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**SOCIAL SCIENCES
& HUMANITIES**

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A special issue devoted to
Vision of Law & Social Change

Guest Editors
Mohd Afandi Salleh, Nazli Ismail & Noor' Ashikin Hamid



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Journal of Social Sciences & Humanities

About the Journal

Overview

Pertanika Journal of Social Sciences & Humanities (JSSH) is the official journal of Universiti Putra Malaysia published by UPM Press. It is an open-access online scientific journal which is free of charge. It publishes the scientific outputs. It neither accepts nor commissions third party content.

Recognized internationally as the leading peer-reviewed interdisciplinary journal devoted to the publication of original papers, it serves as a forum for practical approaches to improving quality in issues pertaining to social and behavioural sciences as well as the humanities.

JSSH is a **quarterly** (*March, June, September and December*) periodical that considers for publication original articles as per its scope. The journal publishes in **English** and it is open to authors around the world regardless of the nationality.

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Pertanika Journal of Social Sciences & Humanities aims to develop as a pioneer journal for the social sciences with a focus on emerging issues pertaining to the social and behavioural sciences as well as the humanities.

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Pertanika was founded in 1978. A decision was made in 1992 to streamline Pertanika into three journals as Journal of Tropical Agricultural Science, Journal of Science & Technology, and **Journal of Social Sciences & Humanities** to meet the need for specialised journals in areas of study aligned with the interdisciplinary strengths of the university.

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The *Introduction* explains the scope and objective of the study in the light of current knowledge on the subject; the *Materials and Methods* describes how the study was conducted; the *Results* section reports what was found in the study; and the *Discussion* section explains meaning and significance of the results and provides suggestions for future directions of research. The manuscript must be prepared according to the Journal's **INSTRUCTIONS TO AUTHORS**.

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Comments to authors are about the appropriateness and adequacy of the theoretical or conceptual framework, literature review, method, results and discussion, and conclusions. Reviewers often include suggestions for strengthening of the manuscript. Comments to the editor are in the nature of the significance of the work and its potential contribution to the literature.

3. The chief executive editor, in consultation with the editor-in-chief, examines the reviews and decides whether to reject the manuscript, invite the author(s) to revise and resubmit the manuscript, or seek additional reviews. Final acceptance or rejection rests with the Editor-in-Chief, who reserves the right to refuse any material for publication. In rare instances, the manuscript is accepted with almost no revision. Almost without exception, reviewers' comments (to the author) are forwarded to the author. If a revision is indicated, the editor provides guidelines for attending to the reviewers' suggestions and perhaps additional advice about revising the manuscript.
4. The authors decide whether and how to address the reviewers' comments and criticisms and the editor's concerns. The authors return a revised version of the paper to the chief executive editor along with specific information describing how they have answered the concerns of the reviewers and the editor, usually in a tabular form. The author(s) may also submit a rebuttal if there is a need especially when the author disagrees with certain comments provided by reviewer(s).

5. The chief executive editor sends the revised paper out for re-review. Typically, at least one of the original reviewers will be asked to examine the article.
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Preface

This issue includes various papers which were presented at the 4th International Conference on Law and Society (ICLAS) 2015, the International Conference on *Waqf* (ICW 2015), the International Seminar on al-Quran in Contemporary Society (SQ 2015) and the International Conference on Empowering Islamic Civilisation (ICIC 2015).

All the conferences were held at Universiti Sultan Zainal Abidin, Kuala Terengganu in 2015. ICLAS and ICW were hosted by the Faculty of Law and International Relations (FLAIR), in collaboration with Harun M. Hashim Law Centre, the International Islamic University Malaysia (IIUM); Muhammadiyah University Yogyakarta (UMY), Indonesia; Istanbul University, Turkey; and Fatoni University, Thailand. The other two conferences, SQ 2015 and ICIC 2015, were organised by the Research Institute of Islamic Products and Civilisation (INSPIRE), UniSZA.

The 4th ICLAS focused on multifaceted issues affecting law, sociology of law, society and globalisation. The main purpose of the conference was to enhance and consolidate the role and functions of law in ensuring good public policy and governance. Various legal, quasi-legal and social frameworks were explored and analysed through various perspectives in the presentations at the conference. The theme “Law, Society and Globalisation” summed up contemporary challenges in this complex area.

The ICW primarily focused on issues impacting the economy, business, finance and entrepreneurship of *waqf* regimes. The main purpose of the conference was to regenerate commitment and conviction by all stakeholders in the value-creation of *waqf* regimes. In this context, the conference adopted the theme, “*Waqf* Issues and Challenges: The Way Forward”.

The SQ 2015 with the theme “Al-Quran Propelling an *Ummah Wasatiyyah*” discussed the idea of moderation (*wasatiyyah*) outlined by the al-Qur’an and emphasised contemporary issues from the Quranic worldview. The ICIC 2015 focused on Bediuzzaman Said Nursi’s thoughts on projecting a universality of Islam in theoretical and practical laws in the context of empowering Islamic civilisation as a relevant theme for the present.

Towards fulfilling the broad scope of the conferences, the organisers accepted papers on the relevant themes, namely, challenges affecting the legal system including law making, dispute resolution, legal education, professional practice; public policy and corporate governance; neo-colonialism, international relations and globalisation; and Islamic thought and other social science subjects.

A total of 114 papers were presented at ICLAS, 33 papers were presented at ICW, 103 papers were presented at ICIC 2015 and 97 papers at SQ 2015. For this 2nd special issue, a total of 28 papers were carefully selected. They are considered suitable to be included in this publication considering the vigorous examination and discussions on contemporary issues relevant to current challenges.

The publication of these papers would not be possible without the support of faculty members, as well as the team of reviewers who have efficiently completed their tasks with highest diligence. To all who have contributed directly or indirectly at both conferences and publications, we wish to express our sincere gratitude and appreciation.

Our deepest gratitude belongs to Dr. Nayan Kanwal, the Chief Executive Editor, and his dedicated team at the Journal Division, Universiti Putra Malaysia for their wisdom and valuable advice especially during the early stages of our own learning process.

Guest Editors:

Mohd Afandi Salleh (*Assoc. Prof. Dr.*)

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Tok Ku Paloh's Manual on Sufi Practices in *Ma'arij Al-Lahfan Li Al-Taraqqi Ila Haqaiq Al-'irfan*

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ABSTRACT

Performing *Sufi* practices is one of the ways of getting closer to Allah and achieving the level of gnosis (*ma'rifa Allah*). The objective of this article is to assess the *Sufi* rituals offered by Sayyid Abdul Rahman bin Sayyid Muhammad Zayn, known widely as Tok Ku Paloh. He was a famous *Sufi* figure in the Nusantara region based on his manuscript entitled *Ma'arij Al-Lahfan Li Al-Taraqqi Ila Haqaiq Al-'Irfan (The Ladder for the Thirsty to Achieve Ma'rifa)*. This is a qualitative study using the content analysis method based on the treatise. The study found that the *Sufi* rituals accomplished by Sayyid 'Abdul Rahman Al-Aydarus were systematically presented, covering fundamental aspects in Islamic spirituality such as repentance (*tawba*), prayer (*du'a*), invocation (*dhikr*) and contemplation (*muraqaba*). This article is based on the premise that Sayyid Abdul Rahman Al-Aydarus has essentially highlighted one of the best manuals of *Sufi* practices to be revealed to the public in his time. Consequently, many of these *Sufi* practices are still practised in modern society today.

Keywords: *Dhikr, ma'arij al-lahfan, ma'rifa Allah, Sayyid 'Abdul Rahman Al-Aydarus, Sufism rituals*

INTRODUCTION

Gnosis (*ma'rifa Allah*) is the level at which a disciple achieves full knowledge of his Creator, the All Supreme. Gnosis here means to know the characteristics of Allah, *dhatiyya* and *ma'nawiyya*, that is, the characteristics that are obligatory and not impossible for Allah to possess. This is so because gnosis is the main element possessed by a religiously responsible

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Mukallaf or an individual who is sane and has reached pubescence in Islam. An individual performing numerous forms of exoteric (*al-zahir*) worship without the knowledge of and understanding gnosis would be offering worship that is not perfect because the aim of offering worship to Allah is to have a feeling of self-humility towards Allah, who possesses all the supreme characteristics that qualify Him as Allah, The Supreme Almighty.

Besides that, an individual can easily fall into the quagmire of treason and blasphemy without gnosis. In order to understand the concept of gnosis, religious scholars have stated that various forms of worship condoned by the *Sharia* (Islamic law) are the main instruments to achieve this aim. The literature shows that many tasawwuf religious scholars, such as Abu Talib Al-Makki (Al-Makki, 2005), Al-Qushayri (Al-Qushayri, 1991), Al-Ghazali (Al-Ghazali, 2011) and many more, emphasised various manuals on *Sufi* rituals in an effort to achieve gnosis. This research intends to elaborate on the manual for *Sufi* rituals by a famous '*shaykh*' religious scholar in Terengganu called Sayyid 'Abdul Rahman Al-Aydarus. This is due to the lack of research focussing on the views of Sayyid 'Abdul Rahman al-Aydarus on the element of completeness in achieving gnosis, which is found in manuals on *Sufi* rituals. This qualitative research uses the content analysis method based on a primary treatise, which is the sole piece of work left by Sayyid 'Abdul Rahman Al-Aydarus, entitled *Ma'arij Al-Lahfan Li Al-Taraqqi Ila Haqaiq Al-'irfan* (Mahyuddin,

Stapa, & Badruddin, 2013) (*The Ladder for the Thirsty to Achieve Ma'rifa*) to understand his thinking on this subject.

Sayyid 'Abdul Rahman bin Sayyid Muhammad Zayn Al-Aydarus, better known by Malaysians as Tok Ku Paloh, was a famous 19th century religious scholar (*ulama*) from the state of Terengganu in Malaysia. His prowess was not only in religious knowledge but also in defending the Malay States as a warrior during the British era. He was born in 1236 *Hijrah* (1817), in Kampung Chabang Tiga, Kuala Terengganu (Bakar, 1991).

Sayyid 'Abdul Rahman al-Aydarus received his early education from his own father, popularly known as Tok Ku Tuan Besar. He was also tutored by Haji Wan Abdullah Bin Mohd Amin or also known as Tok Sheikh Duyong (d. 1889), who was an *ulama* and *mufti* (a Muslim scholar who is entitled to offer legal decrees or *fatwas*) to the Sultan, Sultan Omar. After his father's death, Sayyid 'Abdul Rahman moved to Mekkah to continue his education (Ahmad & Resad, 2014).

In Mekkah, Sayyid 'Abdul Rahman studied under two famous religious scholars of the time, namely, Sayyid Ahmad Zaini Dahlan (d. 1886) and Sayyid Abdullah Ali Al-Zawawi (d. 1924) (Mahyuddin et al., 2013). Under the tutelage of these teachers, he immersed himself in knowledge related to *Tafsir* (Interpretation), *Hadith* (the Way of Life of the Prophet, *Salla Allah Alayhi Wa Al-Sallam*), *tawhid* (monotheism), *Tasawwuf* (teachings on Sufism) and the Arabic language (Bakar, 1991). It has

been said that Sayyid 'Abdul Rahman was also tutored by Shaykh Muhammad bin Sulayman Hasbullah Al-Makki while in Makkah (Alwi, 2007). Sayyid 'Abdul Rahman was a pious *ulama* with deep religious knowledge. Hence, he shared his knowledge through sermons that were effective and imparted some food for thought to society. Besides sermons, he also penned his knowledge. As far as it is known, his only literary legacy was in the form of a scripture called *The Ladder for the Thirsty to Achieve Ma'rifa* (Omar et al., 2014). The scripture contains a summary of knowledge associated to *tawhid* (monotheism), *tasawwuf* (teaching on Sufism) and *tariqa* (*Sufi* path) (Alwi, 2007). Nevertheless, this scripture was not completed as there were a few topics mentioned in the preface but never elaborated on in the content. Thus, the view that estimates the date of the scripture as 1300 *Hijrah* is suspect. The scripture contains four main chapters. Chapter One explains *tawhid* (monotheism); Chapter Two elaborates on *ma'rifa* (gnosis); Chapter Three talks about the *Sufi* order and Chapter Four, which is incomplete (Omar et al., 2014), explains *haqiqah* (the truth).

Sayyid 'Abdul Rahman Al-Aydarus passed away on 1 *Zulhijjah* 1336 *Hijrah* (7 September, 1918) at the residence of his daughter, Tuan Kembang (Arridzo, 2011). He was laid to rest in Kampong Paloh, in a place called Bukit Makam (Yusoff, 2003). He was around 100 years old at that time, highlighting the fact that Sayyid 'Abdul Rahman Al-Aydarus was a religious scholar who lived to a ripe old age. His

demise was not only felt by the people of Kampong Paloh but also by the people of Terengganu. His legendary status associated with his command of religious knowledge is irreplaceable although a century has lapsed

METHODS

This is a qualitative research study using the content analysis framework based on the sole scripture left behind by Sayyid 'Abdul Rahman Al-Aydarus entitled *Ma'arij Al-Lahfan Li Al-Taraqqi Ila Haqiq Al-'irfan*. The technique used to gather primary data was referring to the manuscript. While secondary data was obtained from manuscripts by other figures, previous research, journals, articles and books related to this topic were also consulted.

RESULTS AND DISCUSSION

Sayyid 'Abdul Rahman Al-Aydarus' Manual on *Sufi* Practices

When emphasising the manual on *Sufi* practices, Sayyid 'Abdul Rahman elaborated on a few important aspects in achieving his desired aim. He provided four main components that should be included in every manual on *Sufi* practices, which are *tawba* (repentance), *du'a* (prayers), *dhikr* (invocation) and *tafakkur* (retrospective reflection or meditation).

***Tawba* (repentance).** Sayyid 'Abdul Rahman emphasised *tawba* as the main component that every student must experience if he wishes to travel the road to spirituality. It is not only intended to cleanse

oneself of serious sins but the less obvious but yet unprofitable ones too, hence, to make *tawba* a part of one's life as a disciple of Islam. *Tawba*, according to Sayyid 'Abdul Rahman in his scripture is:

The basis for every cultivated feeling (*maqam*) and divinely bestowed feeling (*hal*) because *tawba* is like the solid ground of a sure foundation. A foundation does not stand firm except if it is on solid ground. Therefore, divinely bestowed feelings (*hal*) and cultivated feelings (*maqam*) would not be complete without *tawba* (Muhammad, 1882, p. 60).

Here, we notice in the definition of *tawba* provided by Sayyid 'Abdul Rahman, *tawba* is said to be the heart of the individual Muslim's faith. For this reason, Sayyid 'Abdul Rahman correlates *tawba* to the terms "divinely bestowed feelings" (*hal*) and "cultivated feelings" (*maqam*).

It needs to be explained that the term "divinely bestowed feelings" (*hal*), according to Sufism, is a heartfelt feeling that blossoms with the bestowal from Allah, without any effort from the person regardless of the feeling, whether of happiness, sorrow, disappointment or otherwise. On the other hand, "cultivated feelings" (*maqam*) refer to feelings cultivated due to the efforts of the individual that have become inherent with that person and cannot be separated from him (Al-Qushayri, 1991).

In other words, if a person has feelings of patience when facing trials and tribulations, it is possible that his patience would run out. The non-permanent feeling of patience is termed *hal* by in *Sufi* thought. However, if someone makes an effort to be continuously patient in the face of trials and tribulations, eventually patience would become an inseparable part of that person's character. This is known as *maqam*.

However, Sayyid 'Abdul Rahman stated that *hal* and *maqam* would be incomplete and meaningless if they were not based on *tawba* (repentance). This means that although a person may possess patience, if his heart does not rest in *tawba*, the patience he displays is of little value. With that, it is only fitting that Sayyid 'Abdul Rahman uses the analogy of the ground being the foundation, in this case patience is the ground. This shows that the ground is the main pillar of the foundation. So too are *hal* and *maqam*, which would not be complete without *tawba*.

Al-Syarqawi believed that *tawba* could be classified into two strands. The first is *tawba* from all sins. The second is *tawba* in a rather specific sense, which is repentance from being careless (*ghaflah*) (Al-Syarqawi, 1992). Repentance from all sins is done when a disciple pleads for forgiveness from Allah for the sins he has committed and proclaims not to commit them again, while to repent from being careless, according to the writer, is not to indulge in activities that would cause us to be forgetful and disregard ourselves and eventually, Allah.

In addition, repentance is an act of returning to Allah by eradicating all sins directly from the heart, followed by obeying all of Allah commands and abstaining from His prohibitions. According to Ibn Abbas, the *nasuha* repentance involves the expression of regret from the heart, praying for pardon (orally) and preventing the limbs of one's body from committing sins in the future (Sa'id, 1998).

Another aspect asserted by Sayyid 'Abdul Rahman that acts as a catalyst to repentance is *istiqamah* (steadfastness in carrying out Allah's commands). *Istiqamah* refers to a disciple's act of carrying out repentance spontaneously and continuously, that is, he should desire to be obedient and do good and abstain from prohibitions. This nature of being in a state of continuous repentance will become merged with one's character; this is termed *maqam*, which has taken shape in that person. A Muslim who possesses this nature of continuous repentance is said to be in *maqam tawba* or repentance.

In addition to the aspects of repentance and *istiqamah* (steadfastness), Sayyid 'Abdul Rahman also suggested that disciples should learn on their own (*tahdhib*) through the act of limited speech (talking) except in matters related to benevolence or welfare. Besides this, he also suggested complete abstinence from relying emotionally on living things and to preserve the stomach from consuming food that is *haram* (forbidden in Islam) and *shubhah* (doubtful if it is forbidden). He further added that one should reduce sleep, increase invocation in remembrance of

Allah and carry out acts of worship towards Him. Sayyid 'Abdul Rahman also stated that disciples need to increase effort and practice of rituals in order to continue to move closer to Allah after accomplishing the three aspects mentioned earlier. As far as possible, the students at this stage need to alienate themselves temporarily from any form of distraction from people in order for the heart to focus on remembering Allah.

Du`a (prayer). After the disciple has finished with repentance, the next component that needs focussing on in the journey to spirituality is prayer. The practice of praying is one of the elements in the manual of *Sufi* practices postulated by Sayyid 'Abdul Rahman. Before praying, Sayyid 'Abdul Rahman suggested that disciples recite the *Al-Fatihah* three times and the *surah Al-Ikhlash* three times while invoking Allah and pleading with Him to present the blessings accrued by reading these verses to the Prophet Muhammad and fellow teachers (*mashayikh*). This is intended to pass on the blessings accrued from reciting the verses from the al-Quran to them and to invoke Allah so that fellow prophets and *shaykh* would pray that the wishes and intentions of the disciples' practices are achieved. Sayyid 'Abdul Rahman also stated that disciples should remember that death is a certain eventuality for all living creations of Allah and when the time of death arrives no one will be able to help except Allah. Sayyid 'Abdul Rahman gave this reminder so that disciples of Sufism would focus intensely on Allah in their worship and not

be preoccupied with temporal matters as death was a certainty. Not a single creature of Allah can predict the time of their death and that is why the disciples need to always be ready to meet death by way of increasing worship and obedience to Allah (Muhammad, 1882).

At this stage, the disciples would need an expert, not only to guide them, but also to be an intermediary (*rabitah*) between the disciples and Allah. The expert here is the *shaykh* who coaches and guides the disciples to ensure smooth implementation of the practices and achievement of the aims. The *rabitah* is a creation of Allah who helps someone to achieve relationship with Allah. In other words, a disciple will remember Allah by looking at any of Allah's creations and feel the existence and supremacy of Allah (Omar & Sa'ari, 2011). According to Sayyid 'Abdul Rahman, the *rabitah* in the context of these practices is the disciple's solemn view that his *shaykh* is the key and guide who will enable him to appreciate Allah.

The specific prayer advocated by Sayyid 'Abdul Rahman in the Sufism practice manual to be recited by the disciples is, "*Illahi Anta Maqsudi Wa Ridaka Matlubi A'tini Mahabbataka Wa Ma'rifataka*" ("Ya Allah, You are all I need and Your blessing is what I seek. Bestow onto me Your love and Gnosis"). This prayer is to be read three times.

The essence of this prayer can be understood as every disciple needs Allah and His blessings in any initiative that is to be undertaken. This is important so that an

individual is always on the path of *Sharia* (Islamic Law) that has been laid out by Allah. The disciple can also train himself to abstain from the prohibitions of Allah; all he has to do is to deliver his sincere faithfulness and implement the commands of Allah. In addition, a disciple should seek Allah's compassion and gnosis so as to be always blessed by Allah.

Dhikr (invocation). After the disciple has finished his prayers, the next step according to the *Sufi* practice manual advocated by Sayyid 'Abdul Rahman is to have a profusion of *dhikr* Allah. The practice of remembering Allah is a demand clearly stated by Allah in the al-Qur'an and elaborated on in the *hadith* by Rasulullah, as exhorted by Allah: "Therefore remember Me" (by praying, glorifying, etc. I will remember you, and be grateful to Me (for My countless Favours on you) and never be ungrateful to Me (*Al-Baqarah*, 2).

Among the invocation (*dhikr*) practices advocated by Sayyid 'Abdul Rahman as stated in the scripture are *dhikr ism al-dhat* and *dhikr nafy wa ithbat*. Before particularising further on the concept and *kayfiyyat* (the way to) of both these invocations (*dhikr*), it would be appropriate if this article highlighted the codes or mannerisms that are required by a disciple before he arrives at the invocation (*dhikr*) stage.

After the disciple has performed repentance (*tawba*), he then has to perform ablution and be cleansed from ritual impurities (*najasah*) found on his body,

clothes or the place where the invocation will be performed. This situation would offer comfort and tranquillity to the disciple while performing the invocation. Then, he needs to face the *qibla* (the universal direction towards the Ka'ba in Makkah) and sit in a *tawarruk* (sitting position while prayer is being recited) position. Next, the disciple needs to expunge past memories or disturbing thoughts (*khawatir*) that could interfere with his invocation (*dhikr*). Thereafter, the disciple has to seek forgiveness from Allah by reciting *astaghfirullah* 25 times, followed by the surah *Al-Fatihah* (three times) and surah *Al-Ikhlâs* (three times). These recitals have to be *ihda'* (a sincere offering) to Rasulullah and the mashayikh. The disciple needs to imagine that after death there would be nobody to help him except Allah.

Next, the disciple recites, "*Ilahi anta maqsudi wa ridaka matlubi a'tini mahabbatak wa ma'rifatak*" ("Oh Allah, You are all I need and Your blessing is what I seek. Bestow onto me Your love and Gnosis") while placing both his hands on his knees. While doing this, his eyes are closed and his head bowed down and he holds his breath for a moment. Thereafter, his tongue is pressed against his palate, his lips are tightly shut and his whole body holds still. The disciple then performs silent *dhikr* exclusively repeating the word "Allah, Allah, Allah..." and imagines the meaning of the Divine's name to *latifa al-qalbi*, which is a spot around the nipple on the left chest area (Muhammad, 1882).

Sayyid 'Abdul Rahman also said that one must invoke by repeating the word Allah 5,000 in a day, which means to invoke it 1,000 every time one performs the obligatory prayers. Sayyid 'Abdul Rahman also suggested that the disciple should increase the number of invocations so that the disciple would not neglect Allah for even a second. In addition, this discipline is not allowed to shift from one *latifa* to another unless with prior permission from the *shaykh*. The disciple will experience seven stages of the *lataif* before implementing the next invocation of the word. Among the *lataif* that need to be experienced are *latifa al-qalbi*, *latifa al-ruh*, *latifa al-sirr*, *latifa al-khafi*, *latifa al-akhfa* and *latifa al-nafs* (Muhammad, 1882).

The disciple will then move to the *nafy wa ithbat* invocation stage. This invocation takes place after the disciple has performed the *ism al-dhat* invocation (Muhammad, 1882). This is because the *ism al-dhat* invocation is intended to abandon all heartfelt feelings except feelings for Allah, while the *nafy wa ithbat* invocation concentrates on strong and honest feelings towards Allah (Sidek, 2007). According to Sayyid 'Abdul Rahman, the *nafy wa ithbat* invocation can also be performed before or after the disciple performs *muraqaba* (meditation). This depends on the choice of the *shaykh* who is guiding the disciple.

The mode or way (*kayfiyyat*) of invoking *nafy wa ithbat* begins with the disciple being cautious about the mannerisms when invoking, just as he had

done while invoking before this, including his allegiance to Allah. Hence, the specialty of invocation is that self-realisation (*talqin*) is delivered by the *shaykh* himself and the clear benefit obtained from performing the *nafy wa ithbat* invocation, that is, the elimination of all forms of disturbing thoughts (*khawatir*) and the purification of the heart from all forms of distractions (*aghyar*). The disciple should then inhale deeply with the intention of eliminating disturbing thoughts that can impede him from remembering Allah and he should hold his breath below the navel. Next, he should silently pronounce the divine negation “*La*”. Then the disciple draws the sound from the area of the navel to the crown at the head. Then, pronouncing *kalimah* “*Ilaha*”, concentration is directed in an imagined line running from the crown of the head to the right shoulder blade. After that, the disciple drives the final refrain, “*Illa Allah*” in a lengthy fashion from deep down the heart and finally closes with the *kalimah* “*Muhammad Rasul Allah*” (Muhammad is the messenger of Allah). Next, he reads with his tongue, “*Ilahi anta maqsudi wa ridaka matlubi*”. The disciple should implement the invocation practices of *nafy wa ithbat* every day and as many as 111 times as the frequency should be an odd number (Muhammad, 1882).

Tafakkur (retrospective reflection or meditation). In the *Ma'arif Al-Lahfan*, Sayyid ‘Abdul Rahman mentioned the practices of *wuquf qalbi*. This practice is part of the *tafakkur* concept performed by

disciples before performing the *tafakkur* (*muraqaba*). *Wuquf qalbi* is a situation in which the disciples control their emotions when invoking, in order to fully focus on reciting the invocations and not to be distracted from the actual meaning of the invocations. In other words, it is a situation where the student puts his heart and soul in connotations of the recitation to Allah until he reaches the moment where his focus is only upon the thought of Allah in his heart.

For this reason, the disciple directs all his senses towards his heart, which is situated at the left side of his chest. This means that all the senses focus their attention on the heart that is performing the invocation while blocking all other irrelevant thinking or remembering. The complete performance of *wuquf qalbi* depends on the ability of the disciples to focus their thoughts on the meaning of the *kalimah* Allah recitation, which is repeated until it succeeds in blocking all other thoughts except that of Allah and trains the senses to focus on the emotions during invocation. This ability can be formed before, during or after invocation. The disciples may not achieve permanent thought of Allah without appreciating *wuquf qalbi*, which can only be felt by the disciples (Omar & Sa`ari, 2011).

