. Electronic evidence is also known as digital evidence, computer evidence, computer generated document or computer-related document. The prime element of an electronic evidence which is an evidence is creating, storing, manipulating or transmitting in digital format with the advancement of technology tool (Mason, 2011).

There is no specific definition on electronic evidence under the Malaysian law, but it could be figured out in three different statutes, namely, the Electronic Commerce (ECA) 2006, Computer Crimes Act 1997 (CCA) and Malaysian Evidence Act 1950 (MEA). ECA in Section 5 defines electronic as any technology that can be used by various functions which is related to the technology. It could be computer and other devices such as a smart phone, tablet, iPad, etc., while 'computer output' is described in Section 2(1) of the CCA, which covers all types of statements or representations including translations that are produced by a computer and displayed on its screen. Section 3 of MEA provides the meaning of evidence and document. An illustration in that Section gives further understanding what a document is, which includes any writing or words printed, lithographed or photographed, a map, plan, graph or sketch, an inscription on wood, metal, stone or any other substance, material or thing, a drawing, painting, picture or caricature, a photograph or a negative, a tape recording of a telephonic communication including a recording of such communication transmitted over distance, a photographic or other visual recording including a recording of a photographic or other visual transmission over a distance, a matter recorded, stored, processed, retrieved or produced by a computer. Hence, electronic evidence is a form of documentary evidence.

Characteristics of Electronic Evidence

Electronic evidence is unique in its character compared to traditional evidence. Electronic evidence is easily manipulated (Kuntze & Rudolph, 2011), altered, damaged or destroyed (Pollitt, 2007). It can be modified without leaving any trace of the original message and it needs an expert to clarify it compared to record written with pen and paper (Garfinkel, 2009). The data in electronic format are also difficult to eliminate but easy to create. When a file or data on the computer was deleted, it does not mean that it is really gone as it will be stored away or merely moved to another location in the hard drive or digital storage device or archive system (Rockwood, 2005). It is because the computer contains metadata to enable the computer to retrieve the data which are supposedly deleted (Rockwood, 2005). Metadata means data which is invisible or hidden behind a screen or display monitor (Harris, 2009). It could be created by a user or automatically created by a programme and stored on the

computer and the user is probably unaware of its existence (Wong, 2013). Volume and speed of electronic data can be increased exponentially compared in paper format (Chung & Byer, 1998; Ahmad, 2008). The great volume of electronic evidence or too much quantity makes timely investigation an insurmountable task (Maurushat, 2010). To date, it has been a challenge for investigators to extract useful information from a large volume of data because the era of Big Data has arrived (Wu, Zhu, Wu, & Ding, 2014). Big Data refers to a buzzword or catch-phrase that is used to describe a massive volume of both structured and unstructured data that are large and difficult to process using traditional data base and software techniques. An example of Big Data is petabytes (1,024 terrabytes) or exabytes (1,024 petabytes) of data consisting of billions to trillions of records of millions of people - all from different sources (e.g., web, sales, customer contract, centre, social media, mobile data and so on). The data are typically and loosely structured data that are often incomplete and inaccessible (Beal, n.d.). Hence, finding data in a Big Data could be like finding a needle in a haystack, which is tedious for the investigator. In order to solve this problem, the investigator may need to use effective tools to investigate the crime such as the Big Data analytics (Armending, 2013).

It can be concluded that electronic evidence is very technical and complex for the user to understand as it has a unique nature compared to the paper format. It is also volatile and easy to manipulate either accidentally, unwittingly or wittingly and has an enormous volume with higher cost and time (Adams, 2011). Proving the authenticity of evidence is a crucial aspect when it comes to electronic evidence. It contains the combination between technical aspect rather than litigation aspect. However, in order to ensure the authenticity of electronic evidence, the expert must be able to show the chain of evidence which will prove the integrity of the evidence itself before it can be used to support a legal process (Rowlingson, 2004).

AUTHENTICATION OF ELECTRONIC EVIDENCE FROM THE MALAYSIAN PERSPECTIVE

"Authentic" in *Merriam Webster Dictionary* means original, real or genuine, true or just like the original (http://www.merriam-webster.com/dictionary/authentic). The authentic characteristic of electronic evidences is difficult to achieve because data in electronic format are prone to alteration, modification and could be corrupted through extraneous factor such as virus or malware. The data, which are in an electronic format, will need to be interpreted because they exist in the binary form. Authentication in digital format can be understood as 'matches the claims made about it' (Pattenden, 2009) and not a fabricated data (Radhakrishna, 2009) or spoliation (Adams, 2011). Adam (2011) defines spoliation as the destruction or significant alteration of evidence based on case *West v. Goodyear Tire & Rubber Co*.,

167 F.3d 776, 779 (2d Cir. 1999). To date, there has been no authentication term in Malaysia concerning electronic evidence but there are modes of authenticating it. Authentication is different from encryption. The word encrypt is defined as 'to change (information) from one form to another especially to hide its meaning' ((http://www.merriam-webster.com/dictionary/authentic). Both authentication and encyrption are considered as two intertwined technologies that help to ensure the data to remain secured (Brenton, n.d.).

In Malaysia, there are two legal issues concerning electronic evidence. Firstly, whether particular electronic devices come under the definition of computer in Section 3 of the MEA. Secondly, whether a certificate needs to be tendered when a maker of a document is not called to testify in court. In *Hanafi Mat Hassan v PP* [2006] 4 MLJ 134, an automated bus ticketing machine, a termalcycler and a deoxyribonucleic acid (DNA) analyser were found to be computer generated documents. Those documents were admitted in the court although no certificate was produced to prove the authenticity of the ticket and the DNA report. The court dismissed the appeal of the accused who was charged with rape and murder and confirmed the conviction and sentences of the High Court. In *Gnanasegaran a/l Pararajasingam v PP*, [1997] 3 MLJ 1 at p.14, the Court of Appeal gave a clear clarification on whether a certificate had to be tendered under Section 90(A) of MEA. Mahadeve Shankar JCA held that Section 90A was enacted to bring "the best evidence rule" up to date with the realities of the electronic age. The effect of Section 90A(1) means that the computer generated document (CGD) is admissible and it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to court, provided he issued a certificate stating to the best of his knowledge and belief that it was made in the course of its ordinary use. The court also held that as the maker was in court to testify, the certificate is not necessary to be adduced. Apart from being primary evidence, the best evidence rule is somehow relaxed when it comes to electronic evidence. It too is an exception to the rule against documentary hearsay. Section 90B requires the court to give the admissible evidence the requisite weightage.

Electronic evidence or computer generated document can be divided into two, namely, produced by a computer in the course of its ordinary use and not produced by the computer in the course of its ordinary use. Shaikh Daud Ismail JCA clarifies that there are two ways to proving 'in the course of the ordinary use' of the computer in *Gnanasegaran a/l Pararajasingam v PP* [1997] 3 MLJ 1 at p.11. In the course of the ordinary use, it may be proven by the production of the certificate as required by sub-section (2). Thus, sub-section (2) is permissive and not mandatory. This can also be seen in sub-section (4) which begins with the phrase, "Where a certificate is given under sub-section (2)", or by calling the responsible person or the maker of the document.

However, tendering a certificate was not mandatory in all cases, as explained in *Gnanasegaran* case which used the words 'may be proved' in Section 90A(2) indicating that the tendering of a certificate is not a mandatory requirement in all cases. In *Petroliam Nasional Bhd & Ors v Khoo Nee Kiong* [2004] 2 LRC 202, Su Geok Yiam JC stated that it is not compulsory for the plaintiffs to exhibit a certificate pursuant to Section 90A in his affidavit in support of the plaintiffs' application in respect of the computer printouts containing the impugned statements. The requirement to tender a Section 90A certificate will only arise if the plaintiffs did not wish to call the officer who had personal knowledge of the production of the computer printouts by the computer to testify to that effect in the trial proper.

From the above cases, it could be surmised that authenticating of electronic evidence in Malaysia can be done in two ways; either by the production of the certificate as required in Section 90A(2) or by calling the maker or the responsible person. In *PP v Goh Hoe Cheong & Anor* [2006] MLJU 468, the accused were charged under Section 39B(1) (a), Dangerous Drugs Act 1952. The electronic evidence, which were the baggage tag and a baggage claim tag were inadmissible in evidence in the absence of both oral evidence from Malaysia Airlines (MAS) or the authority managing Kuala Lumpur International Airport (KLIA) to prove the aspect of physical checking and any certificate under Section 90(1). The failure to authenticate CGD by adducing the certificate that the computer is in good working order and was produced in the course of its ordinary use would make an electronic evidence inadmissible in evidence under Section 67 of MEA. As a result, the accused were acquitted and discharged because the prosecution had failed to prove the charge against them.

Similarly, in *PP v Mohd Abdul Azizi bin Ibrahim* [2014] 10 MLJ 824 at para 62, when the court held that the closed-circuit television (CCTV) recording was inadmissible in the absence of both the certificate as well as the oral evidence for non-compliance with Section 90A of the MEA 1950. In this case, the electronic evidence was the hard disk in the CCTV. Even though it was not damaged and was able to vividly broadcast recording of the crime and was in safe custody, without adducing a certificate or oral evidence, it is inadmissible. Without the evidence of the CCTV recording, the prosecution had failed to establish that it was the accused who had caused the death of the deceased. Consequently, the accused was acquitted and discharged without calling the accused to enter his defence.