After completing the *wuquf qalbi*, the disciples will move to the next stage of *tafakkur*, which is the *muraqabah* stage. When examined further, the word ‘*tafakkur*’ refers to thoughts about all the happenings related to the creatures of Allah, which eventually has the disciple feeling the existence, the greatness and the supremacy

of Allah (Mohammad, 2013). Hence, in *Sufi* terminology it is called *muraqabah*. In the manual of *Sufi* practices advocated by Sayyid 'Abdul Rahman, the disciple has to go through the *muraqabah* stage, either before or after performing the *nafy wa ithbat* invocation. This again depends on the *shaykh* guiding the disciples. In the *Ma'arij Al-Lahfan* scripture, Sayyid 'Abdul Rahman mentioned that there two stages in *muraqabah* that need to be performed by the student, which are the *muraqabah al-ahadiyyah* and *muraqabah al-ma'iyah* (Muhammad, 1882).

The technique of practising *muraqabah al-ahadiyyah* is by fully focussing on the meaning of the monism of Allah until the disciple feels the element of the monism of Allah in his heart. In other words, the disciple focusses his thoughts only on the meaning of Allah the Almighty in his heart, without thinking about the other characteristics of Allah such as The Compassionate, The Merciful, The Sovereign and so on. What more if one thinks about matters such as food, work, property, family and so forth, since thoughts like this would inevitably disturb the concentration of the disciple's thought focussed on the Almightyness of Allah.

After the disciple has performed the *muraqabah al-ahadiyyah*, he may shift to the next stage, which is the *muraqabah al-ma'iyah*. *Muraqabah al-ma'iyah* means giving full attention of one's thoughts to Allah by feeling that Allah is with him wherever he is and in whatever situation he is in, so much so that just by looking

at Allah's creations would be enough to give one that feeling. For example, when a disciples looks at a bird flying in the air, he not only sees the physical attributes of the bird such as its wings, feathers and the ability to fly but he feels the existence of Allah and is deeply aware that Allah made the bird fly. Subsequently, the disciple becomes confident and convinced that Allah is behind the act of the bird flying. This is the meaning of 'togetherness' or being together with Allah wherever the disciple is. This can also be related to all creatures created by Allah.

CONCLUSION

Sufi practices are one form of practice that should be practised by a disciple not just to add to his list of non-mandatory practices but also to bring him closer to Allah. The manual on *Sufi* practices advocated by Sayyid 'Abdul Rahman is a systematic and well-arranged manual. Sayyid 'Abdul Rahman taught his disciples *Sufi* practices with the intention of attaining actual *ma'rifa Allah*. In attaining *ma'rifa Allah*, a disciple needs to increase practices that depict loyalty to Allah. Sayyid 'Abdul Rahman understood that among the practices that depict loyalty are the *Sufi* practices that comprise four important components as basic practice and these are found in the manual of *Sufi* practices. The first is repentance (*tawba*). The writer understood that repentance was the first aspect before a disciple pursues the next stage of *Sufi* practices. This is because repentance is the main pillar in *hal* and *maqam*. The second stage deals with the

component of prayer. Prayer is the effort of a disciple directed towards Allah. It is a weapon of the *mukmin* who has found the sincere disposition of faithfulness towards Allah; a disciple who is weak and imperfect should seek help from Allah, the Almighty through prayer. Prayer here refers to *Ilahi Anta Maqsudi Wa Ridaka Mathubi*. The third stage is the invocation to Allah. The practice of invocation to Allah is a *Sufi* practice that reinforces the heartfelt thoughts of a disciple about Allah. There are two elements in the practice of invocation to Allah that were advocated by Sayyid 'Abdul Rahman, which are *dhikr ism al-dhat* and *dhikr nafy wa ithbat*. Finally, the disciple experiences the *wuquf qalbi* stage, which is the process of controlling the emotions in order to devote one's emotions to Allah.

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The Concept of Human Desire in Al-Ghazali's Perspective

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ABSTRACT

Desire (*iradah*) in humans refers to a person's instinct to achieve or the 'wants' that emerge from the ultimate desire for something. It pertains to matters concerning the hereafter. This article emphasised the concept of 'human desires' that is found in the Quran based on the thinking of al-Ghazali. It also guided by his famous literary work, *Ihya' Ulum al-Din*. Using the content analysis method, this qualitative study postulated that Al-Ghazali had presumed that the trait of desire in people refers to a deep sense of longing. This trait is used to achieve happiness in the hereafter as well as in efforts to encounter Allah SWT, when all pleasures and indulgences in life become insipid to someone who does not possess this trait. The study concludes that al-Ghazali recommended that proper guidance in understanding the concept of 'human desire' and applying it can diffuse conflict produced by human desire.

Keywords: Al-Ghazali, human desire, Ihya' Ulum al-Din, Quran

INTRODUCTION

Every human has his or her own wishes and wants. Nevertheless, people also have the choice of indulging good or bad desire because they have good and bad characteristics. As a result of the potential of good or bad outcomes, people have to decide whether to adhere to divine injunctions to them or to their own inclinations (*al-nafs*) (Azmi, Ismail, & Omar, 2014).

The *Sharia* (Islamic law) is a guide to life as well as a gift to the human mind for

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the evaluation of truth. It must be used in a concerted manner in daily life to enable each person to arrive at his or her final destination. This is the ultimate difference between humans and animals. Humans would not have been chosen as the *khalifah* on this earth if Allah SWT had not equipped them with the potential of becoming a *khalifah* in addition to their role of being slaves of Allah SWT (Azmi et al., 2014).

Therefore, among the main issues that need to be understood is Allah SWT's ultimate aim of creating humans, which was to worship Him solely and to make the earth prosperous (Stapa, 2009). This is elaborated on by Allah SWT in the Quran, as follows: "I did not create the jinn and humans except that they may worship Me" (*al-Dhariyyat* 51: 56). In addition, every duty performed by humans in making this earth prosperous must be carried out in the context of being aware of monotheism (*tawheed*) and worship of Allah SWT. In other words, all efforts to make this earth prosperous should be anchored on monotheism (*tawheed*); making the earth prosperous should not be done wantonly by submitting solely to the desires and demands of human inclinations. The regulations and guidelines are set and forth (*Sharia*) by Allah SWT as the disciple's core beliefs (Stapa, 2009).

The concept of 'desire' is also mentioned in psychology; Western scholars have not denied the existence of human desire. 'Desire' must be accompanied by responsibility. 'Desire' is frequently

presumed to be subjective because it is closely related to internal and external factors such as instinct, natural inclination, objectives, encouragement, suggestion, assumption of benefit, rejection of negative elements, comprehension, rationality and trust. Hence, if desire were associated with responsibility, responsibility would be determined by the outcome of desire. (Atiullah, Ismail, & Bakar, 2014).

METHODS

This study applied the qualitative approach in the form of content analysis. The data analysis technique applied the content analysis document procedure as suggested by MAYRING; the procedure comprises the summary, explication and structuring methods (Kolbacher, 2006).

Summary

This is one of the techniques used to present the points of the content that are most pertinent to a discussion (Kolbacher, 2006), which in this context is human desire according to the views of Al-Ghazali. Besides the original documents, other reference items used in this study were journal articles, academic literature and books. The analysis process was more concerned with summarising the content of the *syurut al-Iradah wa muqaddimah al-mujahadah wa tadrij al-murid fi suluk sabil al-riyadah*, a chapter found in the *Ihya' 'Ulum al-Din* scripture, to determine the elements of the concept of *Iradah* according to the views of Al-Ghazali.

Explication

This technique elaborates, explains and annotates data obtained from the summary (Kolbacher, 2006) in order to determine the elements of 'human desire'. Using this technique, data were collected, categorised and related to the subject matter of this study, human desire, after which the results were collected in various forms (Sarantakos, 1993).

Structuring

This is the most important technique in the content analysis because it can structure data according to content, form and scale (Kolbacher, 2006). In this study, the data obtained using the technique of explication was structured around the on the subject matter, human desire, as ordered by Al-Ghazali. The development of and elaboration patterns pertaining to elements of 'human desire' were then identified.

RESULTS AND DISCUSSION

'Human Desire' as mentioned in the Quran

As a slave of Allah SWT created in His image, people must be cautious of every single desire they admit into their consciousness. A desire ought to be either entertained or rejected. If the desire is something detested by Allah SWT and it fosters negativity in the person or others, it should be rejected.

On a similar note, humans should always remember that no matter how

meticulously they plan their lives as subjects, the results are uncertain as the outcome relies on the wishes and consent of Allah SWT. Therefore, the author firstly adduced the religious references (*dalil*) related to the desires of Allah SWT and the wishes of humans based on the evidence found in the Quran *al-Karim*. The word (*kalimah*) *Iradah* is repeated 139 times in the Quran, either in the form of *Fi'il madi* (فعل الماضي) or *Fi'il mudari* (فعل المضارع) (Zayyan, 2010).

References in the Quran about Allah's Wishes

Among the verses in the Quran that portray the characteristics of desire (*Iradah*) are:

(1) From *Al-Baqarah*, 2: 185:

The month of Ramadan is one in which the Qur'ān was sent down as guidance for mankind, with manifest proofs of guidance and the Criterion. So let those of you who witness it fast [in] it, and as for someone who is sick or on a journey, let it be a [similar] number of other days. Allah desires ease for you, and He does not desire hardship for you, and so that you may complete the number, and magnify Allah for guiding you, and that you may give thanks.

(2) From, firstly, *Al-Ahzab*, 33: 33 and then *Al-Ghafir*, 40: 31:

- Stay in your houses and do not display your finery with the display of the former [days of] ignorance. Maintain the prayer and pay the *zakāt* and obey Allah and His

Apostle. Indeed Allah desires to repel all impurity from you, People of the Household, and purify you with a thorough purification.

- Like the case of the people of Noah, of 'Ād and Thamūd, and those who were after them, and Allah does not desire any wrong for [His] servants.

(3) From *Al-Insan*, 76: 30:

But you do not wish unless it is wished by Allah. Indeed Allah is all-knowing, all-wise.

(4) From *Al-Baqarah*, 2: 284:

To Allah belongs whatever is in the heavens and whatever is in the earth; and whether you disclose what is in your hearts or hide it, Allah will bring you to account for it. Then He will forgive whomever He wishes and punish whomever He wishes, and Allah has power over all things.

Besides the word *iradah*, the word *yasha'* (يَشَاءُ) also carries the meaning of 'wish' or 'need'. Among some of the exhortations of Allah SWT are:

(1) From *Al-Insan*, 76: 30:

But you do not wish unless it is wished by Allah. Indeed Allah is all-knowing, all-wise.

In another verse, Allah SWT is exhorted:

(2) From *Al-Baqarah*, 2: 284:

To Allah belongs whatever is in the heavens and whatever is in the earth;

and whether you disclose what is in your hearts or hide it, Allah will bring you to account for it. Then He will forgive whomever He wishes and punish whomever He wishes, and Allah has power over all things.

Based on the verses of the Quran mentioned above, the concept of 'desire' (*al-iradah*) according to Allah SWT, is inherited in the form of goodwill to His slaves. The verses also clearly show that no matter how meticulous the planning and desire of humans, what is desired is immaterial if not for the *iradah* (desire) and consent of Allah SWT. Verily, Allah SWT is The Most Knowledgeable and Wisest in planning human matters.

Proof of the Existence of the Trait of Human Desire in the Quran

The word (*kalimah*) *al-iradah* (desire) in the Quran refers to people, either individually or in a group (Zayyan, 2010). Some uses of the word are found in these verses:

(1) From *Al-Nisa'*, 4: 134:

Whoever desires the reward of this world, [should know that] with Allah is the reward of this world and the Hereafter, and Allah is all-hearing, all-seeing.

(2) From *Ali-Imran*, 3: 152:

Allah certainly fulfilled His promise to you when you were slaying them with His leave, until you lost courage, disputed the matter, and disobeyed

after He showed you what you loved. Some of you desire this world, and some of you desire the Hereafter. Then He turned you away from them so that He might test you. Certainly, He has excused you, for Allah is gracious to the faithful.

(3) From *Al-Anfal*, 8: 67:

A prophet may not take captives until he has thoroughly decimated [the enemy] in the land. You desire the transitory gains of this world, while Allah desires [for you] [the reward of] the Hereafter and Allah is all-mighty, all-wise.

(4) From *Al-Baqarah*, 2: 216:

Warfare has been prescribed for you, though it is repulsive to you. Yet it may be that you dislike something while it is good for you, and it may be that you love something while it is bad for you, and Allah knows and you do not know.

The verses of the Quran reproduced above clearly show that humans entertain desire that pertains mainly to worldly matters, when what really deserves priority are the resources for the Hereafter. This does not mean that humans completely surrender every responsibility of life to Allah SWT without extending any effort in the present world. However, it is sufficient for people to live on this earth without becoming absorbed in world matters to the extent of neglecting the responsibilities of a slave of Allah SWT. The earth should be seen as a place of wonder and pleasure that tests the

piousness of the individual; there will be an end for its splendours when the time is ripe.

Proof of Satan's Desires Mentioned in the Quran

The Quran also mentions acts of 'desire' portrayed by Satan (Zayyan, 2010). Among them are:

(1) From *Al-Nisa* ', 4: 60:

Have *you* not regarded those who claim that they believe in what has been sent down to *you*, and what was sent down before to *you*? They desire to seek the judgement of the though they were commanded to defy it, and Satan desires to lead them astray into far error.

(2) From *Al-Maidah*, 5: 91:

Indeed Satan seeks to cast enmity and hatred among you through wine and gambling, and to hinder you from the remembrance of Allah and from prayer. Will you, then, relinquish?

(3) From *Al-Nisa* ', 4: 119:

And I will lead them astray and give them [false] hopes, and prompt them to slit the ears of cattle, and I will prompt them to alter Allah's creation. Whoever takes Satan as a guardian instead of Allah has certainly incurred a manifest loss.

Most of the verses in the Quran that discuss Satan's desires are related to Satan's efforts in bringing humans to destruction and wrong-doing.

A Brief Biodata of Al-Ghazali

Al-Ghazali's full name was Abu Hamid Muhammad Bin Muhammad Bin Ahmad Al-Tusi Al-Ghazali. He was widely known as Al-Tusi, which referred to the town of his birth, Al-Tus, in Khurasan. He was given the title al-Ghazzali, which contained the Arabic letter zay (ﺯ) according to the appellation of his father, who worked as a cotton spinner (Al-Ghazzal) (al-Ghazali, 1975). Sometimes he was called Al-Ghazali with one zay (ﺯ), which referred to the name of the local village where he was born, Ghazalah (Aqil, 1993).

Al-Ghazali was born in the year 450 *Hijrah* (1058 AD) (al-Ghazali, 1975). He and his brother Ahmad lost their father when they were still young. Al-Ghazali left for Jurjan when he was 15 years old and then went to Nisabur when he was 19 or 20 to pursue his studies. Abu Nasr Al-Ismai'ili and Al-Juawayni tutored him until he was 28 years of age. While in Nisabur, Al-Ghazali studied theology, Islamic law and philosophy (Hamat, 2002). He met his demise at the place of his birth in 505 Hijrah.

Al-Ghazali was a pious religious teacher and excelled in numerous fields of knowledge. He was given appellations such as *Hujjatul Islam* (The Defender of Islam), *Zayn Al-Din* (The Ornament of Islam) and *Bahr Mugriq* (A Drifting Ark). He left behind numerous literary works. Among his famous works were:

(1) *Ihya' Ulum al-Din* (To Enliven Religious Knowledge) was his largest piece of work. This scripture took several years

to complete. He wrote it while he was moving between Damascus, Jerusalem, Hijaz and Thus. It contained matters related to Islamic jurisprudence (*fiqh*), *tasawuf* and philosophy.

(2) *Maqasid al-Falsafah* (*The Objective of Philosophers*) was his first literary work. It contained matters pertaining to philosophical problems.

(3) *Tahafut al-Falasifah* (*The Distracted Minds of Philosophers*) was written while he was in Baghdad, at a time when his mind was assailed with doubt. In this book, Al-Ghazali criticised philosophy and philosophers who were obstinate.

(4) *Al-Munqid min al-Dalal* (*A Saviour of the Lost*) was a book about the development of Al-Ghazali's philosophy and his attitude towards several types of knowledge and the route to Allah SWT.

The Concept of Human Desire According to Al-Ghazali's Theory

Before elaborating on the concept of human desire according to al-Ghazali's philosophy, the author would like to first discuss *muktazilah* and *'asyairah*. From the view of *muktazilah*, humans have freedom of will and action. 'Abd Al-Jabbar stated that desire is realised in action (Ahmad, 1965). The suggests that people have desires with specific aims and objectives, just as Allah SWT too has His own desires and their specific aims and objectives (Dughaym, 1992).

Nevertheless, Abu Hassan Al-Asha'riy disagreed with this view of the *muktazilah* regarding the concept of desire as he insisted that humans do not have absolute choice with regards to their actions (Atiullah et al., 2014). According to Al-Asha'ariy, Allah SWT is responsible for creating human actions (Al-Ash'ariy, 1955; Al-Juwayniy, 1950). This is based on the *al-kasb* theory, which states that although humans have desire, they are in actuality the creation of Allah SWT and His actions while the role of human desire is metaphorical (*majaziy*). Hence, only Allah SWT possesses absolute desire. This means that whatever happens depends completely upon the will and desire of Allah SWT.

Al-Ghazali, who was one of the top religious scholars of Al-Asya'irah, seconded the view that Allah SWT is not compelled to solve the problems (*al-salah wa al-aslah*) of humans and compensate or reward people based on His actions, although Allah SWT could bestow unbearable burden on humans. The justification here is that Allah SWT has absolute power and this does not contradict any of Allah's characteristics, even Allah SWT's intent and desire to destroy His creatures or offer a pardon to infidels or punish all *mukmin*; He is absolutely free to do this if he so desires (Al-Ghazali, 2010).

Al-Ghazali did not deny that human actions were efforts that rise within individuals themselves but added that they did not originate from the desires of Allah SWT. In other words, a *mukmin* needs to believe that *qada'* and *qadar* are from Allah SWT. However, if Allah SWT wishes

onto a person, Muslim or infidel, pious or polytheist either good or bad, success or failure etc., then that is what would surely occur according to Allah SWT's desire or His *qada'* (Al-Ghazali, 1975).

However, Allah SWT would surely be merciful to His slaves. Those who do not understand this concept might accuse Allah SWT of despising them and they might question why Allah SWT does not accept them if they revealed a particular disposition. It is believed that the person intent on exercising his own desire and pleasures has allowed Satan to control him, following Satan's temptations and instigations instead of the commands and wishes of Allah SWT (Al-Ghazali, 1975).

In order to overcome this, among the main issues that people should attend to are *ma'rifah Allah* and allegiance to Allah SWT, rather than to depend solely on actions stimulated by cognisance (Al-Ghazali, 1975). Therefore, Al-Ghazali stated, the actual concept of 'human desire' is a 'want' or 'feeling of deep love' possessed by someone in order to achieve happiness in the Hereafter when he faces Allah SWT. This deep love obliterates all worldliness and temporal pleasures and delights, making them bland or tasteless to the person who chooses this feeling of deep love (Al-Ghazali, 1975; Omar, Zin, & Baru, 2010). According to him, the lack of piouness (*iman*) towards Allah SWT is the vital obstacle for anyone who intends to equip himself with this trait (Al-Ghazali, 1975).

This 'desire' is based on piouness (*iman*), which needs to be cultivated and

nurtured through the practice of traits such as honesty and sincerity. Piousness (*iman*) as defined by Al-Ghazali is not merely lip service or the professing of the two *syahadah*; it must delve deeper into the practice of truth (*al-sidq*) and sincerity (*al-ikhlas*) towards Allah.

Truth (*al-sidq*) was originally referred to as strength in something such as a particular word (Shuhari & Hamat, 2015). Al-Jurjani stated that truth (*al-sidq*) is the origin and the beginning, whereas sincerity (*al-ikhlas*) is a branch of truth (*al-sidq*) (1985). Actual sincerity according to Al-Ghazali refers to an individual who does not enslave himself and his natural inclinations; instead he subjects himself solely to Allah SWT. To pursue truth is to be steadfast in implementing the commands of Allah SWT as well as to worship Him (Al-Ghazali, 2010). Hence, sincerity, according to Al-Ghazali, is the intention found in every action taken that focusses solely on Allah SWT. In other words, actions are carried out solely because of Allah SWT. Therefore, intention is presumed to be insincere if intention is based on something other than Him (Shuhari & Hamat, 2015).

In order to ensure that the virtues of desire, *iradah*, are realised, four important conditions must be prioritised by the individual, according to Al-Ghazali. The stipulated conditions are: 1) to own only property that is truly needed and nothing beyond it, 2) to avoid being vain and to avoid showing off, 3) to believe sincerely rather than to rely on the strength of the

belief of others 4) to distance oneself from committing sins (Al-Ghazali, 1975). He dictated that wealth, pride, acts of imitation found in beliefs and vices are the main factors that impede people from possessing the true of Allah SWT (Omar et. al, 2010). If these conditions can be kept, the individual may successfully cultivate desire (*iradah*) as it ought to be cultivated in each person.

Al-Ghazali also touched on worldly matters in the *Ihya' 'Ulum al-Din*. In the chapter on *dham al-dunya*, he explained that people could become careless and lapse in their allegiance to Allah SWT when they become too busy with worldly affairs. However, he did not deny that among the main human needs are the three most basic needs, namely, food, shelter and clothing. However, in meeting these basic needs, people should take care to avoid worldliness (Yakub, 2013).

Therefore, as slaves of Allah SWT, people must always remember that the Hereafter awaits us and that heaven is generous. This means that whatever people desire is solely of Allah SWT; hence, whatever is done on earth should be done in obedience towards Allah SWT.

CONCLUSION

The writer is able to conclude that the Quran and *Al-Sunnah* are core sources of guidance that aid people to live a life of peace, conducting their day-to-day life in peace. That is the beauty of Allah SWT's words, which outline in the Quran every aspect of life related to belief, laws and morality.

This pertains also to human desire. Although people have different desires, their desires and actions are based on the desire of Allah SWT, the Most Knowledgeable and Wisest. Hence, as the servant of Allah SWT, people should pledge allegiance to Him and rely on His strength. Al-Ghazali's views on human desire are a good explanation of Islamic life and can be used to help Muslims lead a correct and fulfilling life as Muslims. It is worth remembering that the best desires are those desires that do not contradict the guidelines set by Islamic *sharia* (law). Humans are advised to pursue their desires in a spirit of moderation in worldly matters. Desires that are in the form of ration or supplies for the afterlife (*ukhrawi*) should always be pursued. In other words, every action ought to obtain the blessings of Allah SWT. Al-Ghazali's knowledge as available in his literary works is a tremendous benefit to the *ummah*. Hence, we should keep in mind that the literary works of famous religious scholars that are grounded in the Quran and *Al-Sunnah* can help us solve problems in life.

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Direct Quranic Quotation Methods in *Kitāb Al-Kifāyah* and *Kitab Risalah Fi Bayan Hukum Al-Bay' Wa Al-Riba: A Comparative Study*

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ABSTRACT

The Quran has been revealed by Allah SWT as a primary source of Islamic law, followed by the *Hadith*, the *Ijma'* and the *Qiyas*. Scholars of the past, including in Terengganu such as Shaykh Abdul Malik and Shaykh Abdul Qadir, have been known to use direct Quranic quotation methods in their manuscripts. The direct Quranic quotation methods in the *Kitab al-Kifayah*, for example, are likely to differ from the *Kitab Risalah Hukum al-Bay' Wa al-Riba*. In this paper, the researchers studied the respective authors' background and the direct Quranic quotation methods employed in their manuscripts. This historiography study uses the documentation method to achieve the above-mentioned objective. This study finds that there are both similarities as well as differences in their direct Quranic quotation methods. They employed similar quotation techniques by not stating the name of the *surah* and its verses in their respective manuscripts. In contrast, however, Quranic verses in the *Kitab al-Kifayah* were used mainly to explain stories and/or metaphors found in the Quran, whereas the ones in *Kitab Risalah* were mainly used to contextualise arguments in *fatawa*-issuance. As a result, the number of Quranic verses used in the *Kitab Risalah Hukum al-Bay'* are significantly higher than in the *Kitab al-Kifayah*.

Keywords: Quran, Shaykh Abd al-Malik bin Abdullah, Shaykh Abdul Qadir bin Abdul Rahim, Terengganu, writing methods

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INTRODUCTION

Malay-Muslim culture is certainly blessed by its heritage of the Malay manuscript. The writing of manuscripts in Malay

reached its peak in the 17th century, with the spread of Islamic knowledge in its epicentre, Aceh, Indonesia. However, most of the manuscripts as they were physically prepared were not able to withstand the hot and humid tropical climate. As a result, these highly-value manuscripts tended to rot and decay. Academic study on these manuscripts is scarce despite its significance in the study of *fiqh* (Islamic jurisprudence) especially in the Malay Archipelago. This study focusses on the direct Quranic quotation methods that were employed by Shaykh ‘Abd al-Mālik bin ‘Abdullāh, more popularly known as Tok Pulau Manis Terengganu, as well as Shaykh Abdul Qadir bin Abdul Rahim.

METHODS

This paper uses the qualitative methods of textual analysis and interview. Textual analysis is based on primary references such as handwritten manuscripts, instead of secondary books. An interview in the form of a personal communication was carried out with Shaykh Tok Ku Ibrahim Mohamad, *Mudir* (Principal) of Pondok Pulau Manis, Kuala Terengganu. He is believed to be an eighth-generation descendant of Shaykh Abd Al-Malik bin Abdullah. Shaykh Tok Ku Ibrahim Mohamad lives in Kampung Pulau Manis, Kuala Terengganu.

RESULTS AND DISCUSSION

Background of the Scholars

It is worth discussing briefly the background of the two scholars, namely, Shaykh ‘Abd

Al-Mālik bin ‘Abdullāh and Shaykh Abdul Qadir bin Abdul Rahim.

The Life of Shaykh ‘Abd Al-Mālik Bin ‘Abdullāh

Shaykh Abdul Malik was a Muslim scholar who was born in Terengganu and whose ancestry can be traced to scholars who hailed from Baghdad, Iraq. According to the birth and death records found on his headstone in Kampung Pulau Manis, Kuala Terengganu, he was born in 1089H/1678AD and died in 1149Hijrah/1736AD (details procured on a visit to the grave of Shaykh Abdul Malik on 15 January 2011). Based on the dates on his headstone, he died at the age of 58. However, other existing proof indicates that he was born almost three decades earlier, in 1650AD (Shafie, 1977; Mohd, 1983). The date of his death (1149H/1736AD) as stated on his headstone however, is indisputable as this fact is consistent with a finding that he died of old age (Sheppard, 1949). Oral accounts, which were passed down by his descendants that he had died of old age, are also in agreement with the stated date on the headstone (Shafie, 1984).

Shaykh Abdul Malik’s education can be categorised into two stages. His formative years of education were spent in his native Terengganu, and Aceh, Indonesia. He advanced his studies in Makkah and Madinah (Ibrahim, 2009). He continued his studies in Aceh in the 1670s. At that time, Aceh was the epicentre of knowledge in the Malay Archipelago. Due to its popularity and status, Aceh was also

more popularly known as ‘*Serambi Mekah*’ or ‘gateway to Makkah’ (Ibrahim, 2009). Shaykh Abdul Malik was known as one of Shaykh Abdul Raūf Singkel’s exceptional students (Azyumardi, 1994). A copy of the *Tafsiran Baiḍawī* (in Jawi) written by Shaykh Abdul Raūf Singkel and handwritten by Shaykh Abdul Malik proves that he was in Aceh at the time (Shafie, 1989).

He later moved to Makkah in the 1680s in his 30s to continue his studies. To date, there is no official account of the first Malay to have studied in either Makkah or Madinah. Nevertheless, past studies have shown that Shaykh Abdul Malik is one of the local pioneers to study in Makkah, if not the very first (Mohammad, 1998). He returned home and significantly contributed to the development of Islamic knowledge like other well-known Malay scholars such as Muḥammad Arsyād Al-Banjari, Nawawī Al-Bantanī and Shaykh Daud Al-Fatani (Mohammad, 1998).

Most of his teachings took place in Masjid Al-Ḥarām and Masjid Al-Nabawī. The education system places special importance on the triadic knowledges of *aqidah*, *tasawwuf* and *fiqh* (Shafie, 1989). Among the three disciplines, Shaykh Abdul Malik was an ardent student of *tasawwuf*. His second most favourite subject was *fiqh*. His main teacher was Shaykh Ibrāhīm Al-Kurānī. His writings seem to have indicated that he relied heavily on *fiqh* books such as *Daw al-Shama’ah* by Shaykh Jalaluddin Al-Suyūṭī, *Munyah Ahl Al-Warā’* by Shaykh Aḥmad Al-Qusaishi, *Minhaj Al-Ṭālibīn* by Imam Nawawī, *Tatimmah* by Ibn Matūlī,

Al-Ḥawī by Al-Mawardī and *Nihāyah* by Imam Al-Ramlī (Shafie, 1985). He has been reported to have left Makkah for his hometown when he was in his 40s.

The Life of Shaykh Abdul Qadir Bukit Bayas

Historians agree unanimously that the birthplace of Shaykh Abdul Qadir Abdul Rahim was Patani Dar Al-Salam. However, there is no official record of the exact date and time of his birth (Sharifah, 1990; Omar, 1991). The closest estimate that historians are able to make is the late 18th century in the 1790s (Fathy, 2002). The Terengganu Islamic Religious Council (MAIDAM) for instance, points to a more general birthdate in the late 1700s.

The strongest and most popular opinion of his demise was circa 1864AD (Omar, 1991; Wan, 1997; Fathy, 2002). Another record gives the year of his death as being a year later in 1865AD (Omar, 1991). He was said to have died in Kampung Paya Bunga. However, there are other opinions that he died in Bukit Bayas instead (Omar, 1991; Wan, 1997). According to the most popular opinion, he was buried in the Shaykh Ibrahim Burial Ground in Jalan Pusara, Kuala Terengganu (Wan, 1983).

Shaykh Abdul Qadir bin Abdul Rahim received his early education from a few *madrassa* in Pattani, including the ones in Pondok Kuala Bekah and Pondok¹ Pauh

¹Pondok literally means ‘the travellers inn’. It is the equivalent of “pesantren” in Indonesia.

Bok. He then continued his studies in Makkah and has been said to have studied in Madinah (Wan, 1997; Fathy, 2002).

A few studies have postulated that there exists a student-teacher relationship between Shaykh Abdul Qadir bin Abdul Rahim and Shaykh Daud bin Abdullah Al-Fatani, arguably one of the most famous Islamic scholars in the Malay Archipelago. The family genealogy also points to the interesting fact that Shaykh Daud was in fact, his grandson. During his time in Makkah, he was a student under various scholars such as Shaykh Muhammad Salih bin Abdul Rahman Pauh Bok Al-Fatani and Shaykh Muhammad Zain bin Faqih Jalaluddin Aceh, all of whom hailed from the Malay Archipelago (Sharifah, 1990; Wan, 1997).

Background to the *Kitāb Al-Kifāyah* and *Risalah Hukm Al-Bay' Wa Al-Riba*

Kitāb Al-Kifāyah. The root word “*kifāyah*” comes from the Arabic word that literally means ‘sufficient’ (*Kamus Besar Arab Melayu-Dewan*, 2006). *Kifāyah* as the title of this manuscript refers to the importance, sufficiency and fundamental religious knowledge that is required of every Muslim. It signifies that the *Kitab Al-Kifāyah* is a book that contains the basic or fundamental knowledge required by every single Muslim, known as personal obligation or knowledge (*fard ayn*).

As arguably the oldest *fiqh* book written in Terengganu and among the earliest in the Malay Archipelago (Zurita, 2014), the

Kitab Al-Kifāyah, the researchers contend, was intentionally written by Shaykh Abdul Malik with the aim of spreading fundamental knowledge of Islam within the Malay-Muslim community at the time. The *Kitab Al-Kifāyah* discusses the aspects of *aqidah* and *fiqh* in Islam. However, the discussion on *aqidah* covers only 30% of the total content while the rest of the book is devoted to the discussion of *fiqh*.

During the late 17th and early 18th centuries, *fiqh* books were rather scarce (Shafie, 1985). Scholars from Aceh, which was the epicentre of Islamic knowledge at the time, wrote many important *fiqh* books, which included the *Kitab Şirāt Al-Mustaqīm*. The book was penned by arguably the most famous Aceh scholar of the era, Shaykh Nūr Al-Dīn Al-Rānirī (1054H/1664M) (Abdul, 1996). The second most important book in this part of the world after *Şirāt Al-Mustaqīm* is *Mir'āt Al-Ṭullāb li Ma'rifah Al-Sharī'ah Al-Malik Al-Wahhāb*, which was written by Shaykh Abdul Ra'ūf al-Fanşurī (1024H/1615M-1105H/1693M). Then came the *Kitab Sabīl Al-Muhtadīn*, which was written by Shaykh Muhammad Arshad Al-Banjari in 1195H/1779M (Abdul, 1996). Between these two books, Shaykh 'Abd Al-Mālik bin 'Abdullāh produced the *Kitab Al-Kifāyah*. The book was seen to fill the void caused by the lack of reference materials especially on *fiqh*.

Although the *Kitāb Al-Kifāyah* was one of the earliest *fiqh* manuscripts in the Malay Archipelago, and the first in Terengganu, there is a paucity of dedicated studies on

this manuscript. This is compounded by the fact that even locals are not aware of the existence of such an important manuscript. The researchers, therefore, felt compelled to do an in-depth study on this manuscript, especially on the writing methods of its Quranic verses' by its author, Shaykh 'Abd Al-Mālik bin 'Abdullāh.

Kitab Risalah Hukm Al-Bay' Wa Al-Riba.

Kitab Risalah Hukm Al-Bay' Wa Al-Riba is the only authentic work that can be attributed to Shaykh Abdul Qadir bin Abdul Rahim. This fact is corroborated by both literature on his life and by a few ancient, Malay literary manuscripts (Ibrahim & Osman, 1992; Wan, 1997; National Library of Malaysia, 2001; Fathy, 2002; Engku, 2007).

A scribble on a page of the manuscript states the exact date and time he finished the manuscript i.e. *dhuha'* (forenoon), 8 *Rabi' al-Awwal* 1234, or 4 January, 1819 (Abdul, MSS 2276; MSS 2397 & IIAMM 98.1.128). This *fiqh* manuscript was written according to the *Shafi'e madhab* school of thought, which covers *muamalat* (commercial and civil acts or business dealings under Islamic law) i.e. *hukm* on trading, *hukm* on deception in trading, *hukm* on *riba'* (usury), *hukm* on *al-musahalah* (compromising) in trade, the importance of avoiding destruction in trade, *hukm* on short-weighting, *hukm* on *ihtikar* (hoarding of goods from the market) and *hukm* on *mudharabah* (profit-sharing) (Hasanulddin, 2014).

Analysis of Direct Quranic Quotation Methods

In this part, this paper will discuss a few aspects of the direct Quranic quotation methods in both *Kitab* such as the purposes of directly quoting Quranic verses, the total number of Quranic verses and the name of chapters and verses.

Direct Quranic Quotation Methods in *Kitāb Al-Kifāyah*

Purpose of directly quoting Quranic verses. Quranic verses are used in *usuluddin* (Islamic studies) to convey stories such as the first revealed verse and the revelation of *solat* (prayer). The author quoted the following verses from *Surah Al-'Alaq* (96:1-5) and *Surah Al-Muzammil* (73:1-4):

Recite in the name of your Lord who created (1) Created man from a clinging substance (2) Recite, and your Lord is the most Generous (3) Who taught by the pen (4) Taught man that which he knew not (5).

O you who wraps himself [in clothing] (1) Arise [to pray] the night, except for a little (2) Half of it - or subtract from it a little (3) Or add to it, and recite the Qur'an with measured recitation (4).

Apart from storytelling, Shaykh 'Abd Al-Mālik bin 'Abdullāh also uses Quranic verses in the *Kitab Al-Kifāyah* to present *dalil naqli* (argumentation by reference

to relevant passages of the Quran) in his arguments. The following verses were recorded as references to the *ahkam* (Islamic legal doctrines) on the commendable act of giving away meat from *qurbān* (sacrifice of animal during *Eid ul Adha*) in *Surah Al-Haj* (22:36) and the impermissibility of eating halal animals that were not slaughtered according to the Shari'ah in *Surah Al-Maidah* (5:3): "...then eat from them and feed the needy and the beggar..."; "...except what they have slaughtered..."

Total number of Quranic verses. In the *Kitab Al-Kifāyah*, Shaykh ‘Abd Al-Mālik bin ‘Abdullāh quoted a few Quranic verses together with their Malay translation when he was deliberating *Sharia*-related matters or explaining a story in the Quran. However, a verse was quoted without its *Surah* and verse being stated. The *Kitab Al-Kifāyah* shows that there are only 19 directquotations from the Quran. Table 1 gives the detailed breakdown.

Table 1
Number of Quranic verses in the *Kitāb Al-Kifāyah*

No	Subject	Number of verses
1	Usuluddin	17
2	Fiqh	2
		19

Table 1 shows that Shaykh ‘Abd Al-Mālik bin ‘Abdullāh used more Quranic verses to deliberate matters related to *usuluddin* as compared to only two Quranic verses in *fiqh*-related matters. Nonetheless, this does

not imply that he makes no reference to the Quran, as according to Shafie (1987), it is incomprehensible that Shaykh ‘Abd Al-Mālik bin ‘Abdullāh did not use the Quran in his judgement, as he was a well-known *mufassīr* (a scholar of Quranic exegesis) of his time. However, there is a more logical explanation for this; during that era, writing paper was very expensive and difficult to obtain. As a result, it was used rather selectively (Masittah, 1993). Therefore, Shaykh ‘Abd Al-Mālik bin ‘Abdullāh had to keep his writings relatively short and concise. There is also a plausible explanation as the *Kitab Al-Kifāyah* was used widely in the *pondok* system in the past; Quranic verses that were relevant to the discussion but were not directly quoted in the manuscript were discussed directly with his students instead.

The name of chapters and verses. As with most old manuscripts in Islamic studies, there is no mention of the exact chapter and verse number in the *Kitab al-Kifāyah*. In order to retrieve the exact name of the chapters as well as its verse numbers, the researchers utilised the *Kitab Fath Al-Rahmān Li Ṭālib Āyāt Al-Qurān* (Ahmad, 1902). However, while quoting from the Quran, Shaykh ‘Abd Al-Mālik bin ‘Abdullāh employed full Arabic diacritics. This attention to detail enables readers to properly pronounce the Quranic verses. Besides that, these Quranic verses were also accompanied by their Malay translation as well as their accompanying exegeses.

Direct Quranic Quotation Methods in *Risalah Hukm Al-Bay' Wa Al-Riba*

Purpose of directly quoting Quranic verses. Shaykh Abdul Qadir bin Abdul Rahim has been found to have used a few approaches in direct Quranic quotations in his discussions. First, it is clear from his writings that he placed the utmost importance on the Quran as the highest authority in his deliberations. Shaykh Abdul Qadir bin Abdul Rahim also gave a detailed description of his deliberations through certain Quranic verses, for instance:

If then it is because this trade needs to pronounce the *ijab* and *qabul* (offer and acceptance) because it is done in good faith, as Allah says:

O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent.

And mutuality is something that cannot be seen, hence, a ruling is based on the superficiality of *ijab* (offer) and *qabul* (acceptance). Therefore, the absence of mutuality invalids a trade.

Total number of Quranic verses. Shaykh Abdul Qadir bin Abdul Rahim used considerably more direct quotations from the Quran than Shaykh 'Abd Al-Mālik bin 'Abdullāh i.e. 21, to be exact. Table 2 provides the detailed breakdown.

Table 2
Number of Quranic verses according to chapters

No.	Chapter	Number of verses
1	Introduction	1
2	<i>Hukm on Muamalat</i> (commercial and civil acts or business dealings under Islamic law)	2
3	<i>Hukm on Riba'</i> (usury)	7
4	<i>Hukm on Deceptions in Trade</i>	0
5	<i>Hukm on al-Musahalah</i> (compromising) in Trade	2
6	The Importance of Avoiding Destruction in Trade	1
7	<i>Hukm on Short-Weighing</i>	1
8	<i>Hukm on the Transgressor</i>	6
9	<i>Hukm on Ihtikar</i> (hoarding of goods from the market)	0
10	<i>Hukm on Mudharabah</i> (profit-sharing)	1
	Total	21

These figures, however, are about 20% of the total number of *'ahādīth* that were quoted in the manuscript. This disparity,

however, can be attributed to the nature of the Quranic verses of being *ijmali* versus the *tafsili* nature of *'ahādīth*. The

ijmali nature of the Al-Quran calls for a shorter and more concise form whereas the '*ahadith*' that was narrated by Prophet Muhammad (peace be upon him) gives a more comprehensive explanation of the Quran. This unique need of *tafsili* renders '*ahādīth*' a closer comparison with the concept of *ta'abuddiyyah* (servitude to Allah). This detailed (*tafsili*) nature of '*ahadith*' also enables Muslim scholars of later generations to debate and subsequently, issue contemporaneous *fatawā* to the public.

The name of chapter and verses. Unlike Shaykh Abdullah's *Kitab Al-Kifāyah*, Shaykh Abdul Qadir bin Abdul Rahim did a proper citation of the Quranic verses by stating the exact *Surah* and its verse. This may be attributed to the fact that Shaykh Abdul Qadir bin Abdul Rahim put more emphasis on the *hukm* that can be derived from those Quranic verses, along with its deliberations. This is in line with *fiqh* methodology, which places special importance on the implied consequences of a Quranic verse. It was also a normal practice of such a time, which can be seen from manuscript heritage that was yet to be contemporaneously extracted (*takhrij*) and edited (*tahqiq*). Shaykh Abdul Qadir bin Abdul Rahim did the same thing as he did not copy the whole verse but focussed on portions of the verses that were directly related to his discussion.

CONCLUSION

Although both Shaykh 'Abd Al-Mālik bin 'Abdullāh dan Shaykh Abdul Qadir

bin Abdul Rahim Bukit Bayas did not extensively employ direct quotations from the Qur'an, they in no way put less importance on the Quran as being the single-most important reference in *Sharia*. There are some similarities as well as differences between the two scholars in their use of Quranic verses in their respective manuscripts.

Both scholars employed a similar style of writing, whereby they did not state the name of the verses and their numbers. Apart from that, they tended to quote incomplete Quranic verses, citing only relevant parts of the verse that were relevant to their discussions. One of the major differences between their style, however, was the purpose of using these direct quotations from the Qur'an. In *Kitab Al-Kifāyah*, the Quranic verses are used to convey stories, whereas in the *Kitab Risalah Hukum Al-Bay' Wa Al-Riba*, they are used to contextualise the writer's arguments on *fiqh* rulings. As a result, the latter manuscript uses a relatively higher number of Quranic verses. It is important to note that Shaykh 'Abd Al-Mālik bin 'Abdullāh' is no less of a scholar because the *Kitab Al-Kifāyah* quotes considerably fewer Quranic verses. This is actually attributed to a number of factors such as the high cost of writing paper at the time and, more importantly, the need to accommodate readers' need for simple and concise reading materials in *fiqh*.

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Muhammad Abdul Wahhab and the Influence of *Salafiyah*: A Study of the Movement's Influence in Terengganu, Malaysia

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ABSTRACT

The debate on *Salafiyah* has been ongoing since the early 20th century during the reform (*Islah*) movement in Egypt and its neighbouring countries. The movement affected local Muslim scholars who had been studying abroad, especially in Saudi Arabia and Egypt, who brought its influence back to their homeland. The objective of this study is to describe the background of the *Salafiyah* that spread to Malaysia, especially Terengganu. It also aims to examine the views of several Muslim scholars in Terengganu on the matter. This descriptive study combines both literature review and field study. For the literature review, references such as books, theses, journal articles and paper work were consulted. Interview sessions with the selected scholars were conducted using a structured questionnaire. The findings show that this movement spread in Malaysia from the *Islah* movement in the Middle East countries and the influence of Malaysian students who studied in Makkah, Egypt and India and brought back these new ideas to Malaysia

Keywords: Influence, *Islah*, Muhammad Abdul Wahhab, *Salafiyah*, spread

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INTRODUCTION

Salafiyah is an *Islah* movement founded by Muhammad ibn Abdul Wahhab (1702-1787), descendant of Bani Sinan, one of the Bani Tamim tribes who lived in the central region of the Arabian Peninsula in East Hijaz (al-Nawawi, 1989). The spread of this movement was aided by Muhammad bin Sa'ud, ruler of the Arabian Peninsula. The *Salafiyah* group has been labelled by its

opponents as Wahhabiyyah because of the doctrine and approach that they subscribe to, which resemble the teachings of the missionary, Muhammad Abdul Wahhab (al-Azmeh, 1986), while its followers called themselves *al-Muwahhidun*, that is, oneness with Allah, or *al-Salafiyyah*, those who follow the methodology of the Salafs. It later became the main adherent of Muslims in Saudi Arabia and a few other places in Muslim countries in the dynasty of King Sa'ud, as a lasting and visible result of establishing the Kingdom of Saudi Arabia. This movement continued the reformation based on the principles of Ibnu Taimiyyah. The reformation was based on two main points (Zahrah, 1999):

- i. A pure *aqidah* (creed), free from the elements that lead to *shirk* such as tomb visitation, *tabarruk*, *tawassul* and *istighathah*.
- ii. Following in the acts and teachings of Prophet Muhammad (peace be upon him) and against acts of *bid'ah*.

According to Awang, the *Salafiyyah* movement received full support from the government of Saudi Arabia and spread to other Islamic countries such as Egypt, Afghanistan, India (1999, p. 6) and Malaysia in addition to several other countries. This resulted in very strong *Salafiyyah* influence among the alumni of the foreign institutions in their respective countries and also started a prolonged controversy among Muslim scholars. Debates opened up not only in mosques, but also in schools, colleges and universities.

Background and Development of *Salafiyyah*

Salafiyyah is practised in Muslim countries such as Egypt, Iraq, Libya and Indonesia and among Muslim communities in India. In Egypt, a number of Muslim scholars such as Jamaluddin al-Afghani (1834-1897), Muhammad Abduh (1849-1905) and Rashid Redha (1865-1935) imported the idea of *Islah* to their country. They were seen as reformists "influenced by modernism" (Abdullah, 1998, p. 163). The three scholars shared similar ideas of *Islah* that they had received from Muhammad bin Abdul Wahhab. For example, Muhammad Abduh and Muhammad bin Abdul Wahhab (Jum'ah, 1990 both refuted *bid'ah* and *shirk* towards tombs and *wali* (saint) and encouraged *ijtihad* (independent reasoning).

For this reason, Muhammad Abduh was assumed to be partially influenced by the thoughts of Muhammad Abdul Wahhab (Jum'ah, 1990). Rosdi (2003) stated that Jamaluddin al-Afghani went to India, and subsequently Makkah for performing the *hajj* (pilgrimage). In Makkah, he met with many scholars of the *Salafiyyah* movement pioneered by Muhammad bin Abdul Wahhab in *al-Hejaz*. From then on, Jamaluddin al-Afghani initiated his *tajdid* movement in Egypt, which spread to the whole Muslim world. Said Ramadhan al-Buti in his book discussing the term *Salafiyyah* confirmed that the *Salafiyyah* started in Egypt as the result of the *Islah* movement that was supported by Jamaluddin al-Afghani and his successor, Muhammad Abduh. Their idea was to bring Muslims back to genuine

Islam, free from innovation (*bid'ah*) and doubt (al-Buti, 1990).

al-Latif (2006, p. 19), a scholar from Jordan claimed that Rashid Redha, a scholar, was also influenced by *Islah* "although he denied that allegation." al-Latif also outlined the statements of Rashid Redha in *al-Manar* magazine, pointing out that he was indeed influenced by the idea of *Islah*, highlighting the disagreements between him and Syeikh al-Azhar, Syeikh Yusuf al-Dajuri and Syeikh al-Kauthari on *Islah*; the similarities in his preaching (*da'wah*) with that of Muhammad bin Abdul Wahhab, which revolved around the issue of *khurafat*, tomb worship, *shirk* and *bid'ah*; his acknowledgement of the reign of the Sa'ud family in Saudi Arabia; and the fact that his follower, Syeikh Abduh, was among the people who urged him not to adhere to the view of *al-Asya'irah* and *al-Mathuridiyyah*.

Hasan al-Banna, the founder of al-Ikhwanul Muslimun, was also reputed to continue the thought of *Salafiyah* in his *tajdid* movement throughout the Islamic world (Rosdi, 2003). In India, *Salafiyah* was introduced in 1804 in Bengal by Syariatullah, a scholar who used to study in Makkah. Upon returning to India, he formed a movement against the British. Meanwhile in Punjab, *Salafiyah* was pioneered by al-Sayyid Ahmad al-Bazili (born 1787), who used to study with the *Salafiyah* scholars in Makkah (Daud & Ibrahim, 1987).

In the Middle East, it was believed that Muhammad al-Alusi (died 1835), the author of *Tafsir al-Alusi*, brought the influence to Iraq. This was proven based on

his writings, which rejected the narration of *al-isra'iliyyat*, the explanation of faith based on *Salafiyah* and his protest against *Wahdah al-Wujud* by Ibn 'Arabi. The same goes for his brothers, Nukman al-Alusi (died 1899), who defended Ibnu Taimiyyah, and Shukri al-Alusi (died 1924), a Najd scholar who wrote a book to refute Syi'ah's view (Daud & Ibrahim, 1987) and reviewed and praised the method by Muhammad bin Abdul Wahhab.

In Nigeria and West Africa, the *Salafiyah* was brought by Shehu Uthman bin Fodio (1754-1817) via his mentor Jibril ibn Umar. Shehu Uthman observed and scrutinised the movement and its effects on the Arabs. During that period, the movement, called *al-Muwahhidun*, was in its peak, establishing an Islamic nation based on the al-Quran and the *Sunnah*. Upon returning to Nigeria, with the assistance of his disciple, Shehu Uthman started to spread the thought of *Salafiyah*. Among others, the action taken was to combat *bid'ah* and *khurafat* in Hausaland (Jameelah, 1997).

In Libya, it was introduced by the al-Sanusiyyah movement, which was led by Sayyid Muhammad bin Ali al-Sanusi (1787-1859) in 1837 in Mecca (Azmi, 1984, p. 20). It resembled the Salafi movement in its pledge to only the al-Quran and the *Hadith*, returning Muslims to "genuine Islam and rejecting any form of *bid'ah* and *khurafat*" (Ansari, 1978, p. 51). One of the main focus points of this movement was to transform the Islamic community into one based on the al-Quran and the *Hadith*. For that reason, Maryam Jameelah thought that

his movement took its impetus from Ahmad bin Hanbal, al-Ghazali, Ibnu Taimiyyah and Muhammad ibn Abdul Wahhab (1997, p. 12). This was due to the fact that he was in al-Hejaz for 20 years pursuing his studies, while al-Hejaz was the centre of the *Wahhabi* movement during that period, suggesting that the scenario was shaped by the interplay of both movements (Pritchard, 1974).

The influence of the *tajdid* movement in the Middle East further spread to the Southeast Asian countries, especially Indonesia and Malaysia. It started in Sumatera, followed by Java Island and subsequently reached Kalimantan, Sulawesi and several neighbouring islands. In Sumatera, the person responsible for this movement was Haji Miskin and his companions who had subscribed to *al-Muwahhidun* teachings during their study in Makkah. It resulted in the establishment of local people to fight the Dutch for 15 years (1822-1837) during the Padri War. Although they ended up on the losing side, *Salafiyah* continued to spread throughout the island. In Java Island, *Salafiyah* spread through the Muhammadiyah movement founded by Haji Ahmad Dahlan in 1912 in Yogyakarta. His movement later was merged with the al-Irsyadiyah movement that was founded by Syeikh Ahmad Sukarti. In Makkah, he mostly socialised with the *Salafiyah* scholars (Daud & Ibrahim, 1987).