It is clear that there are methods in authenticating electronic evidence in Malaysia. Under Section 90A, electronic evidence can be admitted through one of two ways; either by tendering a certificate as stated in Section 90A(2) and (3) or an oral testimony to prove the document was produced by the computer "in the course of its ordinary use". It is followed by the

presumption in Section 90A(4) that the computer is in good working order and operating properly at the material time. The question is who will ensure that the computer or particular devices were properly functioning at the material time? Even though the computer was in the cause of its ordinary use, it is not impossible that at the material time, it was not in good working order or failed to operate properly (Mason, 2011). Even though in *DPP v McKeown; DPP v Jones*, Lord Hoffmann, [1997] 1 All ER 737 at 742, said that "it is notorious that one needs no expertise in electronics to be able to know whether a computer is working properly", it is an extreme view because it is not impossible to know that a computer is working properly even for an expert. Moreover, with the ability of cybercriminals to hack the computer system would depend on the expert to ensure that the computer is working properly. It shows the dependency to the expert in clarifying the electronic devices are in good working order.

Unfortunately, there is no specific provision in MEA on the authentication of electronic data or evidence compared to the United States (US) Federal Rules of Evidence in Rule 901 and Singapore Evidence Act (Amendment) 2012 in Section 116A, which repealed Sections 35 and 36. Other laws such as the United Kingdom (UK) Civil Evidence Act 1968 (CEA), the UK current civil evidence legislation, i.e. the Civil Evidence Act 1995 (CEA) and the UK Police and Criminal Evidence Act 1984 (PACE) also recognise the admissibility of electronic data and the importance of authenticating the data. Although there are provisions in MEA on authenticating a document under Sections 67 to 73A, the absence of specific provisions on electronic evidence has given rise to misunderstandings as to its admissibility or weightage (Radhakrishna, Zan, & Khong, 2013). Although the certificate or oral testimony is one of the means of authenticating electronic evidence, particularly computer generated document, it is not sufficient to ensure the originality and genuineness of electronic evidence. In the Supreme Court of India, Kurian J., in *Anvar P.V. v P.K. Basheer and others* Civil Appeal No. 4226 of 2012, observed that "electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice". In this case, electronic evidence by way of secondary evidence such as printouts, compact discs (CDs), pen drives, micro-chips, etc., shall not be given and used as evidence unless the requirement of Section 65B of the Indian Evidence Act (IEA) is satisfied, which requires the person in-charge of the duplication of data to give the court a certificate that the data are authentic to the best of his or her knowledge. It is to be noted that Section 65B of IEA is *pari materia* with Section 90A of MEA 1950.

The issues of collection, preservation and discovery are also important to ensure the authenticity of the contents of

the electronic evidence. The court must look into the importance of preserving electronic evidence to ensure that the contents of the electronic evidence are also authentic (Haneef, 2006). It seems that people who are associated with the justice system must equip themselves on the reality of electronic evidence, i.e. the unique characteristic which is prone to damage and alteration (Garrie & Gelb, 2010). This is because they can properly address the issues that come with it.

Modes of authenticating electronic evidence

In order to ensure electronic evidence is admissible, the parties involved must not only prove that the electronic evidence is both relevant and authentic. There are several ways of proving authentication in the MEA, which include calling the maker or the witness (Section 67) and expert opinion (Section 45), and comparing signatures (Section 73) and admission (Section 70). However, the unique nature of electronic evidence poses a special way in investigation, preservation as well as authentication of its contents (Borisevich *et al*., 2012). Electronic evidence can be authenticated by the following modes:

1. Testimony of the witness

The witness can testify the data or evidence from the photo. For example in *Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris* [2014] MLJU 177, 9 MLJ 605 at 618, the defendant denied that he is the author of all the articles in any blog available at the following URL, www.papagomo.com, and that he is not the owner of that blog. The defendant was accused for publishing the defamatory statement of the plaintiff through the website www.papagomo.com. However, there was a credible witness testimony [Mohd Fauzi bin Mohd Azmi (SP1)], which recognised the defendant as *papagomo* when he and the defendant met at the Bloggers United Malaysia Conference on 16 May 2009 at Lake View Garden in Subang Jaya, where he took the defendant's photograph. At that time, the defendant admitted to the witness that he was indeed the blogger named 'Papagomo'. Although the defendant denied that he is the person in the photograph, the court has a base to believe that the person in the photograph and the defendant are the same person based on the observation of the court. As a result, the defendant was ordered to pay RM800,000.00 to the plaintiff because the defamatory statement could be attributed to the defendant.

It is clear that without any credible witness (i.e., Mohd Fauzi bin Mohd Azmi), it is difficult to prove the responsible person or defendant being the author and owner of the blog. Even with the photograph of the defendant, without the testimony from the witness, the defendant could have easily denied that he was the writer named papagomo who had published the defamatory statement of the plaintiff through the website www.papagomo.com due to the anonymity of the virtual activity by internet user (Keene, 2012).

The user only can be identified through the Internet Protocol (IP) address and not by the person. Thus, there is a great challenge for investigator to identify the user of the electronic device. Even though the IP address is unique, it can be easily duplicated (Chen *et. al.*, n.d). In other words, cybercriminals can hide behind the IP address as an anonymous user. Cybercriminals do not use their real identification when committing any offence. Therefore, the testimony of the witness can corroborate the electronic evidence.

It is clear that in order to establish an authentic electronic evidence (photograph), expert opinion or a specialist in that subject is required to verify whether or not the photograph has been modified (Low, 2012). There are various types of software used in editing electronic pictures. However, identifying the authenticity of such pictures is a challenging task. This shows that electronic data including electronic photograph can be easily altered by using other technology. Apart from the testimony of witnesses, the testimony from the victim can authenticate electronic evidence. In *Kevin Michael Shea v The State of Texas*167 S.W.3d 98; 2005 Tex. App. LEXIS 3091, the accused (Shea) was convicted for indecency with a child. The victim's testimony authenticates the emails sent to her by the accused. The victim is familiar with the defendant's e-mail address and the contents of the e-mails match the conversation between them. In specific, the victim testified that the defendant had called her to confirm that she had received his e-mail. As a result, the court accepted the electronic evidence (emails) with the corroboration with other evidence. This overruled the objection raised by the defendant who had argued that the emails lacked of authenticity. On the other hand, the High Court of Kuala Lumpur in *Re Ng Liang Shing: ex-parte Sirim Bhd.* [2013] 8 MLJ 916 dismissed an appeal made by the Judgment debtor (JD) who relied on computer evidence and emails. The learned judge said, "Although the judgment creditor (JC) had not objected to the authenticity and the admissibility of JD's electronic evidence, nevertheless, for such evidence to be admitted, it would also require the evidence to be tested against the normal rules of evidence on burden and standard of proof and the weight to be attached to the evidence. The court found the relevance and weight to be given to the e mail trail and the electronic attendance record to fall far short of proof that the JD was actually in his department when the bankruptcy notice was purportedly served on him".

2. Expert Opinion

Section 45 of the MEA defines an expert as a person who has a special skill or knowledge or experience in science or art or foreign law which is acquired through special study or practice in that particular area. This means expert witnesses are able to give opinion(s) based on their skills for the questions asked. In *Chou Kooi Pang & Anor v Public Prosecutor* [1998] 3 SLR 593, Yong Pung How CJ opined that the expert opinion was only admissible to furnish the court with scientific information which was likely to

be outside the experience and knowledge of a judge. An expert must be skilled in his field whether through special study or from experience in order to assist the court.

Electronic evidence is a combination of law and technology, and the authentication of its contents has to be done by expert witness, i.e. a computer forensic investigator. Some countries have added a new section concerning expert opinion on authentication of electronic evidence to their existing laws. India, for example, inserted a new section, i.e. Section 79A of the Information Technology (Amendment) Act 2008, which involves or includes expert opinion as an examiner of electronic evidence. Computer forensic experts have a difficult task to prove the authenticity of electronic evidence, which is to ensure no doubt of any possible alteration during the process of searching, collecting, analysing and presenting the data to the court (Juan, 2011). In *Kennedy v Baker* [2004] FCA 562, Branson said that, "Computer data can be easily altered and merely turning a computer on causes data stored within the computer to change. One of the principal objectives in forensic examination of a computer system is to ensure that data on the computer system is not altered by the examiner during the examination process." In this case, Mr Kennedy sought an order that would prevent the respondents from examining or otherwise dealing with the imaged hard drive and required the delivery up of the imaged hard drive to him. The issue in this case concerns with the extent of the power given to an officer executing a search warrant. The application was dismissed with cost.

A computer forensic investigator is the person most suitable to help establish the authenticity of electronic data. The expert can preserve and ensure from the first step i.e. collection of electronic evidence up to the time when the evidence is produced in court. It means that a computer forensic expert can assist the judicial system in implementing justice relating to the techniques of investigation, i.e. to authenticate electronic evidence (Haneef, 2006).