Malaysia started to experience the influence of the *Salafiyah tajdid* movement with the emergence of *Islah* figures who were against the practice of *khurafat* and

bid'ah. Though it is not certain if the influence originated from Egypt or al-Hejaz, one obvious element was that the similar approach taken by the *Salafiyah* in al-Hejaz was also seen in Malaysia, although not comprehensively (Rosdi, 2003). Generally, *Islah* and *tajdid* started in Malaysia in the early 20th century through the influence of the *Islah* scholars in Egypt such as Sayyid Jamaluddin al-Afghani, Rashid Reda dan Syeikh Muhammad Abduh. This was based purely on the relationship between the former Malaya and al-Hejaz and the the political and sosiocultural situation of the Malay community in Malaysia at the time.

RESEARCH OBJECTIVES AND METHODS

This study was generally carried out to investigate and analyse the spread of the ideology of Muhammad bin Abdul Wahhab and his revivalist movement in Malaysia and describe the role of local Terengganu scholars who contributed significantly to the spread of the ideology in the state. It is a descriptive study that combines both literature review and field study. For the literature review, extensive reference was made to books, theses, journal articles and paper work. Field work involved interview sessions with the selected scholars using a semi-structured questionnaire.

RESULTS AND DISCUSSION

The Spread and Development of *Salafiyah* in Malaysia

The influence of *Salafiyah* was spread in Malaysia by local students who had studied

in Makkah and Madinah. It was presumably started during the reign of Amir Muhammad bin Sa'ud in Saudi Arabia. According to Daud and Ibrahim, these students tried to introduce and establish the influence of the movement in Malay communities, which resulted in "the enlightenment of the community" and led them to fight "elements of *shirk* and *bid'ah*" (1987, p. 38).

A similar approach was taken by the *Islah* scholars within the *tajdid* movement in Malaysia such as Syeikh Tahir Jalaluddin (1869-1956), Syeikh al-Hadi (1862-1953) and Abu Bakar al-Asy'ari (1904-1970). This so-called reformation movement was said to have been influenced by Muhammad Abdul Wahhab, who used the motto, "*Tauhid Salafiyah*", introducing the terms "*Tauhid Uluhiyyah*" and "*Tauhid Rububiyah*" (Abdullah, 1998). Meanwhile, in the view of *la mazhabiyah* (not following any *mazhab* or denomination), its champion, Syeikh Abu Bakar, was assumed to be guided by the thought of Muhammad Abduh. There is no proof pointing to a meeting with Muhammad Abduh, but it is possible that Syeikh Abu Bakar might have been influenced by Syeikh Tahir or the three personalities of Perlis known as *Tokoh Tiga Serangkai* or *Tiga Mat*, Haji Ahmad, Wan Ahmad bin Daud and Syeikh Ahmad bin Mohd Hashim. These three personalities were influenced by al-Hasan Bandung, while al-Hasan Bandung was influenced by well-known *Salafiyah* scholars through the magazines he read. He was also influenced by well-known personalities of the Middle

East, their equivalent of *Tiga Serangkai* (Rosdi, 2003).

Nonetheless, the *tajdid* movement was undistinguished during that period due to the strong influence of the orthodox scholars who adhered to *Asya'irah*. These scholars identified the *tajdid* movement as a deviant sect. Muhammad bin Abdul Wahhab's connection to the *tajdid* movement was through the relationship between Abu Bakar al-Asy'ari and *Tiga Mat* that was influenced by al-Hassan and Ahmad Surkati. These two *Islah* scholars, who originated from Indonesia, were apparently the advocates of Salafi Wahabi in Java. Abu Bakar Acheh and Van Der Kroef as Bisri (1999) stated that the *Wahabi* movement spread from the Arabian Peninsula, represented by Ahmad Surkati al-Ansari, a famous scholar. Ahmad Surkati al-Ansari, the founder of the Wahabi movement and the reformist front in Egypt, specialised in the works of Ibnu Taimiyyah and Ibnu Qayyim.

Views of *Salafiyah*

***Salafiyah* supporters among scholars.**

Among the earliest scholars who supported the *Wahhabi* movement were Sheikh al-Amir Muhammad bin Ismail al-San'ani. He was a contemporary of Muhammad bin Abdul Wahhab. Much of his poetry is concerned with *Wahhabi* views. Sheikh al-Amir recognised Muhammad bin Abdul Wahhab as a revivalist who had shaped Sharia law in his time. He also insisted that Muhammad bin Abdul Wahhab had been on the right track by calling on the community to enforce Sharia law (Ibn, 1975).

Later, some scholars emerged who spread the same doctrine. One of them was Mahmud Shukri al-Alusi al-Baghdadi in Iraq. He had been influenced by his brother, Muhammad al-Alusi, a supporter of *Salafiyah* in Iraq (Daud & Ibrahim, 1987, p. 38). In his review of the book written by Muhammad bin Abdul Wahhab entitled *Masailu al-Jahiliyyah Allati Khalafa fih Rasulullah Ahla al-Jahiliyyah*, Mahmud Shukri al-Alusi al-Baghdadi had praised the contents of the book and recognised Muhammad bin Abdul Wahhab's approach in spreading *da'wah*.

Among other scholars who supported this ideology was al-Zirkali. In his book *al-'Ilam*, he considered Muhammad bin Abdul Wahhab as a Muslim reformist similar to later figures like Jamaluddin al-Afghani, Sheikh Mahmud al-Alusi and Jamaluddin al-Qasimi. He described Muhammad bin Abdul Wahhab as a leader of the Islamic awakening in the Arab Peninsula and a reformer of the Muslim world.

The *Salafiyah* movement had an impact on later *Islah* leaders like Rashid Reda and Jamaluddin al-Afghani in Egypt. Rosdi believed that the relationship between the Egyptian reformist and Hijaz scholars might have influenced the spread of the thought in Egypt (2003, p.40). Rashid Reda described Muhammad bin Abdul Wahhab as an *Islah* leader and a Mujaddid in the 12th century Hijri and connectors to fight Ibn Taymiyyah in the 8th century. Al-Sahsawani (1975, p. 6) describes Muhammad bin Abdul Wahhab as a "reformist who taught men to purify the beliefs of faith, the sincerity of worshipping

one God in accordance with the Quran and *Sunnah*, [and] urged the public to leave the matter of heresy and immorality and to turn to Islam wholeheartedly. Therefore, many enemies rose up against him".

Makkah, which was central to the spread of *Salafiyah* ideology, has witnessed the rise of several prominent figures who were strong supporters of this ideology. Among them were Sheikh Muhammad Nasiruddin al-Albani and Ibn Baz (Zin, 2001). Both were strong supporters of the *Salafiyah* as influenced by Muhammad bin Abdul Wahhab and Ibn Taymiyyah.

Other scholars who supported the *Salafi Wahabi* ideology and recognised the doctrine were Uthman bin Bishr, Abu Bakr al-Hussein bin Ghinam Ihsa'i, Zuhair Syawisy and Salim al-Hilali, Ahmad Amin, Prof. Dr. Umar Sulaiman al-Asyqar, Diya 'al-Din Dr. Taha Hussein, Abbas and Dr. Mahmud Aqqad Ahmad al-SarbasiI (Daud & Ibrahim, 1987).

Scholars who opposed *Salafi Wahhabi*. Muhammad bin Abdul Wahab's movement and his ideology was opposed in his lifetime. Among those who opposed him were Muhammad Ibn Abd Rahman al-Afaliq and his brother, Sulaiman Ibn Abdul Wahhab. Al-Faliq had sent a letter to Amir Muammar saying that Muhammad bin Abdul Wahhab had insulted the Prophet's family (Daud & Ibrahim, 1987).

Among others who opposed *Wahhabi Salafi* ideology was the mufti of Makkah, Zaini Dahlan. In his book, *al-Duraru al-Saniyyah fi al-Raddi ala al-Wahhabiyyah*,

Zaini Dahlan raised a number of arguments and evidence in opposition to the ideology of Muhammad bin Abdul Wahhab, especially in issues of *tawassul* and visiting graves. He also described the statement of Muhammad bin Abdul Wahhab, who equated Muslims who visited graves and doing *tawasul* with the polytheists at the time of the Prophet, as being extremely outrageous (Dahlan, 1949).

Jordanian scholar, Hasan Ali al-Saqqaf, who opposed the *Wahabi Salafi* movement, strongly disagreed with Shyeikh al-Albani's opinions. Hasan al-Al-Saqqaf wrote a number of works refuting the opinions of al-Albani, including *Qamus Syataim al-Albani*, *Tanaqudat al-Albani*, *al-Wadihat and al-Basyarah wa al-Ithafima Bayna Ibn Taimiyyah wa al-Albani fi al-Aqidah mina al-Ikhtilaf*.

The opposition was not confined only to the Arab countries, but also spread to Southeast Asian countries such as Indonesia. Among the most vocal scholars in Indonesia was K. H. Sirajuddin Abbas. He wrote a number of books on the differences, or *khilaf*, between these two movements such as *Isra' Mikraj*, reciting *basmalah* in *al-Fatihah*, *tawassul* and *Qunut* in *Fajr* prayer, triple *talaq*, *bid'ah*, *istiwa'* and *ijtihad*. He also claimed the *Salafiyah* as fanatical and radical, as well as proclaiming weird and controversial *fatwas* compared to other Muslim scholars.

***Salafiyah* and Their Scholars in Terengganu**

Although Perlis was noted as one of the earlier states to receive the influence of

Salafiyah, Terengganu was also similarly influenced by local scholars, and the influence subsequently spread within the community. According to Yusof (2008), the reasons for the spread in Terengganu were firstly, the influence brought in by students returning from the Middle East cities such as Makkah and Madinah and Islamic countries such as Egypt and India; and efforts by the Saudi government to propagate the new ideology such as the holding of *da'wah* courses and *tarbiyah* among the religious teachers in Terengganu.

The spread was focussed on the religious lectures in mosques, specifically in the area of *Tauhid* and *Hadis*. The books used were *al-Jawab al-Fasil Yatamayyazu al-Haq wa al-Batil* by Ibnu Taimiyyah, *Syarah al-Tahawiyah* by Syeikh Abdul Qadir al-Mandili, *Syarah Sahih al-Bukhari* and the *Kitab al-Tauhid* by Syeikh Muhammad bin Abdul Wahhab.

The most popular Salafi scholars were identified as Haji Muhammad bin Abdul Majid al-Fatani (70 years old) in Kampung Gong Pak Maseh, Ustaz Awang Nasiruddin bin Abu Bakar in Kampung Batu 6, Ustaz Razali Tahir and Ustaz Yahya Tahir in Kampung Gemuruh, Batu Rakit (Yusof, 2008).

Ustaz Haji Muhammad bin Abdul Majid al-Fatani. Ustaz Haji Muhammad bin Abdul Majid al-Fatani (Personal communication, 2012, October 12), better known as Ustaz Mat Majid, lives in Kampung Tok Maseh, Kuala Terengganu. He was originally from Na Prodo Kupu, Pattani. He received his

early education via the traditional system in Makkah, from the Madrasah Indonesia and Madrasah Makiyyah, and obtained his *Aliah* degree in 1964. He then returned to Pattani and furthered his study in Egypt several years after that. He obtained his degree in *Sharia wa al-Qanun* in 1970. He came to Terengganu in 1983 before settling down in Kelantan for a year. In 1985, he worked as a teacher in Sekolah Agama Durian Guling and Sekolah Menengah Atas Sultan Zainal Abidin (SMASZA) from 1987 to 1993.

He was active in *da'wah* as a *mubaligh* (preacher) for the Majlis Agama Islam dan Adat Istiadat Melayu (MAIDAM). Apart from his home religious classes, he also taught in Masjid al-Muktafi Billahi Shah Ladang, Masjid Hikiran Kuala Terengganu and Surau Haji Wan Endut in Kampung Gong Tok Maseh. He translated a few books and among them was a book written by Ibnu Taimiyyah entitled *al-Jawab al-Fasil Yatamayyazu al-Haq wa al-Batil*, which he used in his teaching.

Based on his educational background, he was believed to have received *Salafiyah* influence during his study in Makkah. He expressed that Muhammad bin Abdul Wahhab was the supporter of *Salafussoleh*, a group of pious predecessors, during the period of the prophet Muhammad (peace be upon him) until the 4th century. He adhered himself to the Quran and authentic *hadis* while preaching. He was against the practices of *talkin*, *tahlil* and Islamic events, which he acknowledged as *bid'ah*. He rejected the idea that some scholars categorise those practices as *furu'*

(branches), while it actually revolved around the matter of *aqidah* and categorised as *usul* (roots).

He also stated that the term *Wahhabi* was given by the Syi'ah and British to the opposition group toward Muhammad bin Abdul Wahhab. It was mainly because there were no specific denomination other than the Quran and the *Sunnah*.

Ustaz Awang Nasiruddin bin Abu Bakar.

According to his wife, Hajjah Rokiah bt Haji Abbas, (Personal communication, 2014, December 10) Ustaz Awang Nasiruddin bin Abu Bakar came from Kampung Bukit Tok Beng, Kuala Terengganu and settled down in Kampung Batu 6, Kuala Terengganu. He was an alumnus of Pondok Tuan Guru Haji Abbas, Kampung Tok Jiring, before he pursued his studies in *hadis* in Jamiah Darul 'Ulum, India. He successfully finished the study of *Sunan Sittah* using the *talaqqi* method and was awarded a degree. He continued his studies in *Syariah wa al-Quran* in Egypt in 1972, and came back to Malaysia in 1974. Upon his return, he was nominated as the PAS representative for DUN Teluk Pasu, and won that position. His excellent command of religious knowledge led to his appointment as Leader of the Dewan Ulama PAS Terengganu until 2003.

Being a politician did not deter him from serving actively in *da'wah*. He used to deliver weekly lectures in several mosques in Kuala Terengganu, especially Masjid Batu 6. He emphasised on the *Salaf tauhid* and asked the community to only practise what was outlined by the Quran and *sunnah*.

He was greatly influenced by *Salafi* during his *hadis* studies and in India. He adhered to Islamic law and rejected *bid'ah* practices such as Quranic recitation for the deceased, *talkin* and *tahlil*. In Masjid al-Taqwa, Kampung Batu 6, Kuala Terengganu, there was only a single *azan* during Friday prayer as it was the *Sunnah* of Prophet Muhammad (peace be upon him).

Ustaz Haji Razali bin Tahir and his brother Ustaz Yahya bin Tahir. Ustaz Haji Razali (Personal communication, 2015, November 30) was originally from Kampung Gemuruh. He settled down in Kampung Bukit Besi, Dungun, Terengganu. His secondary school was Sekolah Menengah Agama Tok Jiring (1982-1988). He then pursued his studies in Ma'had al-Haram in Makkah (1989-1991). In 1993 and 1998, he obtained his Bachelor's and Master's degrees, respectively, from Universiti Darul al-Hadis Faisalabad in the field of *hadis*. He was very active in *da'wah*, and operated a *tahfiz* institute in Bukit Besi, named Institut Tahfiz al-Mizan.

He also delivered lectures to local communities to improve their understanding on Islamic values strictly based on the Quran and *Sunnah*, and also the practices of *Salafussoleh*. Among the books he used in his lectures were *Tafsir Ibnu Kathir* and *Manhaj Aqidah Ahli Sunnah Wal Jamaah* by Ustaz Ismail Omar, *Taudih al-Ahkam min Bulugh al-Maram* by Abdullah bin Abd al-Rahman al-Bassam, *Fiqh al-Sunnah* by al-Sayyid Sabiq and *Syarh al-Bukhari* by Ibnu Hajar al-'Asqalani. He also emphasised

on *Salafi* thought in his lectures. He was attracted to Salafi thought while following the lectures by Ustaz Awang Nasiruddin in Masjid Batu 6, Kuala Terengganu, as well as by his brother, Ustaz Yahya bin Tahir, who was in Makkah during that period.

In his point of view, the term *Wahhabi* was incorrectly used by the community. The term was not founded by Syeikh Muhammad bin Abdul Wahhab, or his followers. It was merely a term used by the people who were against his *da'wah* so as to imply that it was deviated from the correct path. For example, those who were against the practices of *tahlil* and *talkin* and who rejected the method of *ta'wil*, would be labelled as *Wahhabi*. As a matter of fact, those were the practices by *Salafussoleh imam* such as Imam Syafi'i and Imam Ahmad, a long time before Muhammad bin Abdul Wahhab.

He affirmed that Muhammad bin Abdul Wahhab was only an *Islah* individual who continued the teaching of *Salafussoleh* and brought back the Muslim community to the Islamic teaching based on the Quran and the *Sunnah*. He also rejected the claim made by the community that *Wahhabi* was firm, due to the fact that all the prophets were also firm, especially on the issues of *aqidah*. On the matter of *Salafiyah* thought, he suggested the community should read the books, *Manhaj al-Aqidah Imam al-Syafi'i* by Abd al-Rahman al-Qumaisy and *Tabaqat Imam al-Syafi'i* and *Usul al-I'tiqad* by Imam al-Laka'I, in addition to a few other books on the practices of *Salafussoleh imam*. Ustaz Yahya bin Tahir (Personal communication,

2015, November 30) worked with him in spreading *Salafi* thought.

CONCLUSION

Our research findings revealed that adherents to *Salafiyyah* emphasise the principle of *tawhid* (the oneness of God) and eliminate foreign innovation (*bid'ah*). The movement has been notable in Malaysia as being influenced by the *Islah* movement in Middle Eastern countries. It was also spread by Malaysian students who had studied in Makkah, Egypt and India who subscribed to the ideology and later brought it back to Malaysia. *Salafiyyah* scholars also conducted activities such as through their lectures and writings to help spread the thought; however, the impact of their influence is not that obvious. As of now, the influence of members of the *Sunnah* from the sects of *Asyairah* are more significant and dominant within the Muslim community in Terengganu.

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***Al-Qanun Al-Kulliy*: A Philosophy in Understanding Faith in Islam**

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ABSTRACT

This article discusses the concept of *al-Qanun al-Kulliy* as a philosophy in understanding the meaning of the verses of the Qur'an and *Hadith* of the Prophet (S.A.W), both of which are needed in understanding faith-related issues. The concept here is that sense of purpose, considered priority in outward evidences of Islamic law, which has drawn criticism from Islamic scholars who cling to the methods of the *Salaf al-Salih*. To understand the concept of *al-Qanun al-Kulliy*, this paper relies on the analysis of some related sources, the study of which has shown that *al-Qanun al-Kulliy* is a philosophy in understanding matters of faith that was adopted by some theologians (*Ahl al-Kalam*). The paper also shows that Ibn Taimiyyah and his student, Ibn al-Qayyim, are among Muslim scholars who maintain firm criticism of *al-Qanun al-Kulliy* on the premise that it denies many faith-related issues stipulated by the texts of personality (*qat'iy*). The paper adopts a qualitative approach, being mainly a library-based research study. The aim of the paper is, therefore, to maintain *al-Qanun al-Kulliy* as a means to understanding faith in Islam if properly employed.

Keywords: Faith, Islam, *kulliy*, philosophy, *qanun*

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INTRODUCTION

In the history of Islamic thought, various scholars have appeared with their own philosophical framework for understanding the Islamic faith as mentioned in the Qur'an and *Hadith* of the Prophet (S.A.W). The basis for the stance of some scholars in upholding the intellect to understand faith-

related issues is evidently informed by the *Jahamiyah*, *Jabariyah* and *Mu'tazilah*. The *Mu'tazilah* was more stunt in this matter, to the extent that its thoughts successfully influenced the government of al-Ma'mun, which made the thought propagated in the *Mu'tazilah* an official stand of the state in the concept of faith. Understanding of the Qur'an is being encouraged widely and has become the official stand of the government. In such a climate, Imam Ahmad Ibn Hambal was imprisoned for criticising the creed. Ibn Taimiyyah in his work opined that the *Mu'tazilah* led to the founding of *al-Qanun al-Kulliy*. These scholars believe that denial of the attributes that reveal God's greatness, among other matters, is due to the concept of *al-Qanun al-Kulliy*. It is, therefore, the aim of this article to review the concept of *al-Qanun al-Kulliy*, its origins, criticism concerning it and its accuracy in elucidating revelation. Thus, this paper further advances our knowledge of yet an important part of *Kalam* that has become neglected even by Muslim scholars.

Definition of Concept

This concept is intended to advance views and opinions framed by the intellect (*al-aql*) from the truth as presented by the Qur'an and *Hadith* of the Prophet (S.A.W). In Faith and Sharia, explanations can be contrary to projections of the intellect. This concept is known as *al-Qanun al-Kulliy*. Ibn Taimiyyah explained that where there is conflict between evidence of intellect

and revelation (*naql*), then the solution is based on:

- i. A combination of the two things that contradict each other: This is impossible because we cannot combine two contradictory things.
- ii. Rejection of the two things that contradict each other: This is impossible because one of the two contradiction must be accepted.
- iii. Start with the evidence of revelation rather than the evidence of intellect: This is also impossible because the intellect is the origin of revelation. If we start with the evidence of revelation rather than of the intellect, we would be insulting the intellect. When the position of the intellect is insulted we would end up insulting revelation because the intellect is the origin of revelation.
- iv. This means that common sense must take precedence over revelation: Then the explanation of the intellect to clarify the meaning of revelation shall be given close scrutiny (Ibn Taimiyah, 1950, p. 1).

According to Safar al-Hawaly, some of the supporters of the concept above were al-Razi, al-Ghazali, al-Juwayni, al-'Ijij, Ibn Fawruq and al-Sanusi. Safar al-Hawaly attested that the concept of *al-Qanun* is to combine the teachings of revelation with the teachings of philosophy (al-Hawaly, 1986, p. 34).

This kind of concept denies the *Hadith* of the Prophet. Some scholars reject the use of the *Hadith* where it contradicts the Qur'an. They claim that most verses of the *Hadith* oppose the teachings of the Qur'an and the two are in conflict with one another. They believe that the *Hadith* is an unreasonable teaching in the form of intellectual law. The intellectual and logical concepts held by this group clearly show they are influenced by the views of the *Mu'tazilah*. They state that even if the *Hadith* were accepted by Muslims as a second source of law, its legitimacy is still disputed by the *Mu'tazilah*, consisting of philosophers and scientists. This shows that there is no final agreement on the validity of the *Hadith* as the final approval of the Qur'an (Kassim, 1992, p. 47).

The Greeks introduced the earliest concepts pertaining to understanding knowledge and reality. According to Aristotle, reality does not only contain meaning, it also coincides with basic metaphysics and high logic. He outlined the principles outlining reality in the following way:

- i. Everything is in its own right. There can be no consent if there is no contradiction.
- ii. From two possible sides to any question, one must be admitted and the other denied; the one admitted is the correct understanding.
- iii. Between two contradictory statements, one must be affirmed and the other denied; there cannot be a third statement (Mohd, 1982, p. 98).

There is no doubt that the influence of philosophy on Muslims is one of the reasons for this problem. In this connection, al-Sayutiy explained that philosophy and logic had affected the thinking of Muslims, especially during the time of foreign nation states in the first century, but the scholars of *al-Salaf* played their role by preventing Muslims from receiving this influence. However, al-Sayutiy further expounded, the influence of philosophy began to spread in the times of Yahya Ibn Khalid Ibn Barmak, and it grew and flourished during the reign of al-Ma'mun, who encouraged the teaching of philosophy at that time (al-Sayutiy, n.d, p. 12).

Yahya Ibn Khalid encouraged the reading of Greek thinking. He procured Greek philosophical manuscripts from the Roman state where they had been archived safely for fear that if they were disseminated to the public, the people of Rome would subscribe to the religion of Greece. So when the books were endorsed by Yahya, the Roman state agreed to give them to him because in that way they believed they could bring harm to Islam. The King of the Romans is recorded to have said to his minister; "If it (the philosophy manuscript) were to be with the Nasarites and they have read it, it would have caused destruction to their religion and shattered their community. And I thought of sending it (the manuscript) to him (Yahya) and I would ask him not to return it. They would be tempted by it (the manuscript), and so we would be saved of its evil" (al-Sayutiy, n.d, p. 8).

A similar statement was recorded as having been made by one of the ministers of King Qubrus when al-Ma'mun asked for the philosophy books, who had said, "*These sciences would not get into an Islamic nation without damaging it and cause division and misunderstanding among its scholars*" (al-Sayuti, n.d, p. 7). Because of the awareness of the danger that it could cause to Muslims, al-Shafi'i declared, "People were not ignorant and were not divided until when they sacrificed the Arabic tongue for [the] Aristotelic tongue" (al-Sayuti, n.d, p. 15).

Al-Shafi'i mentions the fact as his response to the teaching of philosophy that affected the *Mu'tazilah* at that time, as they abandoned submission and obedience to the Qur'an and disputed the teachings of the Qur'an and the *Hadith* of the Prophet with their logical sense, thinking that the Qur'an was a created entity (al-Sayuti, n.d, p. 15). Some among the *Mu'tazilah* affected by this philosophy were Wasil Ibn 'Ata', al-Huzayl, Ibn Siyar al-Nizzam, Ibn Khabid, Ibn 'Ubbad al-Sulamiy and Ibn Atras al-Numayriy (al-Shahrastani, n.d, p. 42-85).

Others such as Ibn Sina, al-Kindi, al-Farabi, al-Razi and Ibn Rushd are considered to have brought together revelation and Greek philosophy to produce a robust philosophy called Islamic philosophy. According to Aboebakar (1970, p. 15), the basis of Greek philosophical thought is also the basis of Islamic philosophy.

What is clear about the influence of philosophy on Muslims is that it damaged their faith. Those influenced by philosophical teachings raised the intellect to a higher

position than the position of revelation. For example, al-Razi, according to Harun (1978, p. 21-22), was an individual who believed in the power of the intellect and did not believe in revelation. He believed there was no need for prophets and apostles and that prophets and apostles wrecked the lives of the people through their teachings. He noted that people subscribed to religion as tradition and as such, denied the possibility of miracles.

Al-Farabi considered God as sense; from sense, there emerges existence of the other. God was considered a form of the First Existence and that intellect arose as the Second Existence; this splitting of existence continued up to the 10th Existence (Harun, 1978, p. 27-28). He also said there were similarities between the Angels and the 10th sense. Ibn Sina held this same view.

This explanation clearly shows that the group that contradicted raised the intellect above the Qur'an and the *Hadith*. They made the intellect the chief of all laws and principles (Harun, 1978, p. 31). To understand this concept in more detail, it is necessary to review its main principles (Harun, 1978, p. 35).

Principles Contained in the Concept

The following explains the main principles contained in the above concept:

Intellect as an assessment to revelation. Those who adhere to the *al-Qanun al-Kulliy* will not receive revelation if it is not evaluated by the intellect. For them, the teachings of the Qur'an and the *Hadith* must

be in accordance with the intellect. If it is not, they reject it.

Al-Dhahabi narrated that Mu‘az Ibn Mu‘az, when he heard ‘Amr Ibn ‘Ubayd repeating from the *Hadith* the circumstances of a baby’s existence in its mother’s belly, recited from ‘Abdullah Ibn Mas‘ud, “If I had heard al-A’mash mention it, I would have rejected it, until he [said] even if I had heard the Prophet (s.a.w) saying it, I would have challenged it” (al-Dhahabi, 2004, p. 104-105).

Al-Qadi (1988, p. 690), one of the *Mu‘tazilah* who clearly adhered to this principle, easily rejected the *Hadith* where it is associated with intercession (*shafa‘ah*) that is received by believers who have committed major sins. In this regard, he stated of the *Hadith*, “My intercession (*Shafa‘ah*) is for perpetrators of major sins, is not authentic.” If it is valid, this *Hadith* is a single *Hadith* of the Prophet (*Ahad*) that does not generate any science. Thus, he believed that this *Hadith* of the Prophet could not be used as an argument.

Al-Qadi (1988, p. 232) also denied that those who have faith will be able to see God on the day of judgement. He said that if God could be seen, God would be equal to His creation, and this means God’s message would have to be rejected. Because everything can be seen in the future, this would be something seen by all. If God can be seen, He would have mass; if He had mass, He would be just like His creation. Therefore, it had to be denied that God would be seen in the Hereafter as stated by the *Hadith* in question, “Indeed you will

see your Lord on the day of resurrection as you see the full moon...or as reported” (al-Qadi, 1988, p. 267). Al-Qadi firmly stated that this *Hadith* suggested that God was equal to His creation because the moon is seen as a round shape, high and luminous in the sky. Therefore, he attested, God should not be described. He explained that the information against the Prophet was a lie and that he had not said so; the message was just a fabrication. He said that even if the information were authentic it was only a single *Hadith* of the Prophet and it did not have any knowledge or benefit (al-Qadi, 1988, p. 268-269).

What is clear from the above statement is that the *Mu‘tazilah* adhered to the principle that the intellect is superior to revelation. When the intellect sees a revealed message that seems illogical and unreasonable, it rejects it without compromise. This principle can be seen more clearly in al-Qadi’s (1988, p. 226) statement that it is impossible for revelation by itself to explain the nature of God because the validity of the texts about the nature of God can only be decided by the intellect. Thus, he was explaining texts that described the nature of God. Al-Rumiyy (1986, p. 53) said that the concept of the intellect by the *Mu‘tazilah* can be seen from two goals; one, as freeing thought from any ties to revelation, and two, as making the intellect the absolute punisher.

They made every effort to adapt the texts of the Qur’an and the *Hadith* conform to common sense by their opinions. Al-Zamakhsyariyy once stated when describing the intellect as the king on the stage,

“Perform your religi[ous duty] under the supervision of the authority, and do not accept the relation of so and so” (Al-Rumi, 1986, p. 54).

This principle also affected Muhammad ‘Abduh when he declared the first basis of Islam as the debate of the intellect to acquire knowledge, besides making the intellect a way to achieve true faith. The second basis of Islam according to ‘Abduh was giving the text a more intellectual view than was apparent when there is conflict (Al-Rumi, 1407H, p. 730).

The Shiites also displayed their stand on this principle. Al-Tusi, when criticising an opinion that the prophets and apostles in the context of *ma'sum* were inseparable from sin based on the evidence of *Surah Taha*, verse 121, which reads, “...And Adam disobeyed his Lord and he strayed,” stated that those who thought so were wrong in their interpretation of the verse. In this context, he explained, the intellect did not necessarily understand the evidence of the words literally. Despite that, the truth of the matter was that the intellect required the prophets and apostles not to do wrong. Therefore, the verse should be interpreted in its literal sense. (al-Tusi, 1986, p. 262).

What is clear is actually a group of Shiites have been firmly clinging to the works of the famous *Mu'tazilah* with its principle that the intellect is superior to revelation, and it is on this principle that their argument concerning the nature of God and *qadar* (predestination) is based. *Qadr* (predestination) is the same as *Mu'tazilah*, as explained by Ibn Taymiyah (1986, p. 70).

One who was clearly from this group was Hitham Ibn al-Hakam, who thought that God has mass, although there are Shiites, *al-Jahiz* included, who did not think that God has mass. They also thought that God does not know anything until it happens (Ibn Taimiyyah, 1986, p. 71-73). They argued that the Qur'an was created and God cannot be seen in the Hereafter, and as such, rejected *qadar*, saying God is unable to give directions or mislead anyone (Ibn Taimiyyah, 1986, p. 99).

As for the *Jahmiyyah*, they were affected by the philosophical teachings introduced by Samaniyyah, a Hindu philosopher who only trusted what existed. So, al-Jahm Ibn Safwan supported the opinion that God absolutely exists without any nature (Abul 'Iz, 1987, p. 794). His teacher, Ibn al-Ja'd, also took lessons from the philosopher of Harran in addition to learning from a Jew who deviated from his religion, and who also had a relationship with Lubayd Ibn al-'Asam, who conjured the prophet. We therefore see that this group denied many established tenets of the faith (al-Baghdadi, 1977, p. 211).

The anti-*Hadith* who claimed to be patriots of freedom of thought (Kassim, 1992, p. 15) found that many of their religious beliefs clearly contradicted the stand of *Ahl al-Sunnah*. Some of these were:

- a. Only cling to the the Qur'an;
- b. Reject in *qadar* (predestination);
- c. *Shahadah* is only 'la ilaha illa Allah';
- d. Reject intercession;
- e. Reject miracles (*al-mu'jizah*);

- f. Reject punishment of apostasy;
- g. Reject stoning;
- h. Everyone has the right to profess any religion;
- i. Pray according to one's accepted way, and so on (Kassim, 1992, p. 139-150).

It is clear that the main principle was that the intellect was more valuable than revelation, and any teaching that did not conform with the intellect was rejected.

Intellect is absolute as a source of religion.

This principle was clearly displayed by those involved in Theosophy, which had characteristics of philosophy. A basic understanding of the formation of *Wahdah al-Wujud* (Pantheism) proves that it was derived from the philosophy of Plotinus. According to Plotinus, the universe flowed from the original. The flowing out is the original equipment, and in this context God is not within the natural environment, but the environment is in God (Mohd, 1982, p. 132). Plotinus also believed that a first creature called intellect existed i.e. the world of thought. From the intellect, clearly came the human soul, which came after the birth of things. According to this philosophy, the closest thing to God is the intellect, as origin gave birth to the intellect as well as the mental world. According to Plotinus, the birth of a variety of things in nature, including humans as well as objects that are not organic, takes place as the shedding of energy into those objects (Mohd, 1982, p. 134).

It is clear from the statement above that this universe generated from gods. In this connection Sulaiman (1999, p. 38) explained that the notion *emanisasi* or beam is so obviously embraced by al-Farabi. He believed that God is the first intellect that caused the second intellect to exist through a process known as overflow, where the second intellect, then the third intellect were born and so on till the 10th intellect or the 11th. The spirits of humans on earth are made from the overflow of the 11th intellect.

Sirojudin (1999, p. 99-100) also explained that according to this understanding, the existence of something is an absolute existence, though this nature existed, but its existence exists as the shadow of the substance of God. This means all existence is only one fact of God. This thought was also shared by Naqiub Sayid al-Atas. This can be seen in the explanation that the doctrine of *Wahdah al-Wujud* (Pantheism) is the principal teaching of Theosophy arising from faith, when faith is born in the Islamic dimension, then *Wahdah al-Wujud* (Pantheism) is an inner dimension (Sulaiman, 1999, p. 69).

The teaching, *al-Ittihad* (merger), was that a servant united with his god. Such teachings were influenced by philosophy and ideas of Philon Alexander, who maintained that the ultimate goal was to unite with God in spirit and feeling. He believed that the highest knowledge was to look into the soul of a god that could not be known (Mohd, 1982, p. 129).

The ideology of *al-Hulul* is also sourced from philosophy. It states that God chose

certain people's bodies to exist after what was human in the body is removed. This concept was actually derived from Neo-Pythagorean philosophy, the founder of which was Moderatus from Gades, who lived in the first century. His teaching was developed by Nicomachos from Gerasa in the Arab states, and was further advanced by Noumenios from Apamea (Mohd, 1982, p. 127). According to this philosophy, the cleanest of all the stains is God, and all human nature is stained. Therefore, according to this doctrine, God can only be approached through spirit, because the spirit does not need any tool to be close to God. Hence this doctrine explained that the soul lives forever and moves from one generation to the other (Mohd, 1982, p. 127-128).

Harun stated that, according to the teachings of Theosophy, before God can take over the place in man, man must first get rid of the attributes of humanity. When people give up human nature, they go through the process of *al-Fana'* and *al-Baqa'*, travelling towards the divine attributes of God, where God is moving into the body of the human; this is when the spirit of God and the spirit of man unites (Harun, 1978, p. 89).

It is clear that there were thinkers who made the intellect the absolute source of religion, an idea that originated with the Greeks. In Islamic thought, this philosophy is wrong. It is unfortunate that many among the intellectual Muslims were influenced by these teachings.

Ridiculing the evidence of *naql*. This principle considered that the evidence of

naql seems to be doubtful (*zan*) and was not strong evidence neither was it intellectual. When the intellect is considered the assessor of revelation, that revelation could come from God is simply not admitted. If revelation is to be accepted, it must succumb to being judged by the intellect. If the intellect affirms it, the doctrine of revelation is accepted; otherwise, it is not.

A careful study of the establishment of the *Mu'tazilah* shows that they exalted the intellect while ridiculing revelation. This is seen in the five bases or origins they held, namely, justice, faith, the promise of good and bad, *al-'amr bi al-ma'ruf wa al-nahy 'an al-munkar* (the promotion of virtue and prevention of vice) and *al-manzilah bayn al-manzilatayn* (status among the middle range). For instance, in the case of faith, according to Abul 'Iz (1987, p. 793), such matters are determined based on the intellect, upon evidence of *naql*. According to al-'Ijy, *naql* cannot produce a firm conviction unless it is found not to be contrary to the intellect, and if there is conflict between *naql* and '*aql*, then the '*aql* must be ahead of the *naql* (al-Sufyani, 1988, p. 194).

In this connection, it is clear that *naql* was subjected to the judgement of *al-'aql*. From the perspective of jurisprudence, this group of thinkers believed that *fiqh* cannot be trusted as it too would not allow for credible evidence. These thinkers, as did al-Razi and al-Juwayni, for example, distinguished between *al-Adillah* (evidence) and *al-Amarat*. According to them, outward evidence is '*am* (general), *mutlaq* (absolute),

qiyas (measurement), *khabar ahaad* (single informant *Hadith*) and *al-Istishab*. While this may be acceptable evidence, it was not accepted by these thinkers as evidence and was termed *al-Amarat*. For them evidence had to generate confidence (al-‘Arusi, 1990, p. 23).

According to al-‘Arusi (1990, p. 25), the two terms derived from the *Mu‘tazilah* did not provide for tangible evidence and denied also the source of *Ahaad*, especially the attributes of God and the Hereafter. This was because these thinkers had already decided that everything rested on the intellect or ‘*ijma*’ (consensus) among themselves or texts which in their view were *qata’i* (final proof). Therefore, since matters such as the punishment of the grave, intercession, *al-sirat* (Path) and *al-mizan* (scales) are explained by the Qur’an and the *Hadith*, and not by the intellect, they are not approved. Thus, to ensure that there was a difference between the evidence accepted by the group of thinkers as *qata’i* the terms *al-Dalil* (evidence) and *al-‘Amarat* were coined; therefore, when there was a conflict between the evidence accepted by the intellect and *al-Amarat*, the evidence accepted by the intellect would be chosen over *al-‘Amarat*.

In this connection, al-Razi (1992, p. 390-406) mentioned in his book of *usul* that the evidence of the Qur’an and the *Hadith* on issues of law was doubtful (*zan*); therefore, to accept the evidence, there must be 10 conditions, one of which was that the evidence could not be contrary to the intellect. If it was, then the intellect would be chosen.

It can be concluded that those who evaluated the texts of the Qur’an and the *Hadith* chose one of the following three options:

- i. Accept the explanation of the texts, acknowledging the conditions on the intellect;
- ii. Interpret the explanation of the passages based on their own views; or
- iii. Reject the texts because they cannot be accepted by the intellect.

It is thus clear that this group of thinkers were not convinced by evidence as given by the Qur’an and the *Hadith*. All evidence had to be accepted by the intellect only; otherwise it was rejected.

Uphold the interpretation (*ta’wil*). *Ta’wil* are the principles contained in this concept. Generally, *ta’wil* in this context means to change the meaning of an utterance from literal to deep meaning without reliance upon any valid evidence. Al-Amidi explained *ta’wil* as, “using a statement against its apparent connotation, and assuming it means the same.” This gives to *ta’wil* one of three connotations as described by al-Shanqiti, namely:

- i. Changing the meaning of words that are not apparent to their apparent meaning based on the authentic evidence of the Qur’an and the *Hadith*. According to al-Shanqiti, *ta’wil* (interpretation) in this sense is true without *khilaf* (dispute). *Al-Jaar* (neighbour) is interpreted as *al-Shariik* (partner) as stated in the

Hadith, “*al-Jaar* (neighbour) or partners are more entitled to the goods shared” (Ibn Hajar, 1986, p. 437). Interpreting *al-Jaar* in the *Hadith* from the apparent meaning to mean *al-Syariik* is based on al-Shanqiti’s words, “...and when the limits had been determined, and the ways had been changed, then it is no longer convertible property” (Ibn Hajar, 1986, p. 436).

- ii. Changing the meaning of words that are not apparent to the apparent intention by a *mujtahid* (diligent). An example is Abu Hanifah’s interpretation of women in the *Hadith*, “Any woman who got married without the approval of her guardian, her marriage becomes invalid.” In the words of Sahih Sunan Abi Dawud, it is *mawaaliha*. He interpreted the word *imraah*, which means women in the apparent meaning, literally. It is the slave who is not independent. This *ta’wil* is not correct because the word *ayyu* (any) that precedes *imraah* is of the general sense rather than the specific. *Ta’wil* of this type is known as *Ta’wilan ba’iidan* (distant interpretation) or *Ta’wilan Faasidan* (corrupt interpretation).
- iii. Changing the apparent purpose to another meaning that is not apparent without any charge to the evidence. This type of interpretation is wrong and misleading, as practised by theologians, for example. Where texts outwardly clear are interpreted according to will, such as *al-Rafidah*, who interprets verse 67 of *Surah al-Baqara* as, “Allah

commands you to slaughter a cow.” This group of thinkers interpreted *Baqara*, the ostensible purpose of heifers, as ‘*Aayishah*, the intangible, without any evidence. This *ta’wil* is also likely to hold true for the nature of God (al-Shanqiti, 1991, p. 80-82).

This third connotation of *ta’wil* is a contingency in understanding the Qur’an and the *Hadith*. This type of *ta’wil* is invalid and the method deviates from authentic *ta’wil*. According to al-Julaynid (1983, p. 86), the *Khawarij* were the first to interpret passages of the Qur’an incorrectly. One example of invalid interpretation they made is of verse 71 of *Surah al-An’am*, “Say (Oh Muhammad): Shall we invoke other than Allah... .” They interpreted the verse with the intent that those on the right path are the *Nahrawan* (*al-Khaw-arij*). Another example is of verse 204 of *Surah al-Baqarah*: “And from amongst men is one whose speech about worldly life amazes you... .” They interpreted *man* as ‘Ali (r.a), and that he was a hypocrite who spouted interesting speech about worldly life (al-‘Ash‘ar-i, n.d., p. 103).

The Shi’ites, as described by Ibn Qutayba, also claimed to have inner knowledge, and they interpreted verse 16 of *Surah al-Naml* to Prophet Muhammad (S.A.W) as, “And Sulaiman inherited Dawud... .” They said that Prophet Muhammad (S.A.W) had bequeathed his knowledge to the priest. They interpreted verse 67 of *Surah al-Baqarah* as, “Allah has ordered that you sacrifice a heifer.” They

said that God had ordered the slaughter of Aisha (Ibn Qutayba, n.d, p. 49). They also legalised illegal items such as wine and carcasses, giving an invalid interpretation of verse 93, *Surah al-Ma'idah*, "There is no sin on those who believe and do good concerning what they taste... ."

The *Mu'tazilah* interpreted a lot of the verses of the Qur'an by changing the meaning of terms, for instance, they changed God's hands to grace and God's eyes to knowledge and rejected the idea that God had a face. They construed *al-Somad* as meaning *al-Sayyid* (al-'Ash'ar-i, n.d, p. 6).

In connection with *Tariqah al-Batiniyyah* (mysticism), according to Ibn Taimiyyah, they interpreted religion as a whole, considering the whole Qur'an as something tangible and necessary. They interpreted Muslims' prayers as performing a secret activity, fasting as hiding a secret and pilgrimage as a journey to their sheikhs. According to this group of thinkers, the general community were allowed literal interpretations, while a special inner circle could be entrusted with deeper understanding of the laws. For this reason, they did not observe many religious practices (Ibn Taimiyyah, 1985, p. 48).

CONCLUSION

This paper explored the invalidity of the principle of *ta'wil* employed by various sects in interpreting the Qur'an and the *Hadith*. These *ta'wil* caused them to stray from the approved teachings of Islam and to indulge in irregularities. This strongly suggests,

therefore, that the concept of preferring the intellect to reality as offered by the Qur'an and the *Hadith* is not the practice of all scholars. While the mainstream scholars validate the teachings of the Qur'an and the *Hadith*, one group of thinkers chose not to, doing injustice to the concepts of faith and Sharia. It is the stand of this paper that the *al-Qanun al-Kulliy* has been misused and exaggerated; it has too greatly absorbed the influence of Greek teachings imported without reservation into Islam. However, if properly and carefully employed, *al-Qanun al-Kulliy* could be of great service in understanding the message and content of the Qur'an, and, of course, the *Hadith* of the Prophet (S.A.W).

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Philosophical Foundations and their Implications on the Islamic Education

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ABSTRACT

This paper aims to elucidate some philosophical foundations underlying education in the Islamic *weltanschauung*. The qualitative method of philosophical analysis is employed for the purpose of this study. The finding of this study is the significance of four philosophical foundations, namely, the ontological, epistemological, theological and axiological, which are essential for developing a theoretical framework for Islamic education. The ontological foundation, which pertains to the theory of existence or being, focusses on human nature and man's integrative components and functions. The epistemological foundation illuminates the nature of knowledge, its sources and methodologies. The theological foundation constructs the Islamic belief system based on the unity of Divinity and the *tawhidic* paradigm. The fourth foundation is the axiological, which emphasises certain key values underlying the Islamic value system. This study has some implications on Islamic education. The ontological foundation strengthens the philosophical basis of Islamic education, while the epistemological foundation provides curricular implications on its content and both the theological and axiological foundations are significant for the methodological processes of education. Together, they ensure a holistic personality as the final product of Islamic education.

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INTRODUCTION

It is worth reviewing the meaning of 'Islamic education' because if this notion were not measured lucidly, it might endanger the ensuing Islamic educational activities. There are four types of such activity. The first is education in Islamic doctrine initiated by the Muslim community for transmitting Islamic knowledge with emphasis on Qur'anic memorisation and the religious sciences. The second is 'education for Muslims,' as offered in full-time Muslim schools, which provide both the traditional religious and national secular curriculum. The third is 'education about Islam' as represented in various subjects of religious studies prescribed by the national general curriculum. The last is 'education in an Islamic spirit and tradition'. (Douglass & Munir, 2004). This article aims to elucidate some aspects of the philosophical foundations underlying Islamic education.

METHODS

The qualitative method of philosophical analysis was employed in this study. A strong concept must be founded on a firm philosophical foundation. It must be based on the revealed Truth, not mere speculation.

RESULTS AND DISCUSSION

Philosophical Foundations Underlying Islamic Education

In order to define the concept of Islamic education, the aspects of its philosophical foundation need to be elucidated. The first is the ontological aspect, which pertains

to the theory of existence or being. The second is the epistemological aspect, that is, philosophy and the study of the nature of knowledge, sources and methodologies. This aspect also highlights the unity of knowledge and the different kinds of enumeration. The third is the theological aspect, which constructs the Islamic belief system based on the unity of divinity and thus, creates the *tawhidic* paradigm. The fourth is the axiological aspect that emphasises certain key values underlying the Islamic value system and is vital to achieving overall excellence.

Ontological foundation: Human nature.

The first philosophical foundation of Islamic education concerns the nature of the human being including his multiple dimensions, purpose of his creation, his various perceptual faculties and points of accountability. Man needs to be educated and he needs to remain inquisitive in seeking knowledge. The nature of man from the Islamic worldview is different from that of secular theories expounded by secular thinkers such as Aristotle, Charles Darwin (1809-1882 C.E.), Sigmund Freud (1856-1939 C.E.), Abraham Maslow and B. F. Skinner (b. 1904 C.E.) and others.

In the Islamic worldview, man is a distinctive being, created with purpose by the Creator, the Almighty Allah. This corresponds with Aristotle's idea that man is "a rational being, who inhabits a rational and purposeful universe" (Gutek, 1987, p. 41-43); his ability to communicate (*nutq*) reflects this rational faculty. In

Islamic belief, the first man created by God was Adam. Adam was man's primordial ancestor. It was through him and Eve that the whole human race was derived. This belief challenges Darwin's evolutionary theory that hypothesised that man originated from dissimilar ancestors through the process of evolution.

Man is bestowed with a dual physical and spiritual subsistence. The physical element covers the body and the brain. The body comprises several faculties, namely, the five physical senses while the brain is the most complex structure in living things. The spiritual component comprises the soul (*rūh*), intellect (*'aql*) and a passionate soul appended to the body (*nafs*). The 'mind' integrates these three forces, making every man unique. It is the mind that distinguishes man from other creations. The state of the soul changes depending on the individual's morality, while the intellect is 'the centre of consciousness.' It is directly connected to the brain and acts as a bridge between the soul and the body (Al-Mahdi, 2004).

The intellect (*'aql*) is synonymous with the heart (*qalb*), which is a spiritual organ of cognition. Al-Jurjānī (1978) described *'aql* as "a spiritual substance by which the rational soul recognizes and distinguishes truth from falsehood." Al-Ghazali maintained that "if a man knows [his] heart (*qalb*), he knows himself, and if he knows himself he knows his Lord" (n.d./2007, p. 2). The heart, al-Ghazali explained, "possesses an organ of sight like the physical eyes, and outward things are seen with the outward eyes and inward

realities with the eyes of the heart." The intellect (*al-'aql*) is "an expression for the heart where exists the image of the specific natures of things" (al-Ghazali, n. d./2007, p. 40). Al-Ghazali (n. d./2005) allegorised the relationship between knowledge and the intellect as fruits that spring from trees, light from the sun and vision of the eyes. However, intellect (*'aql*) is different from reason as the latter is a mere manifestation of the former. According to Yasien (1988), the function of reason is restricted to analysis and logic, whereas intellect has a more advanced function in the recognition of the principles of matters' principles. Osman (1992) stated that Al-Farabi's theory of the intellect covered the idea of prophetic intellect, which acts as a vehicle of divine revelation (*wahy*), and this established relationships between revelation, intellect and reason.

In Islam, the soul (*al-rūh*) is the essence of man that needs to be nurtured. It is dynamic, having the ability of obtaining intuitive knowledge. Initially, it acts as an internal force, which stimulates the external forces of the five physical senses in gathering empirical data. Subsequently, the intellect acts as a tool for processing and interpreting data before finally reaching a conclusion. Indeed, the intellect acts as a vehicle to guide man onto the right path. Unlike Aristotle, who regarded the intellect as divine and the happiest life as the life lived according to reasoning, Islam holds the intellect to be subservient to divine revelation, through which man experiences the happiness of life. All human perceptual

faculties as well as divine revelation imply types of knowledge included in Islamic education.

Special mission of vicegerency. Islam verifies that the existence of man manifests the divine magnificence in the physical world, that is, man is held responsible for carrying out God's special mission as His vicegerent (*khalīfah*). This was commanded to Adam in Allah's proclamation to the angels, "I will create a *khalīfah* on earth..." (Al-Quran, Al-Baqarah, 30). The logical implication of this, according to al-Mahdi, is that Allah has a grand plan for all His creation and that Mankind is the focus of this Grand Plan. The initial step in successfully carrying out the grand role as *khalīfah Allah* for man is to understand his place in Allah's Grand Plan of Creation (Al-Mahdi, 2004, p. 20). Generally, because of the designation of *khalīfah*, every man is entitled to serve Allah and such an entitlement is a great honour for mankind. With respect to this however, even, the angels were asked to bow before Adam (Al-Quran, Al-Baqarah, 34). Thus, man is obliged to fulfil the divine trust (*amānah*) by establishing true religion and justice ('*adl*) (Al-Quran, Sad, 36; al-Nisa, 58; al-Maidah, 8) and to follow His absolute guidance (*hidāyah*) for the success of worldly and otherworldly life (Al-Quran, al-Sajadah, 24; al-Araf, 43; al-Qasas, 56; Taha, 50).

In order to equip man fulfil the mission of vicegerency, some essential qualities were endowed to him. The first was the ability to use symbolic names and intellectual

faculty for thinking, conceptualisation and communication (Al-Quran, al-Baqarah, 31). From the beginning, man has had natural disposition (*fitrah*) toward righteousness and an instinct for God-consciousness (Al-Quran, al-Rum, 30). Then, Allah granted man a little measure of His divine attributes and some sensual faculties to empower him (Al-Quran, al-sajadah, 9). Material resources are provided for human sustenance as Allah's recognition of man's authority (Al-Quran, al-A'raf, 10; al-Luqman, 20; al-Baqarah, 29; al-Mu'min, 64; al-Jahiliyyah, 13). Al-Ghazali (n. d./2005) specified that man possesses two distinguished qualities, namely, knowledge and will power. Knowledge is "the power of generalisation, the conception of abstract ideas and the possession of intellectual truth," while will power is the "strong desire to acquire an object which reason pronounces to be good" (Quraishi, 1983). Man has freedom to make choices with God's will through his inner speech and by utilising his faculties and all other facilities provided to him while administering himself, his fellow beings and the physical world according to Allah's Will.