3. Chain of custody

At the same time, the chain of custody of such evidence is important to ensure that the electronic evidence is authentic and accepted by the court from the time the data were created up to the time they are required (Giova, 2011; Mason, 2010). In *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210 at 229, the appellant was found guilty by the Session court judge. In this case, the learned counsel for the appellant contended that the chain of custody of the tape recordings had not been established by the prosecution. He further said that it must be affirmatively proven and referred to *Ghazali bin Salleh & Anor v PP* [1993] 3 CLJ 638, where Abdul Malik Ishak JC (as he then was) said in p. 644, "since the tape-recorded conversation is susceptible to interference, and can be easily altered, there must be evidence to show that it is well guarded. The essence of any safeguard which is at once real and understandable seems to lie in physically guarding the disc or tape as soon as a recording has been made on it; and making sure that it is

under guard until it is needed for a lawful occasion or until it is brought to the court". Augustine Paul J. said that the authenticity of the recordings had not been proven beyond reasonable doubt as there was a break in the chain of custody. Therefore, the tape recordings were wrongly admitted in evidence by the judge. As the conviction of the appellant on the first charge was anchored on the recorded evidence, it could not be sustained. Accordingly, the conviction and sentence on the first charge were quashed.

In order to ensure the authenticity of electronic evidence, the expert must be able to show the chain of evidence which will prove the integrity of the evidence before it can be used to support a legal process (Rowlingson, 2004). Furthermore, the investigators need to recognise that the chain of evidence is just as important as electronic evidence as it is with physical types to ensure the integrity of the evidence (Cameron, 2011). Apart from that, the unbroken chain of evidence is also the most effective method to preserving electronic evidence (Group 3, 2014). It can reveal any tampering and error in data entry, which is an evidentiary problem concerning electronic evidence.

It is clear that there are many modes of authenticating electronic evidence such as through testimony of witness, admission, expert opinion and also through the break in the chain of evidence. Electronic evidence is one of the forms of documentary evidence. Documentary evidence is one of the modes of proof other than oral evidence, circumstantial evidence and physical evidence. In *PP v Mohd Abdul Aziz bin Ibrahim* [2013] MLJU 530, although the court admits electronic evidence, they would still fail to prove a prima facie case unless the accused pleaded guilty. This is a murder case under Section 302 of the Penal Code. In *PP v Muhammad Nuzaihan bin Kamal Luddin* [2000] 1 SLR 34, the accused pleaded guilty to unauthorised access to computer materials, unauthorised modification of the contents of a computer and unauthorised access to a computer service under Sections 3(1), 5(1) and 6(1)(a) of the Computer Misuse Act (Cap 50A, 1993 Ed) ('CMA'). In *PP v Law Aik Meng* [2007] SGHC 33, the accused pleaded guilty for working in syndicate which involved in perpetrating an automated teller machine (ATM) card fraud and was charged under the CMA and the Penal Code. However, if the case is primarily based on the electronic evidence, the court might not be able to convict the accused without any other evidence if there was no weightage or the weightage attached to the electronic evidence is trivial.

CONCLUSION

It can be said that electronic evidence is not synonymous to cybercrime as one might have thought. Electronic evidence also relates to other cases other than cybercrimes; in fact, proof or conviction of the accused is much easier compared to other evidence as electronic evidence is automatically available in hard disks such

as those in speed cameras and in computers. For electronic evidence, however, being a documentary evidence, apart from its clean provenance (i.e., authenticity), legal relevancy and the best evidence rules must be complied in order for it to be admissible. The certificate used for authenticating electronic evidence is not sufficient enough to ensure the originality and genuineness of the electronic evidence or the content. Thus, to ensure that the electronic evidence is authentic, the discovery and preservation of electronic evidence must also be addressed using other evidence. At the same time, the prosecution, through their witnesses, must be able to show that the chain of evidence is unbroken because this will prove the integrity of the evidence before it can be used to support a legal claim. Apart from the modes for authenticating electronic evidence, Malaysia does not have a specific section concerning the authenticity of electronic evidence in respect of the weight to be attached to it compared to Singapore Evidence Act and the US Federal Rules of Evidence. It is proposed that laws on authenticity, reliability, accuracy and their weightage should be made available in the Malaysian Evidence Act 1950 by adopting the Singapore Evidence (Amendment) Act 2012 as a model legislation.

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The Shari'ah Approach to Criminalise Identity Theft

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ABSTRACT

Identity theft is one of the crimes that threaten both society and individuals. Millions of people have been badly affected by identity theft following misuse of their identities by criminals. The term 'identity theft' is used to include all illicit activities (gathering, utilising, buying selling, etc.) that target personal information (including natural and legal persons). Identity theft is not a new crime, and it has grown and become a major concern in the era of information. Around the globe, laws and regulations have been enacted and revised to accommodate the phenomenon. Based on the divine rules of Islam, the Shari'ah has its own formula and perspectives on matter such as identity theft. This paper attempts to define the term 'identity theft' and then recollect and examine some of the Shari'ah rules related to the crime in general and discuss their applicability to this insurmountable matter of identity theft so as to demonstrate solutions that can be offered to Muslim-populated jurisdiction. It is a doctrinal rather than empirical study, therefore, it attempts to explore the Shari'ah rules based on the primary sources of Islam, i.e. the Qur'an and the prophetic traditions (hadith), as well as the juristic opinions of prominent Muslim scholars. The study finds that the Shari'ah law is very resourceful with principles and theories on which laws on identity theft can be established. This paper demonstrates another area where the Shari'ah should be further explored to answer to the challenges of contemporary society. It is argued that a study such as this will positively contribute to the field of justice as it looks at identity crime from another approach and also suggests further research to help alleviate identity theft especially in the Muslim communities.

Keywords: Identity theft, fraud, Islamic criminal law

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INTRODUCTION

Identity theft is one of the crimes that threaten both society and individuals and

"unlike other crimes, victims of identity theft may not know they are victims until weeks or months after the theft has occurred" (An Australian Government Initiative, 2014). In the digital age, interests of people, especially in regard to property, are in serious danger. In traditional theft, thieves usually exercise their physical strength to commit the act of crimes. However, cybercriminals can steal millions of dollars while sitting in their divans and even without their innocent victims knowing about it. Consumer Sentinel Network Data Book highlighted an increase in the number of identity theft victims in the USA during the last 12 years (from 2001 to 2012). In 2001, for instance, the number of victims was about 137 hundred while in 2012, it was over one million (Consumer Sentinel Network Data Book, 2012). It was also indicated that about 15 million of the United States residents have had their identities used fraudulently each year resulting in an estimated loss amounting to $50 million (www.identitytheft.info, 2014). In 2012, around 7% of those aged 16 years or older became victims of identity theft (Erika Harrell, 2013). Identity theft can result in an experience of nightmare as in case of Adrian Richards, a UK citizen who is currently liable for a £130,000 unpaid tax bill in Germany and has to hire solicitors to fight a £34,000 court order (The Telegraph, 19 Oct 2013). Mr. Richards's passport was stolen and identity thieves used his passport to conduct unlawful activities that resulted in this debt.

As many cybercrimes are out of the scope of the traditional laws, lawmakers around the globe have responded by creating special rules that can be applied to digital crimes such as identity theft. Fortunately, the Shari'ah has come to guide mankind and solve their problems. The Holy Qur'an (Al-Hadid: 57) says, "We sent afore time Our Messengers with Clear Signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice" (Abdullah Yusuf Ali, 2007, p. 686). The Shari'ah has its own rules (ahkam) that can be applied to all crimes regardless of the time and location. Generally, the Shari'ah is aimed at benefiting the society and individuals and its laws are designed to protect their benefits and to facilitate their lives (Kamali, 2007, p. 395). This article attempts to positively contribute to the ongoing discussion by looking at identity theft from an Islamic perspective. It starts with a clarification of the term 'identity theft' in its academic usage. Then, it collects and analyses some relevant Shari'ah laws and discuss their applicability to identity theft. This is followed by conclusions for the paper by giving relevant recommendations.

DEFINITION OF IDENTITY THEFT

Nabeth (2009) mentioned that the concept of identity can be approached from two perspectives: the structural and the process perspectives. In the structural perspective, identity as a representation is used as a reference to "a set of attributes (permanent or temporary) describing the characteristics

of the person in context of practical activities" such as positions. In the process perspective, identity is viewed as "a set of process relating to disclosure of information about the person and usage of this information." Here, identity consists of elements that identify persons and link them to some authorisation such as identity cards. It is worthy to note that 'identity' is a term that is shared by many specialists in various fields of knowledge and thus we hear legal, social, technological and commercial identities and so forth (Sidi Mohamed, 2014).

Broadly speaking, identity theft is a term used to describe misusing identities and it is considered as one of the most known identity crimes. Therefore, various terms (e.g., identity crime, identity theft and identity fraud) have been used to describe the act of misusing identities and related information. James Blindell (2006) observes that in the USA, the term 'identity theft' is used to cover all types of identity crimes while in the UK and Australia, terms such as 'identity fraud' and 'identity crime' are used respectively to cover such crimes. Historically, as mentioned by Shun-Yung and Huang (2011), the term 'identity theft' was used to describe crimes committed against individual victims while 'identity fraud' is the term used to describe crimes against collective bodies such as the government and financial institutions. More recently, according to the authors, the term 'identity theft' is used to distinguish the act of obtaining personal identifying information and 'identity fraud' applied to the act of utilising such information.