Epistemological foundation: The nature of knowledge. The concepts of man and knowledge are closely related to each other because man's superiority over other creation is due to his ability to acquire knowledge. The significance of knowledge is highlighted by numerous Qur'anic injunctions and prophetic sayings. Seeking knowledge is indicated in the first divine word revealed to the Prophet Muhammad

(peace be upon him). He also proclaimed that, “The acquisition of knowledge is obligatory on every Muslim.” (Al-Tirmidhi, Hadith 74). This indicates that reading is a vital mechanism of seeking knowledge.

Indeed, the possessor of knowledge would be endowed with honour, excellence, distinction and status over those who do not have knowledge (Al-Quran, al-Imran, 18; al-ankabu, 43; al-Fatir, 28). In addition, knowledge acts as a measurement of man’s distinction over Angels (Al-Quran, al-Baqarah, 23-33); a prerequisite of responsibilities (Al-Quran, al-Baqarah, 247; al-Nisa, 113); and a blessing upon creatures (Al-Quran, al-Zumar, 9; al-Mujadalah, 11; al-Rahman, 1-4). It is also one of the divine attributes (Al-Qur’ān, al-Mulk, 26; Banī Isrāīl, 85; al-Baqarah, 225). The authority of a scholar is established in Islam as “the learned men are (considered as) the heirs of the prophets” (Abu, 1992) No. 183; Sunan Al-Tarmizi (No. 2682).

Knowledge in English means ‘what a person knows,’ which includes facts, information, skills and attitudes. In Islamic terminology, it refers to *al-‘ilm* (Arabic term), which literally means understanding (*fahm*) and gnosis (*ma‘rifah*). Various scholars have defined *al-‘ilm* according to various perspectives. Al-Jurjānī (1978) gave a concrete definition: knowledge means the absolute certainty which is conformable with its actual reality. Thus, it is the certain perception (*al-yaqīn*) that there is no doubt. Açıkgenç (1996) differentiated *al-‘ilm* from ‘gnosis’ (*ma‘rifah*); the former can be practical and theoretical, while

the latter could be obtained through an experiential journey of the qalb, which thus reaches satisfaction (*al-nafs al-mutma‘innah*). Thus, ‘gnosis’ (*ma‘rifah*) is the definitive knowledge acquired as a result of God-consciousness after achieving self-realisation. Conversely, knowledge could be acquired through the rational method.

According to al-Attas (1980), ‘*ilm*’ implies a twofold method; the first is *husūl* or the arrival of meaning (*ma‘nā*) of a thing in the soul and the second is *wusūl* or arrival of the soul at that meaning. In this context, the meaning (*ma‘nā*) is distinctive from the form (*sūrah*) that signifies the exterior actuality perceived by the perceiver’s senses. This is similar to Aristotelian epistemology, where the dual components of knowledge, namely, sensation and abstraction, are differentiated between idea and form. For al-Ghazali, real knowledge referred to the lifting of the veil from before the eyes of the heart so as to see the mysterious relationship between man and his maker and to be filled with a sense of awe and reverence in the presence of an omniscient Being (Quraishi, 1983).

The ultimate source of all knowledge is Allah, the best teacher of mankind, who has granted two references, namely, divine revelation (*wahy*) and the law of nature or the universe (*al-kawn*). Islam considers both references as being equally important for human progress. They unremittingly convey various significant meanings to every human life. More discoveries and findings are produced when more investigation and research is carried out. Natural phenomena

of the universe and human phenomena are types of the latter kind. In addition, the scope of knowledge covers both worldly and other worldly affairs as in the prayer, "...our Lord! Give us good in this world and good in the Hereafter" (Al-Quran, al-Baqarah, 201). This reflects not only a comprehensive (physical and spiritual) but optimistic (contemporary and after life) outlook. The integration of the length and breadth of this scope is significant to Islamic education.

Theological foundation: Islamic belief system. In al-Attas' metaphysics, the reality and the concept of God forms the major thrust of the Islamic worldview. This profoundly implies on the concept of knowledge and Islamic education in terms of concept, content and methods (Rosnani & Imron, 2002). Dhaou (2005) argued that this theological assumption is essential to all aspects of human life and to the authentic integration of educational practices. It is the yardstick for the selection of curriculum principles. It is essentially integrative rather than fragmentary. Theology predominates over the philosophy of education because the former is derived from revelation. The key component of theology is Allah, the component which determines the purpose of man's life as a servant and a vicegerent of Allah. The first is a vertical relationship between man and Allah (*hablun min Allah*). It denotes man's retribution (*'ubūdiyyah*) for being indebted as God's servant (*'abd Allah*) towards the Creator by worshipping (*'ibādāh*) Allah in totality. The second is horizontal relationship between man and

the entire universe. It implies his special mission as *khalīfah* as discussed in the ontological aspect.

This first relationship acknowledges the Oneness of Allah (*tawhīd Allah*). *Tawhīd* is derived from the Arabic word '*wahhada*', which means to be united or unified and literally denotes 'unification' or 'asserting oneness.' Al-Attas' view is that "the one is independent and subsistent and the other is dependent upon it; the one is absolute and the other is relative; the one is real and the other a manifestation of that reality" (Al-Attas, 1980, p. 36). Thus, this monism rejects dualism and "the idea that there are two opposite parts or principles in everything, for example body and soul" (Bullon, 2003, p. 4-5).

The Unity of Allah (*tawhīd Allah*) denotes the "realizing and maintaining of Allah's unity in all man's actions which directly or indirectly relate to him" (Abu Ameenah, 2003, p. 5-25) and it is manifested in the unity of all His creation including universe, mankind etc. *Tawhīd* is the core of Islamic doctrine. All human beings affirmatively believe in it. It is not a philosophical argument to be rejected. The Islamic doctrine (*'aqīdah*) consisting of six articles of faith is based on convincing evidence of the divine sources (*naqlī*), reason (*aqlī*) and the senses (*hawās*). They establish the Oneness of Allah as the Lord (*rubūbiyyah*), the One to be worshipped (*ulūhiyyah*), who is perfect in names and attributes (*al-asmā' wa al-sifāt*) which are classified as definite (*wājib*), impossible (*mustahīl*) and likely (*jawaz*). This is

manifested in the utterance of the words, “There is no god except Allah (*Lā ilāh illa Allah*),” the One and the Only Absolute Truth or single Ultimate Reality that unifies all existence and matter. Hence, this signifies the happiness for the whole mankind regardless of race, gender, socio-economic status etc.

Pertaining to the educational aspect, *tawhīd* is the groundwork for harmonising the process of the Islamic Integrated Curriculum. The application of the *tawhīdic* principle in Islamic education is significant as lucidly proclaimed in the Holy Qur’an; “Allah bore witness that there is no god but He, as did the angels and those who are firmly rooted in knowledge” (Al-Quran, al-Imran, 18). This verse implies that the witnesses to divine absoluteness in transcendence are Allah Himself, His angels and those who possess knowledge regarding *tawhīd* who have faith (*imān*) and are able to acknowledge Allah as the one and only God. Thus, all educational matters and activities in the IIC must be based on the Islamic belief system of *tawhīd* and *imān*. In this context, *tawhīd* is the root of *imān*, not its fruit and surely, faith (*imān*) is a pre-requisite of becoming a true believer (*mu’min*) who lives for the sake of Allah as described in the Holy Qur’an; “Only those are Believers who have believed in Allah and His Messenger... but have striven with their wealth and their lives in the Cause of Allah...” (Al-Quran, al-Hujurat, 15). Hence, the educators and learners should comprehend the Islamic belief system clearly and translate them

into action (*‘amal*) as manifestation of their convictions.

In addition, this theological foundation is significant to the formulation of a single unified system of education and towards achieving solidarity among the Muslim nations, which is essential for Muslim society to attain happiness, prosperity and peace as explicitly enunciated in the Holy Qur’an (Al-Quran, al-Hujurat, 10; al-Tawbah, 71). This was also vividly expressed in an analogy given by the Prophet, “‘A believer to another believer is like a building whose different parts enforce each other,’ then he clasped his hands with the fingers interlaced” (Hadith Bukhari). Similarly, al-Fārūqī (1997) claimed that all humans are one in Allah’s perception. This is the basis of universalism in Islam. All humans are distinguished by their deeds, in which violation and crime are considered chauvinism that implies polytheism (*shirk*). In fact, Islam rejects chauvinism and the negative attitude of ethnocentrism but recognises a universal social order as well as patriotism, which signifies the attitude of love of defending one’s own land or nation.

Axiological foundation: Islamic values System. Islamic education emphasises the proper understanding of the Islamic value system that meets the true Islamic objectives (*maqāsid al-sharī’ah*). Value is defined as ‘consistence, goodness, worthiness and obedience’ and includes ‘grace, virtue and moral excellence’ that is related to five essentials (*al-darūriyyāt al-khamsah*)

derived from the objective of Islamic law (*maqāsid al-sharī'ah*), namely, preservation of religion (*al-dīn*), self (*al-nafs*), intellect (*al-'aql*), lineage (*al-nasl*) and property (*al-māl*) (Muhammad, 2005). Allah determines all values that are absolute and independent of man's thoughts and actions. Therefore, the Islamic value system or ethics in Islam is the Qur'anic code of conduct that is fully epitomised in the perfect moral character of the Prophet Muhammad (Peace be upon him) as he says, "I have been sent to perfect the good character" (Hadith Sahih, *Kitab Husn al-Khuluq*). Hence, the source of values is the Holy Qur'an and the *Sunnah*. Correspondingly, Islamic ethics is a framework, set by the Holy Qur'an, within which all practical conducts are deemed permissible (Umaruddin, 1962). The Islamic religion, '*al-dīn*' is the foundation of Islamic ethics as al-Attas (1978) asserted that the purpose and end of ethics in Islam is ultimately for the individual; what the man of Islam does, he does in the way he believes to be good only because God and His Messenger say so and he trusts that his actions will find favour with God.

Islam promotes an all-pervasive structure of a value system based on the bond between the human innate soul and unchanging absoluteness (Ashraf, 1991). This is contrary to the humanistic assumption of a changing value system whose meanings are personal and absolutely never exist outside the human mind (Mason, 1974). Values in the Islamic worldview are universal and absolute in contrast to the Western perspective, which defines values as relative in nature. On the

contrary, the Islamic value system is based on the universality of the Islamic message, which is preordained for all mankind, as indicated in the Qur'anic phrase, "Oh entire mankind" (*yā ayyuha al-nās*). Rather, the prophetic mission is also meant to integrate the differences in all aspects by protecting human rights and upholding moderation as pronounced by Allah; "We have created you as a balanced community" (Al-Quran, al-Baqarah, 143). The assessment of values must be based on the Qur'anic justification as stated that, "Blessed is He Who sent down the Criterion to His Servant, that it may be an admonition to all creatures" (Al-Quran, al-Furqan, 1). The Criterion (*al-Furqān*) is the Holy Quran, the principle of judgement between virtues and vices or praiseworthy and blameworthy. Islam regards knowledge as value-laden not neutral or value-free as assumed by secularists. However, some knowledge becomes blameworthy due to misapplication by erring humans. Thus, the IIC would integrate knowledge and the whole system of education with values in order to preserve the sacredness of knowledge.

Values in good thinking. The importance of values and care in thinking was highlighted by Lipman (1991), who posited that excellent thinking is multidimensional, which is inclusive of critical, creative and caring thinking as will be elucidated further in the next chapter. Kinds of caring thinking are appreciative, affective, active, normative and emphatic thinking. For Lipman "without caring, thinking is devoid

of a values component” for without ‘valuing’ or ‘valuation’, thinking is predisposed to apathy, lack of concern, indifference and selfishness (Lipman, 1991, p. 270). The values of good thinking are explicated in the Qur’anic injunctions and they promote the use of the intellect as mentioned earlier. Furthermore, the prophetic mission is teaching man revelation and wisdom and purifying him (Al-Quran, al-Baqarah, 129). This implies that teaching for wisdom is an educational aim of Islamic education. The product of good thinking is wisdom, which Miskawayh defined as the perfection of the human intellect and character (Miskawayh, 1968). Since wisdom is a good value, thus, the wise man will attain blessings.

Values of excellence. Al-Ghazali (n. d./2005, p. 20) mentioned, “for knowledge is the most excellent of things, the process of acquiring it would then be a search for the most excellent, and imparting it would be promoting the most excellent.” Being excellent should be the target of every Muslim learner for the Holy Prophet (p.b.u.h) proclaimed, “Allah likes it when the one amongst you perfects his works” (Hadith Sahih). Al-Ghazali (n. d./ 2005, p. 18) added that excellence is an attribute to knowledge. For him, “excellence is derived from the infinitive to excel which is excrescence.” The greatest achievement of man is eternal happiness, and the most excellent thing is the way that leads to it. This happiness will never be attained except through knowledge and works, and works are impossible without the knowledge

of how they are done. There is no exact description defining excellence; however striving for it becomes the virtuous way to attain happiness and success in this world and the Hereafter (Al-Quran, al-Baqarah, 201).

In achieving overall excellence, some value-laden methods are available, as identified by Van Tassel-Baska, (1997). Firstly, internalise the Aristotelian notion of “Excellence as Habit of Mind,” which promotes intellectual habits such as intellectual honesty, integrity, humility, curiosity and independency. Secondly, practise moral and ethical decision-making. Thirdly, give maximum exertion (*ijtihad*) and self-discipline (*ta’dib*), for as Roosevelt claimed, “There has never yet been a man in history who led a life of ease whose name is worth remembering.” Thirdly, recognise the industriousness of intellectual enterprise and the thinking process. Fourthly, apply the attitude of humility (*tawādu’*), broadmindedness, and contribute to problem solving. Fifthly, have commitment (*iltizām*) and consistency (*istiqāmah*) in achieving excellence for long-life learning. Islam accepts modernity as a spiritual phenomenon instead of modernisation, which promotes egoism and individualism. Thus, in response to the challenges of globalisation, Lukens (2000) suggested that a set of Islamic values be adopted as practised in the Indonesian *pesantren*, which upholds brotherhood and unselfishness to preserve against pitiless entrepreneurialism, moderation to control unbridled consumerism and self-reliance to allow for personal and

national independence. An ideal integrated personality should be virtue-based as well as excellence-orientated by applying the concept of *ih̄sān* (beutification).

In the context of education, the Western perspective regards excellence as the goal of optimising the individual's talents and quest for self-achievement. This idea is dissimilar to the Islamic worldview, which considers the seeking of knowledge for individual holistic growth and realising God-consciousness as the final end that is balanced between God-loving and God-fearing. In promoting excellence, Van

Tassel-Baska (1997) suggested the practice of two important societal values viz. the value of education and the value of hard work. This notion is parallel with the Islamic worldview, which promotes excellence through revitalisation of *ij̄tihad* and the practice of *jihād* in which the former requires knowledge to reach the best solution or certain target whereas the latter energises vigour in reaching the target. Thus, Islamic education should be supplemented with these two elements in efforts to promote excellence in the contemporary Islamic education system.

Table 1
The Implications of the Philosophical Foundations of Islamic Education

Philosophical Foundations	Particulars	Implications
ONTOLOGICAL	Nature of man Unity of man, unity of self and unity of life The importance of Soul Integrative faculties Purpose of life Servant of Allah Vicegerent on the earth The holistic man Natural need for education	Philosophy of Islamic education Educational aims, goals & objectives Concern about individuality Cultivation of potential Focus of Islamic education Individual development Social and global transformation Islamic Integrated Personality Lifelong education
EPISTEMOLOGICAL	Nature of knowledge Unity of knowledge The Holy Qur'an as a Divine Book Hierarchy of knowledge The integration of revelation, intuition & reason	Content of Islamic education Integrated curriculum Qur'anic studies as the core subject Knowledge content Seven essential components
THEOLOGICAL	Islamic belief system Unity of Allah <i>Tawhīd & Īmān</i>	Foundation of Islamic education Learning as <i>Tbādah</i> Tawhidic Paradigm Faith-based education
AXIOLOGICAL	Islamic Value System <i>Maqāsid al-Sharī'ah</i> <i>Ihsān</i> <i>Ijtihād & Jihād</i>	Ingredients of Islamic education Universal values Striving for excellence Value-laden education

IMPLICATIONS AND CONCLUSION

In summary, the four aspects of philosophical foundations of Islamic education are essential and give some implications on the philosophy and the content of Islamic education (See Table 1).

The ontological foundation focusses on human nature, man's integrative components and functions, thereby significantly implying a philosophy of Islamic education. Since ontologically, the nature of man is dual, physical and spiritual, Islamic education concerns itself with the development of both dimensions in a balanced and integrated manner. The former embodies the animal aspect for life survival, whereas the latter manifests the angelic aspect for achieving God-consciousness. The harmonious integration of the physical and spiritual dimensions reflects the unity of man. Neglect in either one dimension will produce chaos and injustice in human life. All human components, namely, the soul, mind and body are complementary. Further, man has dual roles, namely, as servant and vicegerent of Allah. Learners should know how to play these roles given on divine trust (*al-amānah*).

The epistemological foundation gives some curricular implications on the content of Islamic education. Islam perceives that all knowledge belongs to Allah alone, while a part of it is divinely revealed to His chosen prophets. This produces divine revealed knowledge in the form of Holy books or scriptures, of which the Holy Qur'an remains intent and authentic. However, a small amount of knowledge is endowed to

people who use their perceptual faculties namely intuition, senses and intellect. This produces human acquired knowledge in the form of scientific, philosophical and other such sciences. Islamic education advocates a complementary relationship between the divine revelation and human reason. It accepts the unity of knowledge and rebuffs any compartmentalisation of knowledge. The integration of both religious vigour and rational thought is vital to produce a true Islamic personality. This epistemological explanation is significant in promoting a culture of philosophical inquiry and scientific investigation as well as enhancing multidimensional thinking. It also maintains integration of theory and practice. It is idealistic and realistic, physical and metaphysical. Therefore, knowledge must be balanced. Balance does not mean equal weight but proper division according to the hierarchy of knowledge. Levelling of all knowledge to the same level or overemphasis on certain knowledge will cause injustice.

Both the theological and axiological aspects are significant for personality development. Both beliefs and values are integral for its transformation process. Both systems are key elements in Islamic education, curricular content and its methodological processes. Theologically, the Islamic belief system ensures that educational practices are in accordance with the *tawhidic* paradigm, which is based on the unity of Allah. Meanwhile, the Islamic value system derived from Islamic law (*sharī'ah*) makes education value-laden. These i.e. both

the theological and axiological elements are integral to Islamic education. In addition, struggle (*jihād*) and reasoning (*ijtihad*) based on perfection (*ihsān*) are keys that accelerate learners' overall excellence and achievements. All these lead to development of a holistic personality as the final product of Islamic education.

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Said Nursi's Theological Thoughts in the Light of *Sunni* Doctrine

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ABSTRACT

This article aims to evaluate the theological thought of Badiuzaman Said Nursi in the light of the doctrine (*aqidah*) of *Ahl al-Sunnah wa al-Jama'ah* or briefly known as *Sunni*. It uses the qualitative methods of analytical evaluation and content analysis. It mainly evaluates Nursi's ideas derived from his primary sources including his speeches and writings including his masterpiece, *Rasail al-Nur*. The evaluation of Nursi's theological thought is divided into four aspects. The first aspect is the methodology of deriving legal verdicts, which is primarily divided into *dalil al-naql* (revelation) and *dalil al-aql* (reason). The second aspect is the pillars of faith (*iman*), which are firm belief in Allah, angels, the divine books, the prophets, judgement day and predestination. The third is related to the divine attributes and the beautiful names of Allah. The final is the different doctrines of various sects (*mazhab*) such as *Mu'tazilah*, *al-Qadariyyah*, *Syiah Rafidhah* and *Zindiq* (atheists). This study found that all four aspects of Nursi's theological thought are consistent with the principles of *Sunni* doctrine and the methods applied by *Sunni* scholars. Hence, it is concluded that Nursi made invaluable intellectual endeavours to defend *Sunni* doctrine through his speeches and writings.

Keywords: *Ahl al-Sunnah wa al-Jama'ah*, *aqidah*, Badiuzaman Said Nursi, Islamic civilisation, Islamic doctrine, Islamic thought, *Sunni* beliefs

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INTRODUCTION

Ahl al-Sunnah wa al-Jama'ah (people of the Prophet's tradition and the Ummah consensus) or briefly known as *Sunni* is the largest sect of Islam as well as the

largest religious denomination in the world and the field of theology. One of the most prominent Muslim theologians to defend Sunni doctrine was Bediuzzaman Said Nursi (1876-1960).

Islamic doctrine (*aqidah*) is the absolute essence referring to the term *al-din* in Islam. Al-Buti (1997) associated the term “*aqidah*” with aspects of a Muslim’s faith and trust in Allah, the Angels, the Messengers, the Books, Judgement Day and predestination or Divine Will and Decree (*Qada wa Qadar*). The word “*iman*” or faith has a similar connotation. Similarly, Nursi (1998) related *aqidah* to the actions and deeds of one who is consistently obedient to Allah Almighty without being associated with aspects of logic or the lack of it. Even the implementation of an action is based on the element of pure sincerity.

Nursi emphasised the role of religion in the problems of the Muslim world that is suffering from spiritual deterioration. Nursi (1956/1995) reminded the faithful that:

The greatest danger facing the people of Islam at this time is their hearts are being corrupted and belief harmed through the misguidance that arises from science and philosophy. The sole solution for this is light; it is to show light so that their hearts can be reformed and their belief, saved. (p. 1435)

He added:

It is a universal principle accepted worldwide that no nation can continue in existence without religion...If, God forbid, a Muslim apostasizes, he falls into absolute disbelief; he cannot remain in a state of ‘doubting unbelief,’ which keeps him alive to an extent. He also cannot be like irreligious Europeans. (p. 374)

Muslims should avoid being in a state of ‘doubting unbelief’ and should also avoid being irreligious. Nursi argued that “Islam is the master and guide of the sciences, and the chief and father of all true knowledge” (1956/1995, p. 374).

Hence, Nursi attempted to integrate traditional religious and modern scientific sciences in order to reveal the truth. Nursi (1956/2007) justified this theoretically:

The light of the conscience is religious sciences (*ulum-u diniye*). The light of the mind is exact or modern sciences (*funun-u medeniye*). Combining both manifests the truth. The student’s skill develops further with these two (sciences). When they are separated, the former breeds superstition and the latter breeds corruption and skepticism. (p. xv)

His main focus was *'ilm al-kalam* (theology) as the means of intellectual defence against the attacks of rationalistic skepticism. The second was *tafsir* (Quranic exegesis) as the means of explicating principal Islamic beliefs. Notwithstanding Western thinkers' attempt to demolish Islamic doctrine in the aspect of human development and civilisation, Nursi struggled to defend Quranic truth and its connectedness with all aspects in order to develop human beings and their civilisation.

Nursi claimed that the *Sunni* school was a school of thought that was compatible with the Quran and the *Sunnah*, and that other schools went off in some excess on one or another point. He considered the *Sunni* doctrine to be the true sect because the truth is predominant in its fundamental beliefs (Yavuz, n. d.).

This article aimed to evaluate analytically the theological thought of Badiuzaman Said Nursi in the light of the doctrine (*aqidah*) of *Sunni*. This paper will unfold his struggles and contributions in maintaining the true doctrine of *Sunni* among Muslims.

METHODS

In terms of methodology, this study used the qualitative approaches of analytical evaluation and documentation as well as content analysis. It mainly evaluated Nursi's theological thought contained in his primary works comprising his speeches and writings in his *magnum opus*, popularly known as *Risale-i Nur* (Epistles of Light). It is a thematic commentary on the Quran with

its main focus on the renewal of faith. In addition, several related secondary sources were also reviewed.

RESULTS AND DISCUSSION

The evaluation of Nursi's theological thought is divided into four aspects: the first is methodology of deriving legal verdicts; the second is the pillars of faith (*iman*); the third is the divine attributes and beautiful names; and the final is the different doctrines of the various sects (*mazhab*).

Methodology of Deriving Propositions and Legal Verdicts

The methodology for deriving legal verdicts or propositions practised by Muslims is based on revealed evidence derived from revelation (*al-naql*), namely, the Quran and the *Sunnah* and rational evidence based on reason (*al-aql*) and customs (*adat*). Propositions derived from reason or custom must adhere to the Quran and the *Sunnah*. Hence, the strength of Islamic doctrine is evident as freedom to prove any reasonable opinion is permissible in Islam. However, this permissibility is limited to the standards of compliance to the Quran and the *Sunnah*. Therefore, any breach against this standard of deriving proposition is rejected by *Sunni* belief (al-Misri, 1972).

Only a true doctrine can ensure that a man achieves salvation on the Day of Judgement in the Hereafter. *Aqidah* is an established adherence and not an illusion or myth without a single doubt. The main core of Islamic doctrine is the pillars of faith, and

all Muslims are enjoined to believe in them as true doctrine (al-Bayjuri, 2011).

In order to prove the purity of faith in Islam, Nursi often introduced arguments based on the guidance of the Quran, the *Sunnah* and reason. Such a propositional method resulted in strong conviction of the soul.

According to Nursi (1956/1994), the Quran reveals all matters that can create conviction in the human soul. For instance, the Quran mentions Allah's power that is manifested in His creation, nature, heaven and hell as well as the histories of previous nations as lessons for future generations. The Quran is the most authentic source of information about metaphysics, the beauty of language and endless magnificence. The Quran also describes the action, the attributes and the beautiful names of Allah.

Nursi proved the Quran as the most authoritative and authentic source of revelation and stated that it should become a major source of guidance for humankind in their beliefs and doctrine. Simultaneously, the status of the *Sunnah* as a source of deriving propositions is acknowledged by Allah. As evidence, al-Nursi referred to some Quranic words:

This is the Scripture whereof there is no doubt, a guidance unto those who ward off (evil). Who believe in the Unseen, and establish worship, and spend of that We have bestowed upon them; And who believe in that which is revealed unto thee (Muhammad) and that which was revealed before thee, and are certain

of the Hereafter. These depend on guidance from their Lord. These are the successful. (*Surah al-Baqarah* 2, 2-5)

Say (O Muhammad): O mankind! Lo! I am the messenger of Allah to you all - (the messenger of) Him unto Whom belongeth the Sovereignty of the heavens and the earth. There is no God save Him. He quickeneth and He giveth death. So believe in Allah and His messenger, the Prophet who can neither read nor write, who believeth in Allah and in His Words, and follow him that haply ye may be led aright. (*Surah al-A'raf* 7, 158)

He it is Who hath sent His messenger with the guidance and the religion of truth, that He may make it conqueror of all religion however much idolaters may be averse. (*Surah al-Saf* 61, 9)

Besides the Quran and the *Sunnah*, Nursi (1956/1995) acknowledged the power and authority of human thought on evidence of truth. However, the status of evidence based human thought regarding faith resolves very little compared with both sources. In other words, if there are differences in the ruling of the Quran and the *Sunnah* in terms of faith, evidence derived from human reasoning cannot provide a better understanding and therefore, should be ignored altogether.