The Canadian Criminal Code (R.S.C., 1985, c. C-46, s.402.2) defines identity theft by stating that, "Everyone commits an offence who knowingly obtains or possesses another person's identity information in circumstances giving rise to a reasonable inference that the information is intended to be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence". In the United States, an identity theft offender has been defined to include anyone who "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law" (Newman, Megan, & McNally, 2005, p. 1).

Academically, Mohamed Chawki and Mohamed S. Abdel Wahab (2006, p. 2) define the 'term identity' by stating that "Identity theft occurs when someone uses or exploits the personal identifying information of another person such as: name, social security number, mother's maiden name, ID number, etc…to commit fraud or engage in other unlawful activities. The OECD Ministerial Meeting on the Future of the Internet Economy in Seoul (2008, p. 12) described how identity theft is committed by the criminals: "ID theft occurs when a party acquires, transfers, possesses, or uses personal information of a natural or legal person in an unauthorised manner, with the intent to commit, or in connection with, fraud or other crimes."

In general, the above definitions include common key elements such as the object of identity theft (data or information), the acts (acquiring data, using or manipulating it, etc.), mental elements (obtaining and using information, etc.) and missing authorisation from the victim. The four mentioned elements "are required for the development of a criminal law provision in defining the structure" (Gercke, 2011). Thus, identity theft is an umbrella term used to place together many offences pertaining to identity (Zulhuda, 2012). For the purpose of this paper, 'identity theft' is used to include collecting personal information in illegal ways, misusing identities (manipulation, forgery, etc.) and using them in various unlawful ways.

Identity Theft Toolkits

Lawson mentioned that identifying information can be obtained through victim's negligence and deception, third party public disclosure and third party negligence or deception (Lawson, 2011). These tactics range from very simple ways such as theft of wallets, documents, dumpster diving, shoulder surfing, listening to oral disclosures of personal identity, to more sophisticated methods such as phishing, pharming, and using hacking and malicious software in which the perpetrators utilise high technology devices to commit their offences (Almerdas, 2007). Some of these tools seem to be unlawful (haram) in the Shari'ah perspective because they either contravene specific laws such as theft, spy and privacy (secret) laws or general laws such as prohibition of oppression and harming or causing damage to others' property, as will be discussed in the later section of this paper.

Purposes of Identity Theft

Identity crime is committed for different purposes. For example, criminals can engage in illegal activities such as selling personal information to other criminals, accessing and using their victims' credit or debit cards and taking over their existing accounts or opening new bank accounts, obtaining a passport or other identity documents in someone else's name, obtaining government benefits and services using the victim's name, concealing their identities while travelling illegally, smuggling drugs, engaging in money-laundering, terrorism or other crimes, misleading law enforcement or court officials by directing them to the wrong persons, etc. (ICCLR, 2011).

IDENTITY THEFT FROM THE SHARI'AH PERSPECTIVE

Protecting individuals' interests and benefits is the main objectives of the Shari'ah, as evidenced from Islamic resources including the holy Qur'an (Kamali, 1991, p. 395). The Shari'ah rules can be applied to all matters including identity theft in the digital age as the rules provide general and specific guidelines for all offences regardless of time and place (Ahmed Vathi, n.d., p. 36). Laws of Shari'ah (ahkam shar^ciah) can be divided into two categories; defining law (al-Hukm

al-Taklifi) and declaratory law (al-Hukm al-Wad[c]i) and each has different types. The former can be defined as "a locution or communication from the Lawgiver addressed to the mukallaf which consists of a demand or of an option" whilst the latter is "communication from the Lawgiver which enacts something into a cause (sabab), condition (shart) or a hiderence (mani[c]) to something else" (Kamali, 1991, pp. 323-325).

Prohibition of theft by the Shari'ah can be taken as an example of defining laws and theft punishment can be given as an example of declaratory laws (Khallaf, n.d., pp. 100-103). In this regard, it can be argued that the Shari'ah protects identities not only through general rules, but also by relying on specific rules (ahkam) and regulations. Laws on theft, forgery, fraud, spying and disclosure of secrets, in addition to sanctity of property are applicable to at least some forms of identity theft. In addition, other Shari'ah laws such as the sanctity of houses, sanctity of man's honour, prohibition of spying and prohibition of disclosure of secrecy could also be employed to curb identity theft in the digital age. The following are some examples of the Shari'ah laws that can arguably be applied to identify them.

Information Theft

Interestingly, under the Shari'ah, theft is one of the most serious crimes in Islam as it falls under the hudud crimes. In Islam, theft consists of infringement of property and privacy of others. Normally, property is protected by imposing a heavy penalty on the thieves. The Qur'an (al-Maeda: 38) reads, "As to thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in Power, Full of Wisdom." Likewise in one authentic narration, the Messenger of Allah (PBUH) said, "May Allah curse the thief who steals an egg for which his hand is cut off, or steals a rope for which his hand is to be cut off" (Ibn Hajar al-Asqalany, 2003, p. 461).

The term 'theft' is known as '*sariqah*' in Arabic, which means the act of taking or appropriating something in a secret way or without the permission of the owner. It includes taking objects and other things such as hearing speech, as the Qur'an (*Al-Hijr*: 18) says, "But any that gains a hearing by stealth, is pursued by a flaming fire, bright (to see)." Meanwhile, Ibn Rushd (1981) defines theft as "...taking the property of others in a secret way without being in his trusteeship." Likewise, [c]Abd Allah Ibn Mahmud (n.d.) mentions the following definition; *"Theft is the act of taking a sound-minded adult secretly a certain storing amount of money or its value, belonging to others, without a valuable reason*" (in other words, without having a reason to believe that such property is lawful for him).

It can be learned from these definitions that theft under the Shari'ah consists of taking the property or possession of others without their permission in a specific manner. Additionally, these definitions contain some conditions related to criminals

and conditions related to property. These conditions are important as they distinguish thefts from other financial crimes such as usurpation (*Ghasb*), embezzlement, (*Al-Ikhtilas*), breach of trust (*Al-Khiyanah*) and so forth.

Once these strict requirements are met, as well as all strict evidentiary conditions are fulfilled and the accused is found guilty by the court for committing theft, the punishment for the thief is the amputation of the right hand.

Does Identity Theft Qualify for Theft Liable for Hudud punishment?

In order to apply theft laws to identity theft, however, one needs to examine whether all the required conditions for theft are present on the occurrence of these crimes. As mentioned above, identity theft includes stealing personal information and utilising this information and each one will be examined in the light of the Shari'ah law.

a. Stealing Personal Information

Cybercriminals can gain information on someone's identity in many ways. Here, the focus is on stealing personal data under the perspective of the Shari'ah. According to Ibn Rushd, the majority of scholars are unanimous that stealing valuable property which can be bought and sold, subjects the thief to the hadd punishment. Thus, the question here is the personal information valuable property in the eyes of the Shari'ah. Can personal information be bought and sold?

Without any doubt, in this digital age, information becomes essential and valuable because "the data…has a very real, commercial value - possession of data itself is every bit as important as possession of physical real estate or capital good" (Barrett, 1997, p. 16) and people use the information in their daily lives. Having said that information is a valuable possession does not necessarily mean that stealing it is a theft under the Shari'ah because wine and pigs are valuable but stealing them is not considered a theft, which is liable for hadd punishment. In other words, the commercial value of information is only one of the conditions required in the stolen thing. Can personal information be bought and sold? Under the Shari'ah perspective, for instance, the object (goods) that can be bought or sold has to be a pure and beneficial thing that can be handed to the new owner (Shaikh Khalil, 1981).

Additionally, dealing with information as an asset is only a new occurrence in this digital age and for that reason, it is missing from traditional Islamic discussions. Nevertheless, another issue related to stealing information has been cited by Islamic jurists. It is the issue of stealing books including Qura'nic and *fiqh* books. In this regard, the Hanafi school, for instance, says that stealing Qur'anic and *fiqh* books does not subject the thief to theft punishment because the books are usually kept for reading and the letters do not have financial values ([c]Abdallah Ibn Mahmud, n.d.). However, other scholars are of the opposite view. For example, the Maliki

school viewed stealing Qur'anic or *fiqh* books as a theft. This opinion was justified by arguing that stealing things which can be sold is a punishable theft (Abd Al-Wahhab, 1997).

It is noteworthy to mention here the opinion of a contemporary Islamic jurist, Dr. Yusuf al-Qaradawi, about stealing information. Al-Qaradawi (2011), when asked about stealing protected information, is of the opinion that information is not a property even though it may have great value and thus, stealing it is not a conventional theft or in other words, stealing information is not a theft in the terminology of Islamic jurists. It seems that Al-Qaradawi has been influenced by the Hanafi school of thought. It is arguable that the opinion of al-Qaradawi is a justifiable opinion because the general rule of Shari'ah, as explained before, provides that *hudud* must be abandoned in the event of doubt or uncertainty. Thus, bearing in mind that the term 'personal information' includes different types and in the light of the above, one can come to the conclusion that stealing personal information may not be a punishable with the *hadd* punishment because the nature of the stolen subject matter is not clear.

b. Using Stolen Information to Commit Theft

Stolen information can include financial information such as credit card information, passwords and physical ATM cards, and such information may enable criminals to access victims' existing accounts, transfer money from victims' accounts to another, buy goods online, etc. These activities are absolutely forbidden by the Shari'ah because they infringe the sanctity of the property of others.

By analogy, Islam has announced that it is illegal to enter the houses of others without permission even though the houses are empty (The Quran, An-Nur: 27). The point being highlighted here is that the financial accounts of others are important personal information that must be protected. In the light of the rules relating to theft, accessing accounts without transferring money cannot be considered as a theft. It is like accessing the physical store or place of property and it is known that one of the conditions of theft is to bring the property out of its store or safe place. The jurists state that if the thief enters the place and takes the property but it is taken from his hands before he exits, it will not amount to the crime of theft which is liable for hadd punishment. It is submitted that the same rules can be applied to cybercriminals who misuse personal data to access others' accounts without permission or authority; though there may be no theft, such unauthorised access of information itself is wrong and can amount to a ta'zir punishment.

In another scenario, cybercriminals can commit further crimes such as transferring money from the victims' accounts to another account. In this case, the criminals can be considered thieves and can be punished by the prescribed punishment if all other conditions are fulfilled. To illustrate this,

theft rules can apply to anyone who takes respected property secretly from its proper place which he enters without permission if all other conditions are fulfilled. Careful examination of these crimes can lead one to conclude that the definitions of theft in Shari'ah can apply to them if all other conditions are fulfilled. On this particular issue, Al-Qaradawi (2011) commented that stealing money from banks by using information such as number on cards and password is a complete theft because all conditions of theft are fulfilled.

FRAUD AND FORGERY IN THE SHARI'AH PERSPECTIVE

Fraud is another part of the Shari'ah criminal law that can be applied to identity theft. According to Ibn al-Arabi (1998), fraud (al-ghish) is derived from the Arabic word 'al-ghashash' which means muddy water as a fraudster usually mixes good and bad quality and hides the reality. He added that all Islamic jurists unanimously agreed that fraud is forbidden by the Shari'ah because it contradicts the obligation of giving advice. It is narrated by Imam Muslim that the Prophet (P.B.U.H) said, "A person who takes up arms against us in not one of us and likewise the one who cheats us is not one of us" (Imam An-Nawawi, 1984, p.770). Undoubtedly, identity theft includes fraud because the criminals fraudulently use victims' identities to obtain goods or services. Phishing is also another manifest of fraudulent act that criminals employ to collect information, as explained before.

Other than fraud, forgery law is also relevant to the crime as identity criminals do expand their illegal actions to manipulate documents or create forged documents. Forgery is "the crime of copying a document, signature, painting, etc. in order to deceive people" (Oxford Wordpower, 2006, p. 309). Similarly in Arabic, the term tazwir (forgery) means to falsely create or say something in order to deceive others (Butrus Al-bustani, 1987). From the Shari'ah point of view, forgery is one of the major sins that are forbidden by the Shariah. The Holy Qur'an (Al-Hajj: 30) states, "…and shun the word that is false." Closely connected to the above, the Shari'ah forbids perjury or false testimony and counts it among the major sins. False testimony is derived from 'al-zur' which according to Imam al-Nawawi (1323H) is disguising falsehood and making it like truth. In fact, "identity thieves can use personally identifiable information to create fake or counterfeit documents such as birth certificates, licenses, and Social Security cards" (Finklea, 2014) and thus, the Shari'ah law of forgery can be employed to combat identity theft.

LAWS OF SPYING AND DISCLOSURE OF SECRECY

Identity thieves employ highly sophisticated methods such as phishing, pharming, and using hacking and malicious software to unlawfully collect personal information (Suhail Almerdas, 2007). Cyber trespass and hacking seem to be illegal (haram) in the eye of the Shari'ah because they

infringe the well-known Shari'ah rules such as infringement of the sanctity of others' property and prohibition to encroach and spy on others.

Spying

Regarding spying rules, the Shari'ah forbids spying and infringement of the sanctity of other people as the Holy Qur'an (Al-Hujuraat: 12) says, "O you who believe! Avoid much suspicions, indeed some suspicions are sins. And spy not, neither backbite one another..." Similarly, the Prophet s.a.w said, "Beware of suspicion, for suspicion is the worst of false tales. Do not look for other's faults. Do not spy one another" (An-Nawawi, a. P. 1185-6). According to Muslim jurists, spying (al-tajassus) is looking for private and secret matters. This includes private information and everything that is kept in secret. Furthermore, spying is an unlawful activity regardless of the means that are taken in doing it. It includes spying on people through doors, as well as using new technology (Hasan Al-Ghafiri & Muhammad Al-Alfi, 2007).

By analogy, cyber trespassing and hacking are akin to spying; hence, one can say that doing so is breaking the rules because cyber-intruders and hackers usually rummage into the victims' computers or computer systems to find secrets and private matters such as financial or personal information and this is exactly what a spy does. For instance, gathering information in a secret way such as installing software programme in the victims' computer to intercept communication and listening to oral disclosure of personal information could be considered as spying from the Shari'ah point of view.

Rule of Secrecy

In the Shari'ah point of view, keeping secrets is a vital matter. As an illustration, it is narrated that Anas (one of the Prophet's companions) said, "The Prophet (PBUH) came to me while I was playing with the boys. He greeted us and sent me on an errand. This delayed my return to my mother, when I came to her, she asked, "What detained you?" I said; "Allah's Messenger sent me on errand." She asked, "What was it?" I said it's a secret. My mother said; "Do not disclose to anyone the secret of Allah's Messenger." Anas said to Thabit: "By Allah, were I to tell it to anyone I would have told you" (An-Nawawi, p. 596-7). This authentic hadith indicates that keeping a secret was an essential matter in the early Muslim society. The jurists say that keeping secrets includes all things such as secret information, private matters, conversation, correspondence and so forth (Ahmad Ibn Ghunim, 1997). Since identity thieves are working under the table, it is arguable that the rule of secrecy could apply to their activities, at least in some instances.

SANCTITY OF PROPERTY AND IDENTITY THEFT

Regarding the sanctity of property, the Messenger of Allah said this when He was delivering the final sermon on the day of

An-Nahr (the sacrifice) in Makkah, "Your blood, your property, and your honour are sacred to you all like the sacredness of this day of yours, in this city of yours and in this month of yours" (Al-Imam An-Nawawi, 1998). This authentic hadith shows how the Shari'ah respects and protects property from any interference.

Additionally, identity theft is considered an act of aggression and mischief against the property of others which is forbidden by the Shari'ah as stated om the Qur'an (*Al-Baqarah*: 188), "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that you may eat up wrongfully and knowingly a little of (other) people's property." As Ibn Juzay (1430H) mentioned, aggression against property encompasses four kinds of unlawful actions: (1) taking property away without the owner's permission, (2) taking advantage of property, (3) destroying property, and (4) spoiling property completely or partially or making it less beneficial. It is argued that identity theft can be considered an aggressive activity against property as it includes the four elements of aggression. For instance, identity criminal can take over existing accounts, documents, services, etc., and use them without permission or even with the victims' knowledge.

CONCLUSION AND RECOMMENDATIONS

The discussion reveals that identity theft has become a major challenge in the information age as it is a menace to all societies regardless of age, position or location. Different preventive measures have been employed to tackle the crime. In some countries, identity theft is a stand-alone crime, while in others, it is "covered by a multitude of rules including unlawful access to data, fraud, forgery, and intellectual property rights, etc" (OECD, 2008). From the Islamic perspective, identity theft is a crime that can be treated by various Shari'ah principles and rules, as explained above.

The Shari'ah principles relating to the law of theft is applicable to identity theft in different scenarios as in cases of account takeovers which "occur when an unauthorized party gains online access to an existing bank account by stealing the access credentials to the account and then conducts illegal transactions" (Castell, 2013). Where all the strict conditions of theft are fulfilled, the prescribed *hadd* penalty (*Haddu al-sariqah*) can then be imposed. On the contrary, if any of the requirements of *hadd* is not fulfilled, the discretionary penalty (*Ta'zir*) is then applicable.

It was also pointed out that fraud and forgery laws can be cited as evidence of criminalising identity thefts from the Shari'ah perspective. Forgery and fraud are usually part of the identity thieves and are also unlawful (*haram*) under the Shari'ah law and for that reason they can be used to combat identity theft. Interestingly, forgery and fraud are discretionary crimes which have no specific punishment and falls under *ta'zir* crimes. It means that the Shari'ah

gives courts or lawmakers the freedom to impose a suitable penalty for the crime.

Other Shari'ah laws such as rules on spying, disclosure of secrecy and protecting of property are relevant to identity theft, as explained above. Therefore, the Shari'ah approach can be adopted to combat identity theft in the digital age as the conventional approach seems to be ineffective in dealing with the phenomenon.

However, it is not the scope of this article to look at how these Shari'ah rules are being implemented in the courts of various jurisdictions, which is a natural follow-up that deserves another research of more empirical nature. Nevertheless, this article recommends that countries with a Muslim community adopt the Shari'ah approach in dealing with identity thefts as the Shari'ah establishes general and flexible rules that can be applied to various crimes related to information-related offences. For instance, the Shari'ah punishment is characterised by the ease of implementation and the power of deterrence (Ahmad al-Raisoni, 1999). With the correct understanding of Islam and the Shari'ah, it is strongly believed that adopting the Shari'ah approach to identity theft will help protect individuals in the society from becoming victims and deter potential criminals from committing the crime of identity theft.