It can be concluded that the evidence method adopted by Nursi is in accordance with the method used by other *Sunni* scholars who derive evidence regarding all aspects of faith from the Quran and the *Sunnah*.

Pillars of Faith

Islam upholds six pillars of faith, namely, faith in Allah, angels, scripture, messengers, the Hereafter and the determinations of Allah. Nursi (1956/1993) explained the pillars of faith in the following way:

- a. Believing in Allah means to acknowledge aspects of His divinity as *Rabb* (Lord), being the owner of beautiful names and possessing a perfect nature. This is followed by having confidence in Allah, the Most Gracious, and acknowledging that He alone is worthy of worship.
- b. Believing in angels demands that a believer must be convinced of their existence. They are honourable creatures of Allah who are ever ready to fulfil all His commandments. Each angel is assigned duties such as delivering revelation, giving sustenance, separating the soul from the body and so on.
- c. Believing in scripture means to believe that Allah presented revelation compiled in books to the apostles to guide people towards the path of truth. Each believer must follow the instructions as taught by the apostles who received the books. The last scripture was received by the Prophet Muhammad, and it revealed an eternal truth based on the teaching of the

Quran.

- d. Having faith in the messenger means believing that the messenger's mission stems from the commandments of Allah. Therefore, a faithful believer must trust, obey and follow all the teachings that the messenger has conveyed. Among the messengers of Allah, the most honourable was the Prophet Muhammad (peace be upon him).
- e. Believing in the Hereafter signifies the reality of resurrection. All human beings will be resurrected from their graves and proffered reward or punishment for all their deeds while living in the world.
- f. The belief in the *qada' wa qadar* (divine will and decree) whether good or bad. All these decrees are predestined at the beginning in *Luh Mahfuz*. Allah performs all decrees according to his absolute free will.

Al-Hulaymi (1979) claimed that the pillars of faith elucidated by Nursi are in accordance with the tenets of faith believed by the *Sunni* at an earlier stage.

Properties and the Beauty of Allah's Names

Al-Nursi recognised the nature and beauty of Allah's names. Research into his *rasail* has compiled all this evidence. In his writing, he stated that everything manifests the existence of Allah. All objects become a window to knowing Him. It is expected that no one denies that all objects in the universe were created based on the nature and beauty

of His name. For example, human wisdom is due to His name *al-Hakim*, while medical science is due to His all-curing name, *al-Syafi* (Nursi, 1956/1992b).

For Nursi (1956/1992b), Allah S.W.T. possesses every great characteristic. Allah is the Most Powerful and the Wisest in creating and sentencing reward or punishment upon His creatures. Every faithful believer must entrust that Allah is perfect in nature. Those who deny the nature of Allah based on evidence of the universe are deviated from the right path.

On the absolute power of Allah, Nursi (1956/1992b) described the human weaknesses that need protective power. Only Allah has protective power. The declaration of human weakness and the belief that Allah alone could provide absolute protection encourages human beings to prostrate before Him and obey His commandments.

On the gracious nature of Allah, the limited human mind is unable to evaluate it. Human beings are only able to express gratitude, thankfulness and endless appreciation. Among the practices to show the degree of gratitude is the recitation of prayer five times every day (1956/Nursi, 1992b).

Al-Nursi also compiled all the beautiful names of Allah. These include the names *al-Rahman*, *al-Rahim*, *al-Latif*, *al-Karim*, *al-Musawwir*, *al-'Alim*, *al-Mun'im*, *al-Hannan*, *al-Adl*, *al-Jawwad*, *al-Jalil* and *al-Baqi*. He explained the details of these names for the benefit of the faithful (Nursi, 1956/1992b).

Al-Nursi's discussion of the nature and

beauty of Allah's names coincided with the analysis presented by *Sunni* disciple. Al-Nursi took care to keep up with the discipline of the *Sunni* faith.

Sect Differences

In the history of the sects, faith and theology were often discussed. The truth and falsehood status of certain sects can be identified by their theology. If the theology conformed to the principles of the Quran and the *Sunnah*, it was correct and acceptable. However, if it diverted from Islamic law, it must be avoided.

In relation to this, al-Nursi displayed numerous writings on certain Islamic sects that displeased him and which he said should be avoided by every Muslim. Among the sects are:

Muktazilah. Al-Nursi (1956/1992a) criticised this group as a group that diverted from the path of righteousness. He stated that the group was not following the straight path traversed by the *Sunni*. Even though the *Muktazilah* made an effort to worship Allah S.W.T. through the assertion that the creature created its own deeds, they had forgotten that everything was produced by Allah's resolution in accordance with the method proposed by the *Sunni* group. He asserted that the *Sunni*'s ways are more subtle, careful and meticulous although *Muktazilah* figures such as al-Zamakhshari and al-Jabba'i labelled the *Sunni* group by various names. However, the *Sunni* believe they will thrive in the Hereafter.

Al-Qadariyyah. This is one of the sects that denies *al-qadr*. It is sub-divided into several groups and tribes. Nursi (1956/1992a) based his reasoning on the Prophet's saying: "The Qadariyyah are Magians of this Ummah. If they fall ill do not visit them, and if they die, do not pray over them" (*Sahih al-Bukhari* and Muslim). The *Al-Qadariyyah* were among the first of the deviant sects to emerge in the period of the Companions and thus, was rejected by *Sunni* scholars.

Syiah Rafidhah. According to Nursi (1956/1992a), loving *Ahl al-Bayt* is commanded by Allah and His Messenger. However, the *Syiah Rafidhah* took a more extreme loving approach even though devotion is divided into two parts. The first approach of devotion is worship based on speech, which refers to the feeling of love towards Ali, al-Hasan, al-Husayn and *Ahl al-Bayt* as worshipping Allah and His Messenger. This feeling of love increases the devotion towards the Prophet Muhammad p.b.u.h. As such, this kind of devotion is a bridge to loving Allah S.W.T. and is allowed in Islam. If there is excessiveness in this type of devotion, it does not cause harm because love has no boundaries and it does not propose hate towards others.

The second type of devotion is the feeling of love in the name of individuals. This type of love encourages a person to be devoted to the body of an individual such as the love towards Ali because of his agility and courage, or the love towards al-Hasan and al-Husayn due to their superiority and other qualifications. However, this type of

love does not lead a person to devotion to the Prophet. Even among the *Rafidhah* group, there were those who loved themselves but did not recognise Allah and His Messenger. As such, this type of devotion does not provide a bridge of love to Allah and His Messenger. Furthermore, this kind of love can lead to extreme hatred and hostility towards others.

It might appear that the *Syiah Rafidhah* have acted extremely by devoting towards to Saiyyidina Ali, while detesting Abu Bakar and Umar. This is the wrong kind of love as it leads to infidelity in Islam.

Zindiq. Nursi (1956/1992a) asserted that his preaching was based on the Quran to defend against atheists who were full of wrongdoing. For example, talking to snakes in human form could lead to further offences that could result in hypocrisy and willingness to sacrifice one's religion. Such people make up the deviants of the *zindiq* group who rejected truth although they knew it was truth. They should soundly opposed by all.

Other sects mentioned and opposed by al-Nursi were similarly resisted by *Sunni* scholars over the centuries. This can be observed in the writings of *Sunni* scholars (Al-Syahrastani, 2003).

CONCLUSION

It can be concluded that the methodology of deriving legal verdicts and propositions, the pillars of faith, the most beautiful names of Allah and His divine attributes as well as the various sects elucidated by Nursi is

consistent with the method used by other *Sunni* scholars and jurists in presenting and defending *Sunni* doctrine. It is evident that his theological statements strengthen the doctrinal arguments upholding *Sunni* scholars, considering his contributions and struggles in defending the most righteous beliefs and practices of Islam and rejuvenating Islamic civilisation.

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The Relationship between Strategic Information Systems and Strategic Performance: The Case of Islamic Banks in Malaysia

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ABSTRACT

The banking business is very competitive and requires good strategies, thus, the use of information systems in the daily operation of banks is considered critical. This paper is aimed at determining the effects of strategic information systems on the strategic performance of Islamic banks. The sample of the study population was randomly selected, and a total of 302 questionnaires were distributed among Islamic bank executives in Kuala Terengganu, Malaysia. The analysis was conducted using a second generation multivariate analysis, also known as Structural Equation Modelling (SEM). The results of the study reveal that strategic information systems have a positive effect on the strategic performance of Islamic banks, especially in terms of flexibility and cost reduction. The paper reveals that Islamic bank executives and stakeholders are obliged to fully comprehend the relevance of strategic information systems in enhancing strategic performance of organisations.

Keywords: Contingency theory, Islamic banks, Malaysia, strategic information systems, strategic performance

INTRODUCTION

Information systems in organisations provide various examples of successful

information systems implementation, providing benefits for both organisations and employees working for them (Dwivedi et al., 2014). These benefits include improved profitability and improved organisational performance as well as efficient and effective business processes or working routines at the individual level. However, organisations adopt strategic information systems that provide top managers with the required range of information to achieve multiple strategic performances, although they differ

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in the extent to which they improve their performances (Naranjo-Gil, 2009).

The major problems of information systems adoption by Islamic banks are closely associated with the management's inability to understand the full benefits of its adoption and the expertise of its usage about strategic performances (Kuppusamy, Raman, Shanmugam, & Solucis, 2009). Another problem is the lack of standards that define a real compliant Sharia system of banking due to a difference in Sharia interpretation in most countries and across a particular country, depending on individual Sharia advisors (Kuppusamy et al., 2009).

However, most organisations find the strategic information system to be a significant support for human resources to improve operations and performances (Bacha, 2012). However, the utilisation of obsolete technology could result in lower productivity, performance and competitiveness in Islamic banks (Kuppusamy et al., 2009). Previous studies have not empirically highlighted the relationship between strategic information systems and strategic performance in the Islamic banking sector in Malaysia, as most of the studies only focussed on financial performance, measured by financial ratios (Siew & Isa, 2015; Kadir, Jaffar, Abdullah, & Harun, 2013; Dusuki & Abdullah, 2009). Also, most studies usually concentrate on comparison between Islamic and conventional banks (e.g. Zarrouk, Ben, & Moualhi, 2016; Wasiuzzaman & Gunasegavan, 2013) and on other sectors

such as hospitality (Gil-Padilla & Rodriguez, 2008) and Malaysian higher institutes of learning (Al-Hiyari, Al-Masregy, Mat, & Alekam, 2013; Al-Mamary, Shamsuddin, & Nor Aziati, 2014).

Thus, this study attempts to fill the research gap by conducting empirical analyses of the relationship between strategic information systems and performance of Islamic banks. This is the first study in the context of Malaysia. The main objective of this study was to examine the effects of strategic information systems on strategic performance in Malaysian Islamic banks.

Literature Review

Strategic information systems are defined as any information system that enables a firm to have competitive advantage and reduces competitive disadvantage (Rainer & Watson, 2012). A strategic information system is a system that helps companies change or otherwise alter their business strategies and/or structure and also streamline and quicken the reaction time to environmental changes and aid the organisation in achieving a competitive advantage. Information systems provide several benefits to the business organisation resulting in appropriate responses to a business situation via the means of effective and efficient coordination between different departments at all levels of the organisation, access to relevant data and documents, use of less labour as well as improvement in organisational and departmental techniques and management of routine activities (Nath & Badgular, 2013).

Strategic performance is defined as cost-focussed strategic performance and flexibility-based strategic performance (Naranjo-Gil, 2009). A cost-strategic objective focusses on internal efficiency and cost control and thus, tends to emphasise on current organisational structures rather than adopt new ones (Miller, 1988; Porter, 1985). A flexibility-based strategic goal focusses on diversification, coordination and decentralisation within the organisation (Porter, 1985).

Underlying Theory

This particular study used the Contingency Theory as a foundation for research. The contingency theory suggests that there is no best way of managing an organisation. It is all contingent (dependent) on the resources available in the organisation. For example, Kim and Lee (1986) suggested that performance of an organisation depends on the existence of an alignment between several organisational characteristics, such as information systems, organisational structure and strategy. Several empirical studies on strategic information systems and their relationship with performance have adopted the contingency theory [e.g. Naranjo-Gil (2009); Choe (2004); Sullivan (2000)].

The Relationship Between Strategic Information Systems and Strategic Performance

Contemporary information system researchers have increasingly directed

their interest and attention towards the link between information systems investment and organisational performance (Salleh, Jusoh, & Isa, 2010; Hia & Teru, 2015). This is because many information systems researchers have focussed on the relationship between information systems and organisational performance and found that strategic information systems have a positive impact on organisational performance (Salleh et al., 2010; Hia & Teru, 2015). The study on the relationship between information systems and performance measurement systems (Salleh et al., 2010) indicated that the strategic information system is a determinant of performance measures.

On the other hand, several studies were conducted to examine the impact of information systems on the performance of firms and these indicated some active and significant results as well as some negative results (Bacha, 2012; Taber et al., 2014). Consequently, an empirical study on the utilisation of information systems and firm performance among 205 small and medium Malaysian enterprises (Kharuddin, Ashhari, & Nassir, 2010) revealed that SMEs that utilised information systems showed increased performance compared to those that did not. However, studies on both strategic performance and information systems are still limited (Burney & Matherly, 2007; Shehzad & Ismail, 2014), while researchers involved have received only limited attention in the information systems field (Burney & Matherly, 2007; Church & Smith, 2007; Budiarto & Prabowo, 2015). Evidently, the studies revealed that the more

valuable the information systems area is, the better the performance (Gil-Padilla & Rodriguez, 2008; Hia & Teru, 2015).

Furthermore, experts have revealed that strategic information systems can be vital tools not only for restructuring business models but also for dimensions that define the complete organisational sectors (Resca & D’Atri, 2012; Al-Mamary et al., 2014). Researchers have revealed how different team compositions related with a strategic information system, and how this interaction affected strategic performance (Naranjo-Gil, 2009). Other studies revealed that information systems’ success and organisational flexibility can be attained through information system compatibility (Palanisamy, 2005; Nath & Badgujar, 2013).

Conceptual Framework

The contingency theory shows that performance is a function of a relationship between multiple organisational features, such as information systems, organisational hierarchy and policy (Choe, 1996; Kim & Lee, 1986). Several empirical studies on strategic information systems and their relationship with performance have adopted the contingency theory and have been able to prove empirically how the theory links these variables (e.g. Naranjo-Gil, 2009; Choe, 2004; Sullivan, 2000).

From the above literature review, it can be seen that on the whole, there is a positive relationship between strategic information systems with organisational performance. Specifically, there is a positive relationship between strategic information systems with

flexibility-based and cost-based strategic performance. Based on the contingency theory and past literature, the conceptual framework of this study is derived as follows:

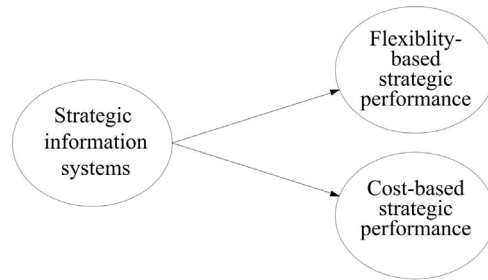


Figure 1. Conceptual research framework

From the above framework, the following hypotheses can be developed:

- H₁. There is a positive and significant effect between strategic information systems and flexibility-based strategic performance.
- H₂. There is a positive and significant effect of strategic information systems and cost-based strategic performance.

METHODS

This study used a quantitative approach and a survey questionnaire for data collection. The unit of analysis used in this study mainly consisted of executives in Islamic banks in Kuala Terengganu. Kuala Terengganu was chosen due to the assumption that people in this state have better religious understanding (Adnan, Nasir, Azeanti, & Mohd, 2013). These bank executives were the users of the bank’s strategic information systems.

A simple random sampling technique was applied in the sampling procedure, while the Krejcie and Morgan (1970) table was used to determine the sample size of the study. Consequently, the sampling frame consisted of a list of 12 Islamic banks in Kuala Terengganu, some of which are full-fledged or partial Islamic banks and window-operated Islamic banks.

Data collection was conducted via a questionnaire survey. A sample of 313 respondents was randomly selected from a population of 1730 as suggested by Krejcie and Morgan (1970). The researcher personally distributed 313 questionnaires to the respondents (bank executives), of which only 302 were returned with complete answers and therefore, able to be used for analysis. Some of the questionnaires were collected after they had been completed immediately or at a later date. The mail survey, a method whereby the researcher emailed the questionnaire directly to the respondents for them to complete and return, was also applied for data collection in the event of the researcher's inability to meet face-to-face with the respondent.

Finally, data were analysed using structural equation modelling, with the help of the AMOS (Analysis of Moments and Structures) software to determine the relationship between the latent constructs of the study. Structural equation modelling is a second-generation multivariate analysis that responds to the limitations of the ordinary least squares approach (OLS).

RESULTS AND DISCUSSION

Measurements

Following Naranjo-Gil's suggestions (2009), the strategic information system as an endogenous (independent variable) construct was measured based on four dimensions, namely scope, timeliness, aggregation and integration. Respondents were questioned on the extent to which they knew that their bank's information system provided each of the dimensions identified. Finally, the exogenous (dependent variable) constructs, which was the strategic performance, was measured on the basis of flexibility and cost reduction as adopted by Porter (1985) and Miller (1988). Thus, this study questioned the respondents to indicate the extent to which the following dimensions fit their personal situation: decentralisation of responsibility, programmes of cost reduction, cooperation with other units or departments of the bank and other institutions (Naranjo-Gil, 2009).

Validity of the Instruments

A majority of the study instruments were adopted as their validity had already been confirmed by previous studies. However, some of the instruments were self-developed as they did not specifically focus on the subject matter under investigation and the need for their validation was highly indispensable for the success of the study. Thus, a pre-test of the instruments was carried out.

It is crucial to state that the most common criterion for the assessment of accuracy and consistency of the measurement scales was ensuring the validity and reliability of the constructs of the study (Kline, 2013). According to many researchers, when validity and reliability are properly addressed, measurement errors, data input errors, respondents' misunderstanding or misinterpretation and so forth are reduced (Awang & Mohamad, 2016). Measurement error is minimised when the observed numbers accurately represent the characteristics being measured. Thus, an essential part of the empirical study was to maximise the reliability and validity of study measures.

The study questionnaire was distributed among 10 senior and experienced researchers for content validation and suggested comments. Most of them approved the questions as being valid and relevant to the research; however, the comment was given that the number of questions asked should be minimised for convenience of answering as most of the respondents were bank executives who would not have much time to fill in a questionnaire due to their tight schedule. Also, a pre-test pilot study was conducted among 20 Islamic bank executives while the construct validity was conducted through the use of both exploratory factor analysis (EFA) and confirmatory factor analysis (CFA) to determine evidence of convergent and discriminant validity (Marsh, Morin, Parher, & Kaur, 2014). The EFA was performed using SPSS version 21 while the CFA

was tested using the structural equation modelling feature of AMOS software version 19.

Assessing Validity and Reliability for a Pooled Measurement Model

After the conclusion of the CFA procedure for every measurement model, the next step was to compute certain measures that indicated the validity and reliability of the construct and then summarise them in a table (Awang, 2014). However, it should be noted that the assessment of unidimensionality, validity and reliability for measurement models was required for modelling the structural equation model (Kline, 2013). The following reveals the procedure of the CFA in steps.

1. Unidimensionality: The item was achieved through item deletion and multicollinearity between the items in various constructs with a low factor loading. This process was however repeated until the fitness indices were achieved.
2. Validity: This requirement was achieved through a convergent validity of an $AVE \geq 0.50$, construct validity to ensure all fitness indices for the models met the required level and a discriminant validity in which redundant items were deleted, some being multicollinear (as shown in Table 2 below).
3. Reliability: This requirement was achieved through an internal reliability with a Cronbach's alpha ≥ 0.70 , a composite reliability of a $CR \geq 0.60$

and an AVE ≥ 0.50 (as shown in Table 1 below).

The hypotheses were analysed using structural equation modelling with the help of the AMOS (version 19) software. The path analysis in the structural model was interpretable as β -statistics from the analysis of moments and structures as depicted in Figure 1 of the study. The confirmatory factor analysis (CFA) confirmed the reliability and unidimensionality of the constructs, with a Cronbach's alpha above 0.7 as shown in Table 1 of the analysis. Notwithstanding, we also assessed the discriminant validity of the measurement model by calculating the Average Variance Extracted (AVE) and comparing it with the squared correlations between the constructs (in Table 2). Results revealed that the discriminant validity was satisfactory because the AVEs were higher than the correlations.

Figure 1 shows the relationship or the direct effect of the independent construct strategic information systems (SSIS) on the

construct cost-based strategic performance (CBSP) and flexibility-based strategic performance (FBSP). The standardised beta estimate was 0.76 ($\beta = 0.76, p < 0.1$), which indicates a significant and direct relationship between the two constructs because the "P" value is less than 0.1. Table 1 is the tabular representation of the relationship between the independent construct, strategic information systems (SSIS) and the dependent construct, strategic performance (SP). Also, the standardised beta estimate for the relationship between the strategic information systems and flexibility-based strategic performance was 0.81 ($\beta = 0.81, p < 0.1$), which also indicates a significant and direct relationship between the two constructs because the "P" value is less than 0.1. Thus, after analysing their relationships in the structural equation modelling we found that there was a significant relationship between the constructs as the beta estimates were 0.76 and 0.81, respectively.

Table 1
The CFA results for the measurement model

Construct	Item	Factor loading	Cronbach's alpha (Above 0.7)	CR (Above 0.6)	AVE (Above 0.5)
SSIS	SSIS1	This item was deleted resulting from a low factor loading			
	SSIS2	0.84	0.939	0.934	0.640
	SSIS3	0.78			
	SSIS4	0.81			
	SSIS5	0.77			
	SSIS6	0.78			
	SSIS7	0.82			
	SSIS8	0.78			
	SSIS9	0.82			

Table 1 (continue)

FBSP	FBSP1	This item was deleted resulting from a low factor loading			
	FBSP2	0.87	0.870	0.963	0.742
	FBSP3	0.85			
	FBSP4	0.90			
	FBSP5	0.89			
	FBSP6	0.90			
	FBSP7	0.82			
	FBSP8	0.82			
	FBSP9	0.87			
	FBSP10	0.83			
CBSP	CBSP1	0.80	0.959	0.958	0.741
	CBSP2	0.78			
	CBSP3	0.84			
	CBSP4	0.88			
	CBSP5	0.92			
	CBSP6	0.86			
	CBSP7	0.89			
	CBSP8	0.89			

The requirement for the validity in Table 1 above was achieved through a convergent validity of an AVE ≥ 0.50 , construct validity to ensure all fitness indices for the models met the required level and a discriminant validity in which redundant items were deleted, with some being multicollinear. Also, the table above met the requirement of the reliability as achieved through an internal reliability with a Cronbach's alpha ≥ 0.70 , a composite reliability of a CR ≥ 0.60 and an AVE ≥ 0.50 (as shown in Table 1 above).

Table 2
The discriminant validity index summary

Construct	FBSP	SSIS	CBSP
FBSP	0.861		
SSIS	0.793	0.800	
CBSP	0.809	0.734	0.861

The square root of the AVE in Table 2 above is represented by the diagonal values (in bold), while the others are the correlation between the respective constructs. The discriminant validity of all constructs was achieved because the diagonal values (in bold) were higher than the values in their rows and columns (Kline, 2013). Thus, referring to Table 2 above, the discriminant validity of the constructs of the study was achieved. Therefore, the discriminant value for the independent construct SSIS was 0.800 and the value for the dependent construct FBSP were 0.861 and 0.861 for CBSP, respectively. This is an indication that the pooled measurement model was valid, and the data were reliable for analysis (Awang, 2014; Wirth & Edwards, 2007).

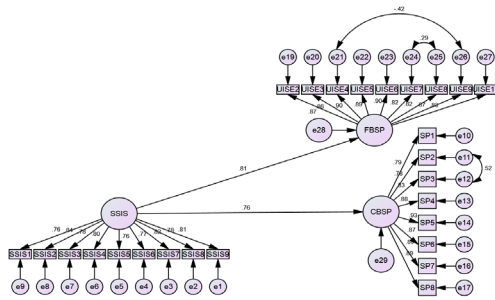


Figure 2. The relationship between the strategic information system and strategic performance

CONCLUSION

The study, therefore, concluded that strategic information systems have an impact on the strategic performance of Islamic banks. However, among the key findings of the study were that flexibility-based strategic performance was more likely to be achieved if there were effective and efficient utilisation of strategic information

Table 3
Standardised regression weights for the direct effect of SSIS on CBSP and FBSP

Construct	Path	Construct	Beta Estimate	S. E.	C. R.	P-Value	Result
Cost-based strategic performance (CBSP)	←	Strategic information system (SSIS)	0.76	0.66	12.429	0.000	Significant at 1%
Flexibility-based strategic performance (FBSP)	←	Strategic information system (SSIS)	0.81	0.061	14.351	0.000	Significant at 1%

Table 3 above is the tabular representation of the relationship between the independent construct, strategic information system (SSIS) and the dependent construct, strategic performance (SP). After analysing their relationships in the structural equation modelling (as depicted in Figure 1 above) we found that there was a significant relationship between the constructs as the beta estimate was 0.76 and 0.81, respectively. The direct effect that was measured through beta coefficient was significant and hence, supported the hypothesis of the study. The results were consistent with those of other studies (e.g. Salleh et al., 2010; Gil-Padilla & Rodriguez, 2008).

systems in Islamic banks, as indicated by the beta estimates.

Several studies have been conducted in relating the effect of strategic information systems on strategic performance (Al-Mamary et al., 2014; Hia & Teru, 2015; Salleh et al., 2010). This study examined the relationship between strategic information systems and strategic performance in the Islamic banking sector, a subject not yet explored. We showed that there was a strong and positive relationship between strategic information systems and strategic performances in the banks studied and hence, the executives, managers and other stakeholders in Islamic banks must be

aware of the impact of the sophistication of strategic information systems and how it affects performance. Another contribution of the study was that the researchers used a second-generation method of data analysis to relate the effect between the latent constructs. In this regard, the constructs were modelled into a structural equation modelling and were analysed with the help of the AMOS software version 19. Consequently, the study also revealed that organisational leaders must also be aware of the relevance of training sessions for employees to improve their technical IT skills and expertise in the usage of more advanced and strategic information systems. Conclusively, if properly utilised, strategic information systems will give Islamic banks the ability to gain a competitive advantage and to be able to differ from competitors.