Apart from that, steps can be taken to enact and create special laws (based on the Shari'ah) that deal with identity thefts and digital crimes in general. This recommendation was initially suggested by some researchers who urged for creation of comprehensive identity crime offenses that cover identity theft and identity fraud (Commonwealth of Australia, 2008). It is believed that such specific laws are necessary particularly in countries that do not have computer crime acts. This special law can be a multipurpose tool. On one hand, it would enable law-enforcement bodies to prosecute identity criminals and on the other hand, it would help to create public awareness of identity crimes.

In addition, raising awareness among the legal fraternities and public about this type of crimes is also essential because there is a real need to sensitise the public to the problem of identity crime and its grave consequences. In the digital environment, people are willing to share everything including personal information and the criminals, as said, wait in ambush. Therefore, educating people about the consequences of identity crime and warning them that their personal interests could be in danger would lead them to be extra careful with their identity information and consequently protect themselves from identity theft.

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Criminalisation of Misappropriation of Traditional Cultural Expression (TCE)

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ABSTRACT

An act can only be regarded as a crime if its exercise can cause harm to others. On that basis, many activities that usurp copyright and can possibly pose harm to the society have been criminalised. In relation to traditional cultural expression, model laws such as the World Intellectual Property Organisation (WIPO) Draft Articles on the Protection of Traditional Cultural Expressions (2011), WIPO-UNESCO (the United Nations Educational, Scientific and Cultural Organisation) Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Action (1982) and the South Pacific Model Law for National Laws (2002), as well as some national laws of the United States of America and the Philippines have criminalised certain acts constituting the misappropriation of traditional cultural expressions (TCEs). TCEs or expressions of 'folklore' are considered by many developing countries as part and parcel of their cultural fabrics and their misappropriation as 'harmful' not only to the right holder's interest but also to the country. To that extent, the misappropriation of TCEs must be criminalised. This paper commences with an examination of copyright protection over TCEs in Malaysia with a view to assessing the adequacy, relevancy and efficacy of criminal sanction and ensuring effective enforcement against misappropriation of indigenous TCEs. The article also examines national initiatives on TCEs, particularly countries that have criminal provisions on certain activities involving TCEs. To lend support for criminalisation, the article further revisits the initiatives of WIPO and UNESCO. The article concludes that introducing some form of criminal offences within the context of copyright law is possible either through the extension of the existing criminal provisions or by having a special part dealing only with misappropriation of TCEs.

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INTRODUCTION

Traditional cultural expression (hereinafter referred as to "TCE") includes "any tangible or intangible form of creativity including phonetic or verbal expressions, musical or sound expressions, expressions by actions and tangible expressions (WIPO)"[1]. Internationally, WIPO and UNESCO have for decades tried to come up with model laws on TCEs, with differing objectives and purposes. One of the components of TCE is indigenous TCEs and international treatises dedicated to the rights of the indigenous peoples include some form of control over their TCEs. The main international instrument here is the Declaration on the Rights of the Indigenous Peoples.

At the General Assembly of the United Nations Permanent Forum on Indigenous Issues, Malaysia, together with another 143 states, voted in favour of the Declaration on the Rights of Indigenous Peoples. The event, which took place on 13th September 2007, saw four countries voting against it. These four countries were Australia, Canada, New Zealand and the United States. The enormous support received by the Declaration is a testimony to the recognition of the indigenous people's value and diversity of their cultures to the world (Kuruk, 2004). In relation to cultural heritage, Article 31 declares the dominion and intellectual property of the Indigenous Peoples over their cultural heritage, traditional knowledge and traditional cultural expressions. The broad term of traditional knowledge and TCE encompasses their manifestation of cultures, as well as their sciences and technologies. It also includes *inter alia*, oral traditions, literatures, human and genetic resources, knowledge of flora and fauna, and the like. As Malaysia has voted in favour of the Declaration, the country is duty-bound "to take effective measures to recognise and protect the exercise of these rights".

This paper considers only the punishment meted in the event of misappropriation of TCEs. As far as the current legislation is concerned, there is neither specific law addressing the issue of misappropriation of TCE in Malaysia, nor specific provisions under intellectual property laws, particularly the Copyright Act 1987 (hereinafter referred to as "the Act"). It considers whether criminal punishment can be proposed especially in cases where the moral interests of the practitioners of the TCEs have been impaired. In order to do this, the paper starts by discussing the position of TCE under the Copyright Act 1987, then the normal criminal provisions in the Act before venturing further into national and international initiatives on criminalising offences relating to TCEs.

[1] WIPO: The Protection of Traditional Cultural Expressions: Draft Articles, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO/GRTKF/IC/18/4Rev, available online at www.wipo.int

INDIGENOUS TCE IN MALAYSIA

Malaysia is a country of multi-racial population, blessed with diverse and unique cultural heritage. A small percentage of the population is the Indigenous people; though they are small in number, they greatly contribute to the cultural richness of the country. The Indigenous population of Malaysia includes the *Orang Asli* or "original people" in Peninsular Malaysia and the Indigenous people in Sabah and Sarawak. The *Negritos*, the *Proto-Malay* and the *Senoi* are among the major tribes of *Orang Asli* who live in Peninsular Malaysia. As compared to Peninsular Malaysia, Sabah has more diverse ethnic groups of the Indigenous people such as the *Bajau, Murut and Dusun*. In Sarawak, the Indigenous people include ethnics groups like the *Iban*, *Melanau*, *Bidayuh* and *Orang Ulu*. As a matter of fact, these Indigenous people have been practising and preserving their rich and unique cultural expressions which include *inter alia*, traditional dances, music instruments and various handicrafts. For example, a popular handicraft which belongs to the Iban of Sarawak is *Pua Kumbu* (hand-woven textile), while unique wood sculptures depicting forest spirits belong to the *Mah Meri* tribe who live on Carey Island in the state of Selangor.

TCE is undoubtedly a significant part, in fact an integral component, of the cultural heritage of a nation. This means that TCE is closely linked with the social identity of a nation, regardless of whether the country is categorised as a developed, developing or least developed. The notion is particularly relevant and proves to demonstrate the real challenge to some developing countries as they have encountered unjustifiable commercial exploitation of TCE by tradesmen who are not legally connected with the true owner of the TCEs. This in turn leads to unfortunate consequences as the Indigenous people, who were the real owners of the TCEs, would not be enjoying neither the economic reap nor reasonable profit from such unauthorised exploitation. It is disheartening to note that in some cases, very little or no respect at all was shown to the preservers of the TCEs in such dealings to the extent that the TCEs were exploited in ways that were culturally offensive, spiritually degrading and even insulting to the real custodians of the TCEs (Kuek, 2005).

Developing countries including Malaysia consider TCE as a valuable component of their cultural heritage and view their misappropriation as a serious threat to the integrity of the heritage. The serious efforts of developing countries on the need for an effective and feasible legal framework for the protection of TCE culminated in the proper legislation when many countries in the African continent incorporated specific provisions within their national copyright laws. Undoubtedly, there is a real need to find out an effective solution through a legal mechanism for protection and preservation of TCE (Farley, 1997-1998). As far as legal protection is concerned, copyright law is one of the mechanisms to protect the TCEs. Apparently, copyright law is thought as the possible option that

can afford adequate protection for the TCEs on the basis that it aims to prevent, *inter alia* unauthorised reproduction of the copyright works (where such TCEs satisfy the essential qualifications, or fall in the category of copyright works).

As far as copyright is concerned, it is a statutory, exclusive and assignable legal right given to the originator or creator in certain creative works such as literary, dramatic, musical, artistic and other intellectual works for a specific period. The main governing legislation in Malaysia pertaining to copyright is the Copyright Act 1987 (hereinafter "the Act"). Section 7(10) of the Act expressly states that:

"...the following works shall be eligible for copyright:

(a) literary works;
(b) musical works;
(c) artistic works;
(d) films;
(e) sound recordings; and
(f) broadcasts.

Section 10(1) further explains the eligibility of work to be protected under the Act:

Copyright shall also subsist in every work which is eligible for copyright and which—

(a) being a literary, musical or artistic work or film or sound recording is first published in Malaysia…"

In Malaysia, it is not a requirement to register a copyright as the right automatically subsists once the work is completed. Therefore, the author has to be vigilant in keeping evidence of production of his/her work as that might be used in the future, for example, to pursue a case if the work is infringed, though it is not compulsory to do so. One of the most important rights out of bundle of rights conferred to the copyright owner is the right to control reproduction. This is provided under section 13 (1) of the Act which states:

"Copyright in a literary, musical or artistic work, a film, or a sound recording or a derivative work shall be the exclusive right to control in Malaysia: (a) the reproduction in any material form…"

In this regard, those TCEs which comprise of tribal arts, tales and musical compositions would potentially be considered as literary, artistic and musical works under the domain of copyright. Nevertheless, section 7(3) of the Act expressly spells out the requirement for such works to be qualified for protection, that is, such works must be original in character. Having said that, the ensuing problem arises, as most of the TCEs belonging to the Indigenous people in Malaysia have been practised for so many generations and they have been passed down from the forefathers.

A careful scrutiny of the provisions of the Act reveals that there is no specific or direct provision relating to protection of TCEs in Malaysia. Nevertheless, it is still possible for certain forms of TCEs to be protected by the Act as long as they fulfil the requirements of copyright under the Act. In other words, the Act does not

foreclose new renditions of TCEs in the country from being subject matters under the purview of copyright. For instance, the handcrafts, wood carving and sculptures produced by the contemporary Indigenous people in the country may qualify for the scope of "artistic works" if "sufficient effort has been expended to make the works original in character" under section 7(3) of the Act.

As far as TCEs vis-a-vis the Act is concerned, the only provision that mentions the phrase "expressions of folklore" is found in section 2 of the Act, under the definition of "live performance" in paragraph (a)(vi) which includes within the ambit of recognised performance as "performance in relation to expressions of folklore which is given live by one or more persons in Malaysia, whether in the presence of an audience or otherwise …". Meanwhile, a "performer" is defined under the same section as "a person who performs a live performance under the Act". In theory, it seems that expressions of folklore in Malaysia may possibly qualify for protection though through an indirect manner. In practice, however, in the absence of the definition of "expressions of folklore" in the Act, it is somehow not an easy task to ascertain the specific nature of expressions that falls within the scope of the provision. Apparently, the interpretation of the provision is left for judges to decide. The extent of the indirect protection of TCE provided by the Act is yet to be ascertained as at to date, there have been no reported cases on live performance of expressions of folklore.

Apart from the performer's rights, another relevant provision is section 26(4)(c) of the Act. This provision stipulates that "in the case of unpublished work where the identity of the author is unknown, but where there is every reason to presume that he is a Malaysian citizen, copyright in the work shall be deemed to vest in the Minister charged with the responsibility for culture". From this provision, it is observed that if TCE meets the requirement of a literary, musical or artistic work within the meaning of the Act, copyright in such work shall be conferred to the Minister and the Minister is legally responsible to give proper protection as well as to enforce the rights of the unknown Malaysian author of such work in Malaysia. Such rights are equally afforded to authors from the Berne Union countries.

This article focuses on the criminal remedies for the infringement of TCEs since it is possible for TCE to be recognised under copyright law in Malaysia [in particular under Section 2 and section 26(4)(c), as mentioned above] and fulfils the copyright requirements under Section 7(3) of the Act. In relation to criminal remedies, various attempts have been made over the years to furnish better legal remedies and solutions for the protection of TCEs, and these include discussion and proposal of imposing criminal penalties for wilful infringement involving TCEs.

Thus, in principle, many of the TCEs are protectable subject matters under the copyright law. In terms of fulfilling the conditions for subsistence of protection and

duration, however, there would be problems satisfying the requirement of the copyright law (Moran, 2008). The "originality" requirement under section 7(3)(a) of the Act, which is of paramount importance, means that copyright protection is only conferred to the "original" works, and many traditional literary and artistic productions are not "original" in this sense. In addition, certain 'fixed' expressions under section 7(3)(b) of the Act may not fulfil the requirement of an artistic work such as sand carvings, body painting, face painting and the like. Looking from another angle, adaptations of TCEs can still qualify for the copyright protection and hence be legally protected as the 'original' copyright work and designs (Lim, 2012). In fact, there are quite a number of limitations of copyright law vis-a-vis protection of TCEs as have been suggested by many legal jurists and authors, but the originality requirement and the fixation requirement are some of the oft-cited ones (Vanguardia, 2011-2012; Farley, 1997-1998; Kuruk, 1998-1999).

COPYRIGHT INFRINGEMENT & CRIMINAL REMEDIES

Infringement has always been one of the issues revolving around intellectual property rights, and this includes copyright. Infringement occurs when a person does or causes other persons to do an act controlled by copyright without the consent of the owner. Those acts are listed under Section 36 of the Act which include sale, distribution and exhibition of the product in the public for purpose of sale. Misappropriation of TCEs may amount to copyright infringement (on the assumption that TCE is protected under copyright) in various ways, such as by way of unauthorised reproduction or commercialisation of handicrafts or products made by Indigenous people
with no sharing of economic benefits, neither monetary profit nor acknowledgment of the original creator [which falls under the purview of moral rights of copyright law, i.e. section 25(2) of the Act].

When an infringement of copyright has occurred, civil actions may be initiated by the copyright owner. Remedies available to the copyright owner include *inter alia,* damages and injunction. Section 37(1) of the Act clearly provides that "Subject to this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright and in any action for such an infringement, all such relief by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as are available in any corresponding proceedings in respect of infringement of other proprietary rights". A defendant who has infringed an IPR may also face criminal action for his infringing activities. The criminalisation of these activities, instead of simply making them the subject of civil suit, is justified because of the mischief these activities have caused on the society. The criminal offences include making for selling or hire, or exhibiting for the purpose of sale and importing infringed goods into Malaysia. The punishment meted upon conviction can be quite dire, i.e. a combination of both monetary fine and imprisonment. The

enforcement of copyright criminal offence is done by the Enforcement Division of the Ministry of Domestic Trade, Cooperatives and Consumerism.

It is to be noted that provisions on enforcement are provided under Part VII Copyright Act 1987, from section 44 to section 57. The seized goods can be subjected to forfeiture regardless whether the perpetrator is convicted guilty or not for the offence. The criminalisation of certain copyright offences can be a useful mechanism to deter the public from committing certain offences.

In relation to TCEs, criminal offences can be a strong weapon against misappropriation of these expressions outside the cultural domain of such practices. In addition, where the misappropriation leads to offensive use of revered images of the TCEs, stronger punishment should entail. This requires a careful revision of the current criminal provisions to reflect the sanctity of certain images of TCEs which should be meted with heavier punishment.

In order to understand which context criminal offences can be introduced, this article further examines the practices in some national legislations, as well as recommendations in international framework such as WIPO and UNESCO.

NATIONAL COUNTRIES EXPERIENCE WITH CRIMINAL OFFENCES DEALING WITH TCEs

Legal mechanisms in several countries tend to show a trend of tightening their copyright laws and enforcement in addressing misappropriation of TCEs. Some countries have taken serious efforts by treating copyright infringement as offences under criminal law, and these include misappropriation of TCEs (Tellez & Waitara, 2007). In comparison to other regions, African countries have been observed to be very vocal in protecting their TCEs. For instance, a paramount significance is attached to the legal definitions of the term ‘folklore’ and interestingly, this has underscored the importance of communal rights (Blavin, 2003). A cursory look at various copyright laws of African countries reveals that the legislation affords a comprehensive definition to ‘folklore’. For example, S.31(5) Copyright Act 1999 (Nigeria) defines folklore as:

> “a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.”

Likewise, a similar definition is incorporated in the legislation of other African countries. Art. 15, Law on Copyright and Neighboring Rights (Congo) 1982 for instance, defines folklore as:

> “all literary and artistic productions created on the national territory by authors presumed to be Congolese nationals or by Congolese ethnic communities, passed from generation to generation and constituting one of the basic elements of the national traditional cultural heritage.”

A similar provision can also be found in Art. 4 of Decree-Law Regulating the Rights of Authors and Intellectual Property (Burundi, 1978), which defines folklore as:

> "all literary, artistic and scientific works created on the national territory by authors presumed to be nationals of Burundi, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage."

From the above-mentioned legislations, statutory examples of folklore would include poetry, riddles, songs, instrumental music, dances, and plays, productions of art in drawings, paintings, carvings, sculptures, pottery, handicrafts, costumes, as well as indigenous textiles and the like, though these examples are not exhaustive. Other than the national laws, regional efforts of the African Intellectual Property Organization have also come up with a broader definition of folklore. Annex VII of the Revised Bangui Agreement of 1999 folklore denotes:

> "…literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation."

Interestingly, African legislatures have developed some other alternative legal mechanisms in order to enhance the current protection over folklore rights. A relevant example is a number of African copyright laws which enunciate that such copyright may be vested in the government instead of individual or communal rights. This mechanism is possible as the government is treated as if it were the creator of the original work. Another round of observation on Nigerian laws (which has express provisions on this point) reveals that legal protection of IPRs is specifically expounded under the Nigerian Copyright Act, with amendments in 1992 and 1999. S. 28(1) of the 1999 Act, states:

> "Expressions of folklore are protected against:
> (a) reproduction;
> (b) communication to the public by performance, broadcasting, distribution by cable or other means;
> (c) adaptation, translation and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context."

Thus, it is apparent from the above provision that the Nigerian laws have managed to include the aspect of protection of the cultural rights and traditional cultural expressions which many developing countries are still hesitant to follow suit, the reasons *inter alia*, for fear that such provision may be exploited (Ezeani, 2011). It is also worth noting that S. 29A of the 1999 Copyright Laws specifically provides for criminal liability for the infringement of any expression of folklore. It states that:

> "Criminal liability in respect of infringement of folklore.

29A. (1) A person who -
(a) does any of the acts set out in section 28 of this Decree without the consent or authorisation of the Commission; or
(b) does not comply with the requirement in subsection (4) of section 28 of this Decree; or
(c) wilfully misrepresents the source of an expression of folklore; or
(d) wilfully distorts an expression of folklore in a manner prejudicial to the honour, dignity or cultural interests of the community in which it originates, commits an offence under this Decree.
(2) A person convicted of an offence under subsection (1) of this section is liable on conviction;
(a) in the case of an individual, to a fine not exceeding N 100,000 or to imprisonment for a term of 12 months or to both such fine and imprisonment;
and
(b) in the case of a body corporate, to a fine of N500,000."

Criminalisation of illegal misappropriation of TCEs would run parallel to the notion that the illegal taking should be considered as a crime; in fact, it is not a concept that is foreign to intellectual property law. Proposal and suggestions for criminal sanctions and remedies are made with the primary goal of deterring the criminal conduct, while also providing a realistic, achievable remedy for indigenous people (Vincent, 2010) who are often a vulnerable party in misappropriation cases involving TCEs. Criminalisation of infringement of TCEs owned by indigenous people would to some extent address the problem of misappropriation of TCEs and hence facilitate better protection of their rights.

Since intellectual property is recognised and generally considered as a form of property, the proposition to criminalise primary infringements of copyright could be justified on the same reasoning as offences pertaining to the violation of general property interests. A relevant example would include the law of theft (Cheng, 2010).

Other than African countries, several other countries have also legislated on TCEs at the national level by criminalising several activities constituting the misappropriation of TCEs with particular emphasis on indigenous TCEs (Kuruk, 1998-1999). Of notable mention is the Indian Arts and Crafts Act (2000) of the United States of America. The Act was passed with the objective of preventing commercial interests from falsely representing their services with indigenous peoples. Section 104(a), for instance, "prohibits misrepresentation in marketing of Indian arts and crafts products in the US" comes with "criminal penalties

punishable with fines up to $250,000 of five years imprisonment". The Implementing Regulations (Section 309.2(d)(1) further clarifies that, "an Indian product covers only any art or craft product made by an Indian both in traditional and non-traditional Indian style or medium."

It is clear that the Act makes it illegal, and hence it is a criminal offence to sell or to be involved in trade activities in respect of an art or craft when a person claims them to be created by an Indian, but the truth is that they are not really the products of Indian. It is thus a crime to sell products claiming to be Indian Jewellery in US if it is not true. The only constraint in the Act is that it only applies to the arts and crafts produced after 1935 and the producer of the concerned Indian products must be a US resident.

In the ASEAN region, the Philippines has successfully legislated a broad range of indigenous rights. Under the Philippines national laws, among the rights conferred to the indigenous people are the right to control and govern ancestral domains, as well as the right to self-governance and empowerment, to be given social justice and equal treatment as part of human rights and more fundamentally cultural integrity over their cultural heritage. As the Act serves to recognise and promote all rights of the indigenous cultural communities, it provides for criminal punishment for certain rights and obligations laid down in Section 72 of the Indigenous Peoples' Rights Act of 1997. This includes unauthorised and/or unlawful intrusion upon ancestral lands (as spelt out in Section 21). The Act also covers the unlawful acts pertaining to employment (section 24), as well as rights to religious, cultural sites and ceremonies (Section 33). The provision clearly states that the commission of violation of any of the provisions of the Act will entail criminal punishment and is not confined to only the situations mentioned.

INTERNATIONAL INITIATIVES

The Western copyright system is not designed to give full recognition of the interests of the right holders of TCEs (Torsen, 2008). It is for this very reason that WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) recommends for a mixture of proprietary, non-proprietary and non-Intellectual Property measures (Girsberger, 2008). This will ensure a more comprehensive treatment of TCEs by considering both the monetary and moral interests of the right holders.

The Model Provisions for the National Laws on the Protection of expressions of folklore against illicit exploitations and other prejudicial actions (1985) prepared by UNESCO and WIPO are among the earliest model laws on TCEs. The Model Provisions recommend penal provisions in four instances, as follows:

i) Wilful non-compliance with section 5. Section 5 deals with acknowledgement of source
   of TCEs. Thus, by deliberately not mentioning the source of

the TCEs, i.e. the community or geographic place where the TCEs are derived would entail criminal sanction.

ii) Wilful utilisation of TCE without the authorization or consent of the holder of the TCEs. In this context, utilisation includes publication, reproduction and any distribution of copies of TCEs or public recitation, performance transmission and communication of such TCEs.

iii) Deceiving the origin of artefacts or subject matters of performances or recitations made available to the public to be derived from a certain traditional community when they are not.

iv) When a person publicly uses, in any direct or indirect manner, expressions of folklore wilfully distorting the same that would prejudice the cultural integrity of the TCEs.

On that score, the WIPO IGC during its seventh session in Geneva (2004) recommends that any type of legislative solution must address the interests of the traditional communities themselves. Any legislative solution must address certain key objectives such as raising deference over traditional cultures and folklore, with the aims of paying reverence to the dignity, cultural integrity, as well as intellectual and spiritual values of the right holders of the TCE. One way of achieving these is by empowering them to assert authority over their own TCEs including taking action against perpetrators, should they wish to do so.

The WIPO IGC recognises the need to look at the interests of the traditional community in a broader perspective. The Report stresses the need to explore a wide range of legal mechanisms to achieve the intended objectives of the protection and not just within the narrow confines of copyright. This includes a mixture of non-proprietary and non IP measures. Among the non-IP measures highlighted in the Report is the law in relation to the promotion of arts and handicrafts.

The WIPO IGC recommends member countries to restrain the offensive use of TCEs that might prejudice the honour of the beneficiaries or the integrity of the TCEs. In particular, Article 8 recommends member countries to adopt measures that are necessary to prevent wilful or negligent infringement against the economic or moral interests of the TCE holders sufficient to deter them from repeating the conduct in the future.

Among the conducts that may justify effective sanctions in the WIPO IGC Report (2004) include:

"(a) unauthorized reproduction, adaptation and subsequent commercialisation of TCEs, with no sharing of economic benefits;

(b) use of TCEs in ways that are insulting, degrading and/or culturally and spiritually offensive;

(c) unauthorised access to, and disclosure and use of sacred/ secret materials;
(d) appropriation of traditional languages;
(e) unauthorised fixation of live performances of TCEs and subsequent acts in relation to those fixations;
(f) appropriation of the reputation or distinctive character of TCEs in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and 'style';
(g) failure to acknowledge the traditional source of a tradition-based creation or innovation;
(h) granting of erroneous industrial property rights over TCEs and derivatives thereof."

From the WIPO IGC Report, several observations can be drawn. A broad range of offences can be created in relation to the misappropriation of TCEs. Among them are those considered as 'harming' the cultural identity of the TCEs. These include the use of the TCEs in culturally degrading manner and failure to acknowledge the source of the TCEs. However, some offences that impaired the material needs of the rights holder can also be penalised. These include unauthorised access to secret/sacred TCE, the sale of fake indigenous arts and crafts and the granting of IPRs over the TCEs. Both the impairment of the materials and moral interest of the TCEs can cause considerable harm to the society and should be penalised. If the widespread sales of fake indigenous arts and crafts are left unchecked, there is little respect left for creativity and on the basis of just theory should be curbed.

Another important model law is the South Pacific Model Law for National Laws (2002) lends support to the proposition that certain misappropriation of TCEs can be criminalised. Section 26 of the Model Law provides the criminal punishment for a person who makes use of TCE outside its traditional usage or uses it for commercial purpose without prior consent from the right holders. Other instances of criminal offences are acts inconsistent with the moral rights of their traditional holders are *inter alia*, Section 27 of the South Pacific Model Law for National Laws (2002), where TCEs which are kept sacred and secret are used outside their customary use (as provided under Section 28 of the Model Laws) and also Section 29, which provides for importation or exportation of TCEs without the prior informed consent of the TCEs.

From these international documents, we can propose that certain usage of TCEs must, as a matter of policy, be criminalised. Only then can we take effective measures against misappropriation of TCEs, which will not only harm the right holders but also the society.

CONCLUSION & RECOMMENDATIONS

The extension of copyright over TCEs is the most logical argument raised by many scholars. Similarly in Malaysia, certain renditions of TCEs qualify for copyright protection. Once recognised as a subject matter of copyright, the extension of the criminal provisions to cover the misappropriation of TCEs is the next logical move.

Both UNESCO and WIPO have developed model laws that can be used against misappropriation of TCEs. These two model laws recommend criminalising of activities that impair both the moral and material interests of the TCE right holders. These recommendations support the practices in some countries that have legislated to this effect such as Nigeria and the Philippines. Meanwhile, the US targets only the sale of fake indigenous arts and crafts.

All these international and national initiatives attest to the fact that more should be done to arrest the widespread misappropriation of TCEs. Criminalising certain offences that harm the interest of the right holders of the TCEs serves not only the right holder's interest but also the society. In Malaysia, this can be done by extending the criminal provisions to cover the situations mentioned in the WIPO IGC reports. Another way to do this is by having a special part dedicated solely to the criminalisation of misappropriation of TCEs. The newly introduced part for criminal offences relating to camcording could be a good example. If camcording can be criminalised, so can offences that impair the materials and moral interests of the TCEs. In addition, further support can also be obtained from Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that allows the criminalisation of copyright offences "particularly when they are committed willfully and on a commercial scale." Most of the sales of fake indigenous arts and crafts are done with blatant disregard of the rights of the TCE holders and with the intent of making commercial profit. To that extent, the criminalisation of misappropriation of TCEs falls squarely within Article 61 TRIPS Agreement and thus, is justifiable.

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Revised: August 2015

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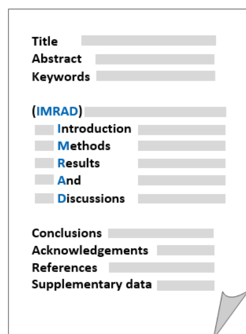

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