Just like any empirical study, this study also had its limitations. The first was related to the sample of the study, which was focussed only on Kuala Terengganu. We recommend that our findings be replicated in samples to include other states in Malaysia. Also, it would be important to exploit a larger sample constituting a number of Islamic banks that operate internationally. Perhaps future studies could include other industries as this study is restricted to the Islamic banking industry. Finally, our study was based on the subjective judgement of the staff or users of the strategic information systems and can serve as a bedrock for more extensive research. In particular, it would be advisable to use technical IT skills to measure strategic performance.

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***Haq Al-Ujrah* (Hire Right) in the Light of Islamic Jurisprudence and Law**

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ABSTRACT

Islam encourages seeking money and earning a living and control of spending habit based on morals. It forbids spending money through illegal means and has established rules for financial transactions on the basis of consent. *Ujrah* (hire) is considered the most important issue for an employee, and it is the focus of the relationship between him and his employer. Sharia and law clearly explain *haqq al-ujrah* (hire rights), an agreement between the employer and the employee for work done. Islamic scholars unanimously agree that the reward is either in cash, kind or benefit. However, scholars have different opinions regarding *ujrah al-hijam* (cupping hire) and taking reward for Quranic teaching. Reward is one of the pillars of contract, and the employer should pay without delay. Jurists also have different opinions regarding *ijarah al-nafaqah* (feeding and clothing in exchange for work). The most important findings of this study is that *haqq al-ujrah* is in line with the stipulation of Islamic Jurisprudence and law. Islamic law has established rules for determining the wages of workers to ensure

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appropriate wages so that workers and their families may access basic needs and that equality between employers and workers may be achieved.

Keywords: *Haqq* (right), Islamic, jurisprudence, law, *ujrah* (hire)

INTRODUCTION

It is permissible to hire a person to do a known job for a given reward, which both parties have agreed upon, whether the worker is an individual, group or company, and whether the reward is in cash, kind or benefit. This, as indicated in *Surah al-Qasas*, verses 26 and 27, is supported by the Quran, in which mention of 'hire' is made.

The daughter's request, "O my father, hire him, for the best one you can hire is the strong and the trustworthy," was granted by the father saying to Musa A. S., "...I wish to wed you one of these my two daughters, on [the condition] that you serve me for eight years, but if you complete it ten, it will be [as a favor] from you. And I do not wish to put you in difficulty. You will find me, if Allah wills, from among the righteous," and which Musa A. S. honourably accepted. This means that all conditions have to be clearly mentioned in the presence of the parties involved, and there should be no force or compulsion. In addition, it is not permissible to exchange the reward of labour for food or clothing as clearly indicated in the Quran. The Prophet (S.A.W.), in a *Hadith* reported by Abu Hurayrah, frowns at the idea of a worker's wages not being paid. The *Hadith* says, "Allah (S.W.T.) says: 'I will contend on

the Day of Resurrection against three [types of] people: one who makes a covenant in My Name and then breaks it; one who sells a free man as a slave and devours his price; and one who hires a workman and having taken full work from him, does not pay him his wages" (Al-Bukhari, 2009, *Hadith* No. 2075, p. 125). The law indicates that it is the right of the employee to collect wages according to the work done.

METHODS

The method used for data collection for this paper was qualitative. The authors relied mostly on primary and secondary sources of relevance to the issues discussed. The sources included, but were not limited to, the Quran, the *Hadith* of the Prophet, dictionaries and encyclopaedia, books of *tafsir*, *fiqh* and history, journals, working papers and numerous relevant academic materials.

RESULTS AND DISCUSSION

The Concept of *Ujrah* (Hire)

The word hire (*ujrah*) in the Arabic language is literally derived from the words for wages and remuneration, and it has two meanings; the first meaning is 'contract and reward' for work, while the second meaning is 'to fix'. One may say, "I hired a man and he served me for 10 years," meaning he became my employee for 10 years, or that he was hired on condition of receiving a certain amount of wages in exchange for labour or service (al-Jauhari, 1987, p. 85). It is said that the word *ujrah* is mostly used to mean a reward

in the Hereafter for good deeds, as the Almighty Allah says, "...and We gave him his reward in this world, and indeed, he is in the hereafter among the righteous" (*Surah al-Ankabut*, 29: 27). This indicates that the devotee will have a place in the Hereafter, in addition to the high position he was given in this world. Also the Almighty says, "they will have their reward with their Lord, and there will be no fear concerning them, nor will they grieve" (*Surah al-Baqarah*, 2: 262). Here, reward refers to a blessing in the Hereafter (al-Samarqandi, 2004, p. 175).

The word *isti'jar* in Arabic is a noun derived from *ijarah*, meaning 'to hire'. *Ista'jarahu* means 'he hired him to work for a given wage'. The word *isti'jar* is more general as the idea of an accompanying reward may or may not be implied. Ibn Faris noted that the word *ajr* can mean 'contract for work' or 'to fix broken bones', and both meanings can be combined (1979, p. 62). With regard to fixing bones, one can say *ajartu al-yad*, meaning "I fixed the hand." Combining these two origins of the word *ajr* could refer to something 'that can be used to solve any problem one has as a result of his labour' (Ibn Faris, 1979, p. 62). Ibn Manzur explained that *ajr* (wages) is a reward for labour, and its plural is *ujur* while *ijarah* (hire) is derived from *ajara* ('he hired') or *ya'jur* ('he is hiring') and is something that is given as a reward for work done. *Al-ajru* also means reward for good deeds, for example: "Allah (S.W.T.), rewarded him, Allah gave him a good reward" (Ibn Manzur, 1993, p. 10).

With regard to the technical meaning of *ujra* (hire), the *Malikiyyah* school of thought was of the view that it referred to a contract that contains human benefit or a contract that contains benefit for mankind. A contract regarding animals and ships is called *kira'* (al-Dasuqi, 1398, p. 2), while others have stated that *ujrah* means possession of benefit for a certain return (al-Shafi'i, 1990, p. 26). The law also stipulates that *ujrah* (hire) is an agreement between the employer and the worker for exchange of payment of a sum of money as reward for work done; additional bonuses and allowances may also be agreed upon.

The Legality of *Ujrah* (Hire)

Hire of persons for labour and service in exchange for cash or other rewards is legal and permissible in Islam, as evident in the Quranic verse quoted from *Surah al-Qasas* 26-27 above. Imam al-Shafi'i said the Almighty Allah mentioned that one of His prophets worked for hire for eight years in exchange for a wife. This indicates that hiring a person on the basis of a contract is permissible in Islam (al-Shafi'i, 1990, p. 26).

The best worker one can hire is one who is strong and trustworthy in carrying out his commitment. In addition to the above verse, *Surah al-Talaq* 6 in the Quran states, "...and if they breastfed for you, then give them their payment and confer among yourselves in the acceptable way; but if you are in discord, then there may breastfeed for the father another woman." This supports the argument that hiring a person is accepted and permissible in Islam.

The particular example quoted above highlights an important principle in hiring persons. The verse acknowledges that workers may not all be as equally productive, skilful or capable, or the particular task may need the worker to do more than he had agreed. It is then acceptable to pay the worker according to his capability or according to the demands of the task. In this example, the task of breastfeeding depends on the body of the woman and the need of the baby. One woman may have more breast milk than another, and her breast milk may be different. So too, one baby may require more breastfeeding than another. Payment, then, should be made based on this; there is no closer interpretation than this.

Hiring a person is also permissible with regards to slaves and other related services (Ahmad, 1994, p. 263). Allah (S.W.T.) enjoins the father to pay the nursing mother, provided that there is utterance and acceptance. Imam al-Shafi'i (1990, p. 26) says "Payment for breastfeeding is permissible, and breastfeeding differs according to the frequency of breastfeeding and the quantity of breast milk, but if another one is not found except this, then payment permissible on it and other similar matters." Ibn Ashur (2005, p. 430) said that the injunction "upon the father is the mothers' provision and their clothing according to what is acceptable" refers to the reward for breastfeeding. A woman in bond of marriage has no right to be paid or clothed for breastfeeding, but for the bond of marriage.

Similarly, the *Sunnah* of the Prophet clearly explained about hiring persons (*ujrah*). A'isha (R.A) narrated the following:

The Prophet (S.A.W.) and Abu Bakr employed a (pagan) travel instructor or guide. He was an expert guide and he broke the oath contract which he had to abide by with the tribe of al-'Asi bin Wail and he [and he shared the same religion as the] Quraish pagans. The Prophet (S.A.W.) and Abu Bakr had confidence in him and gave him their riding camels and told him to bring them to the Cave of Thaur after three days. So, he brought them their two riding camels after three days and both of them [The Prophet (S.A.W.) and Abu Bakr (R.A.)] set out accompanied by 'Amir bin Fuhaira and the Dili guide who guided them below Mecca along the road leading to the sea-shore. (al-Bukhari, 2009, *Hadith* no. 2263, p. 88)

This *Hadith* indicates that the Prophet (S.A.W.) and Abu Bakr (R.A) hired a polytheist. Anas narrated the following:

he was asked about the wages of the one who cups others. He said, 'Allah's Messenger (S.A.W.) was cupped by 'Abd Taiba, to whom he gave two Sa of food and interceded for him with his masters who consequently reduced what

they used to charge him daily. Then the Prophet (S.A.W.) said, “The best medicines you may treat yourselves with are cupping and sea incense.” He added, “You should not torture your children by treating tonsillitis by pressing the tonsils or the palate with the finger, but use incense”. (al-Bukhari, 2009, *Hadith* no. 5698, p. 125)\

These incidents recorded in the *Hadith* indicate that hiring persons is lawful in Islamic law, but the scholars have different opinions regarding hiring for some work. Such work includes:

Cupper hiring (*ujrah al-hijam*). The scholars also have different views regarding cupper hiring. The first view is held by the majority of scholars, that cupper hiring is permissible, even if it involves gain with lowliness. This is based on the *Hadith* of Anas (R. A.) quoted earlier. The second view is that it is forbidden, and scholars who are of this opinion cite the *Hadith* of Haram bin Muhayyisah, who narrated that his father asked the Prophet (S.A.W.) about the earnings of a cupper and he forbade him from that. Then he mentioned his need and he said, “Spend it on feeding your she-camels that draw water” (Ibn Majah, 2007, *Hadith* no. 2166, p. 732). The majority believe that the prohibition is on the basis of transcendence because cupping is obligatory upon a Muslim if there is need for it. It is recorded that the Almighty said, “...and cooperate in righteousness and piety, but

do not cooperate in sin and aggression, and fear Allah; indeed, Allah is severe in penalty” (*Surah al-Maidah*, 5: 2). The majority believe that the Prophet (S.A.W.) ordered the one who asked him about the earnings of a cupper to spend it on feeding his she-camels because if it were forbidden he would not have permitted the man to use it. They also state that the phenomenon does not imply prohibition, as Allah (S.W.T.) says “...and do not aim toward the defective therefrom, spending (from that)” (*Surah al-Baqarah*, 2: 267). This shows that he called the despicable money defective, and did not forbid it; defective is the opposite of good.

Taking payment for teaching the Quran.

The scholars have different opinions with regards to taking payment for teaching the Quran, and there are two different views regarding this. The first is the view of the majority of scholars of the Shafi'i and Maliki schools of thought that it is permissible to take payment for teaching the Quran (al-Nawawi, 1978, p. 15) whether the students are young or adult. They base this belief on the *Hadith* of the Prophet (S.A.W.) “...the best of which you take payment is the book of Allah” (al-Bukhari, 2009, *Hadith* no. 5737, p. 131). This is also based on the *Hadith* of Sahl ibn Sa'd al-Sa'adi (R.A.) that a woman came to the Messenger of Allah (S.A.W.) and said:

“O Messenger of Allah, I give myself in marriage to you.” She stood for a long time, then a man stood up and said: “Marry her to me if you do not want to marry her.”

The Messenger of Allah said: "Do you have anything to give her as dowry?" He said: "I have nothing but this lower garment of mine." The Messenger of Allah (S.A.W.) said, "If you give your lower garment, you will sit while you have no lower garment." He said, "I have nothing." The Messenger of Allah said, "Look [for something], even if it is only an iron ring." So he looked but he could not find anything. The Messenger of Allah said to him, "Have you [memorized] anything of the Qur'an?" He said, "Yes, Surah such and such and Surah such and such," naming them. The Messenger of Allah said, "I marry her to you for what you know of the Qur'an." (al-Bukhari, 2009, *Hadith* no. 2111, p. 236).

Regarding this *Hadith*, al-Qarafi (1994, p. 350) said, "I marry her to you for what you know of the Qur'an," denotes four things. First, his statement "I have nothing but this lower garment of mine," refers to the understanding that a person is not usually incapable of possessing stone or firewood or its equivalent. This indicates that the person had no real interest, otherwise he would have been denied by tradition, and would have been belied by the Prophet (S.A.W.).

Second, the Prophet (S.A.W.) exhorts him to "Look [for something]," making it clear that if he looks for something he can give as dowry, he would find it. Third, the statement "Look [for something], even if it

is only an iron ring," justifies to an extent that the minimum offering is sufficient, and it was known that the ring was greater than the least he could possess. Fourth, the statement, "So he looked but he could not find anything," indicates that he had no money; since he had no money, the marriage contract was legalised based on an estimate of its worth.

Thus, there is consensus among the scholars that it was permissible to take payment in the era of the Prophet's companions and their followers, as indicated in the doctrines, except for the teaching of some who came later such as Abu Bakr al-Asmi and Ibn Aliyah who said it is not permissible because of ambiguity. It is a contradiction that came after a consensus, so it is not considered (Ibn Qudamah, 1988, p. 321). According to Al-Kasani, "the scholars had this unanimous consensus before the coming of al-Asmi, as they hold this view on *Ujrah* (hire) agreement from the time of the companions to this day without being rebuked, so his contradiction should not be considered because it is against the consensus" (1986, p. 174).

Therefore, with regard to absolute interest, there is no doubt that the *ujrah* is a pertinent topic for employers and employees, where it is lawful. The prohibition of hiring persons results in incompatibility with Islamic law as the Almighty Allah has said, "Allah intends for you ease and does not intend for you hardship" (*Surah al-Baqarah*, 2: 185), and also, "...and [He] has not placed upon you in the religion any difficulty" (*Surah al-Hajj*, 22: 78). Everyone

needs money, clothing, food, utilities and other necessities. The needy need money to purchase necessities, while the rich need labour; the seller needs the buyer and the buyer needs the seller. Society in general works on the principle of exchange of money or benefits for work, utilities, necessities, business etc. and this can be achieved only through a hire agreement (*ujrah*).

The second view with regards to taking payment for teaching the Quran is the view of Hanafi, Ahmad, Ata'u, Dahaak and others, and they agree that it is forbidden. Their view is based on the *Hadith* of Ubadatu bin al-Samit, who said,

“I taught some persons of the people of Suffah writing and the Qur’an. A man of them presented to me a bow. I said: ‘It cannot be reckoned property; may I shoot with it in Allah’s path? I must come to Allah’s Apostle (S.W.T.) and ask him (about it).’ So I came to him and said: ‘Messenger of Allah, one of those whom I have been teaching writing and the Qur’an has presented me a bow, and as it cannot be reckoned property, may I shoot with it in Allah’s path?’ He said: ‘If you want to have a necklace of fire on you, accept it.’ (Ibn Majah, 2007, *Hadith* no. 2157, p. 264)

Perhaps the first view is more acceptable, Allah knows best. It is the view of the majority of the scholars of the Shafi’i and Maliki doctrines that it is permissible to take

payment for teaching the Quran because the payment is given with necessity, as given to prayer leaders and those who make the call for prayer in mosques, as well as to judges. Therefore, it is permissible with necessity, but teaching the Quran and Islamic knowledge without payment might be better.

Pillars of *Ujrah*

There are four pillars of *ujrah*. First are the contracting parties i.e. “the employer and the employee; the employer is the buyer, while the employee is the seller of the benefit” (al-Dasuki, 1398, p. 2). According to the majority of scholars, the two contracting parties are required to be eligible for contract; they should be adults and sensible individuals, not boys who are indiscriminate, mad persons or drunkards. It is impermissible to hire a boy even if he is discriminate according to the Shafi’i and Zahiri doctrines; these record different opinions as to whether in such a case, the agreement would be valid (al-Nawawi, 1991, p. 175). According to the Shafi’i doctrine:

if [the young boy] is under guardian’s control, the contract will be based on permission, and the most acceptable view according to Maliki and a narration from Ahmad, is that guardianship is a requirement for entry, not validity, but the contract is not valid according to Shafi’i. In another view of Maliki’s and a narration from Ahmad, it is stated

that guardianship is a requirement for validity of the contract and not its entry. (al-Dasuki, 1398H, p. 3)

The second pillar is the form. "It should be based on what indicates consent like transactions, because it is a business relation, but if it is usually practiced, then the transaction indicates consent" (al-Sawi, 1423H, p. 7). The form may be either explicit or indirect in expression. It is explicit when one states, "I hire you for this," or "I employ you for one year's service." The time reference is an estimate of the benefit rather than a strict adherence to duration as the time may lapse after the employer's utterance or the employer himself may face uncertainties. Similar to this is the verse where Almighty Allah (S.W.T) says, "So Allah caused him to die for a hundred years" (*Surah al-Baqarah*, 2: 259), meaning that He caused the person in question to remain dead for a period of a hundred years. If you say it is valid for the mentioned benefits, then there is no need for assumption unlike the verse as it is clear. I say: the benefit is not real now and the circumstance requires something else, then the assumption of what was mentioned is better or is determined (al-Haithami, 1983, p. 121).

The third of the pillars is confirmation, which has five conditions. *Ujrah* should be "put in order" (al-Ansari, 1997, p. 85), "affordable to deliver" (al-Ansari, 1994, p. 294), free from interest, clear from the beginning in terms of the benefit, the amount and the form and the worker must receive

what was agreed by both parties should be his (al-Nawawi, 1978, p. 173). If the labour is workmanship,

[wages] can be based on time such as a one day's making of cloth, or its nature such as sewing. If they are merged together, i.e. the restriction based on nature and time, and if the situation is complex, it is not permissible based on consensus. However, if the situation is not complex, that it can be completed before the expiration of term, it is opined that it is permissible, but according to the well known view, it is not permissible. (Ulaish, 1989, p. 465).

The fourth pillar is *ujrah* (wages). For the validity of *ujrah*, "it is required that the wages should be known in its type, importance and feature if it is in custody, if not, viewing it is enough for hire of property and contract" (al-Ramli, 1984, p. 266). The majority of the scholars stipulate that conditions for wages as stipulated in the price (al-Kasani, 1986, p. 204) "as the same contract, and must be handed over, likewise the property" (al-Nawawi, 1978, p. 33). It is also required to be clean, and it is not permissible to hire what is unclean such as pigs or dogs. For the Prophet (S.A.W.) said:

"Allah and His Messenger have forbidden the sale of wines, meat of dead animals, pigs and 'idols'. It was said to him: 'O Messenger

of Allah, what do you think of the fat of dead animals, for it is used to caulk ships, it is daubed on animal skins and people use it to light their lamps?’ He said: ‘No, it is unlawful.’ Then the Messenger of Allah (S.A.W.) said: “May Allah curse the Jews, for Allah forbade them the fat [of animals] but they rendered it (i.e. melted it), sold it and consumed its price.” (Ibn Majah, 2007, *Hadith* no. 3486, p. 279)

Time to Pay the Wages

It is known that wages is one of the pillars of *ujrah*. Therefore, it is obligatory upon the employer to pay the employee as soon as it is possible because it is the right of the employee upon his employer, for Almighty Allah has said, “O you who have believe, fulfil [all] contracts” (*Surah al-Ma'idah*, 5: 1). This indicates that Allah commands fulfilment of contracts, and therefore it is obligatory to pay the worker as soon as possible. This refers to any contract such as buying and selling; it is a duty that must be fulfilled. The Prophet (S.A.W.) said, “Give the worker his wages before his sweat dries” (Ibn Majah, 2007, *Hadith* no. 2434, p. 31). The employee is entitled to his wages; the employer must pay the worker if the contract between the parties is to be completed naturally without compulsion or coercion on one another.

Scholars unanimously agree that the contracting parties should agree on the

payment, whether the payment should be made on immediate completion of the work or at a later time, in one sum or in instalments. Scholars have different opinions on what happens when the contracting parties have not agreed on the details of payment, as outlined below.

The first case. The details of the contract should describe clearly and without the benefit of a doubt the details of payment, for example, as if to say, “I agree with you to describe the specifications of a contract for so-and-so to serve me for the period of four years for a certain amount of money.” The number of years of service should be stated, and then the person hired may carry out his duty. Al-Nawai and al-Haithami outlined that if the task involves a venue or travel, the wages should be presented at the place of contract or at the end of the travel. For instance, if someone “hires an animal” for travel or carrying a load, or engages someone to “build a wall,” (al-Nawawi, 1990, p. 195), he should pay the worker at the end of the journey or when the wall is completed. He is required to hand over the wages at the place of the contract; payment “should not be delayed, replaced, transferred or discharged” (al-Sharbini, 1415H, p. 349). Al-Dasuki (1398AH) believed that,

delay in payment of wages is permitted if the worker started collecting the benefit within three days from the date of the agreement on the contract, and if he delays, the agreement becomes invalid;

because if the worker started collecting part of the benefit, it is counted as collection of the benefit.

The second case. If the hire refers to property “such that the hire be a motorcycle, in this case it is necessary to pay the wages with expedition” (al-Imrani, 2000, p. 257). Therefore, delay is not permitted for hire of property because it leads to depreciation and damage; this is a precaution to prevent conflict and dispute between the parties.

The law also stipulates that wages be paid in cash to the worker with the money in circulation, and that payment is to be made (a) on normal working days, (b) at the end of each month for employees paid monthly, and (c) at the end of each week for workers on the basis of units of production, hours, days or week [see Thai labour law, Section No. (3)]. Hence, the law obliges employers to pay workers their wages based on time and place in which the contract was initiated before the work begins, and does not specify a particular time such as a day or a week or a month.

Types of *Ujrah* and the Duration in the Labour Contract

Hiring, it is agreed by the general public and the scholars, is either in cash, property or benefits. Scholars have different opinions regarding hiring in exchange for food or clothing or what is called *ijarah al-nafaqah* (i.e. hire in return for feeding).

The first view is that it is not permissible, according to some scholars of

Hanafi (al-Zaila'i, 1313AH, p. 8), Hambali (Ibn Qudamah, 1988, p. 68), Shafi'i (al-Shirazi, 1990, p. 406) and Maliki (al-Dasuki, 1398AH, p. 8) because the wages is unknown. The second view, that it is permissible, is according to some scholars of the Maliki and Hambali schools, based on the *Hadith* of 'Ali bin Rabah, who said, “I heard 'Utbah Bin Nuddar say, ‘We were with the Messenger of Allah (S.A.W.) and he recited Ta-Sin, when he reached the story of Musa (A.S.), he said: ‘Musa (A.S.) hired himself out for eight years, or ten, in return for his chastity and food in his stomach.’” (Ibn Majah, 2007, *Hadith* no. 2444, p. 817).

The third view details, according to scholars of the Hanafi school (al-Zaila'i, 1313AH, p. 127), that hire for food and clothing is permissible only in wet-nursing. For Almighty Allah says, “Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing (period). Upon the father is the mothers' provision and their clothing according to what is acceptable. No person is charged with more than his capacity” (*Surah al-Baqarah*, 2: 233). The verse indicates that feeding and clothing them is obligatory for breastfeeding and does not differentiate between divorced women and others, but the context indicates divorce because a married woman must be fed and clothed even if she does not breastfeed, as the Almighty says, “...and upon the [father's] heir is [a duty] like that [of the father]” (*Surah al-Baqarah*, 2: 233). This suggests that “the heir is not the parents, and because the benefit of the nursery and breastfeeding is unknown, then

she can be compensated” (Ibn Qudamah, 1988, p. 364).

Thus, the most accepted view, Allah knows best, is the first one i.e. the impermissibility of *ujrah* in exchange for food or clothing, and we can say that this is the tradition among people today. The worker needs money more than clothing or food or what is called *ijarah al-nafaqah* (hire in return for feeding). Therefore, the employer should give the employee money on time; at the same time, the employee may spend the money as he wishes.

CONCLUSION

The most important findings of this study is that *ijarah* is permissible and legal, both in Islam and the Law, but scholars hold different opinions regarding permissibility for some work such as copper hiring and teaching the Quran. As for copper hiring, the majority holds that the most acceptable view is that it is permissible. Regarding taking payment for teaching the Quran, the view of the majority of scholars of the Shafi'i and Maliki schools is that it is permissible because the payment is made based on need as given to the *imam* and *mu'azzin* (prayer leaders and those who make the call for prayer in mosques) as well as to judges, but teaching the Quran and Islamic Knowledge without taking payment is better. The scholars also unanimously agree that the contracting parties should agree on immediate or delayed payment and on payment at once or in instalment; if the two contracting parties do not agree on these details, the scholars unanimously agree that

it is impermissible to hire persons in return for feeding or clothing, which can be said, may be in practice today. The worker needs money more than the clothing or the food or what is called *ijarah al-nafaqah* (hire in return for feeding). Therefore, the employer should pay the employee and the employee is free to spend the wages as he wishes.

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Riwayah of Hafs and Warsh Recitation Methods: The Case of Maqam Ibrahim

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ABSTRACT

The recitation of *riwayah Hafs* and *Warsh* are two methods of reciting the Quran that are common in contemporary Muslim society. Both methods of recitations have an important relationship in *fiqh*. This paper reviews the position of the two *riwayah Qiraat Mutawatirah*, which are recitation of *riwayah Hafs* and *Warsh* in *fiqh*. Analysis is based on *wajh Qiraat* to examine the differences that have impact on matters of *fiqh* among the four schools of thoughts. This paper relies on resources such as books of *tafsir*, hadith, *fiqh* and history, scientific journals, working papers and other relevant academic materials. The findings indicate the validity of *Qiraat* as a discipline, and the differences of reciting the Quran that can bring about a significant impact on Quranic interpretations and Islamic legal rulings. This means that differences in reciting the Quran can lead to differences of opinion among Muslim jurists and their rulings, as in the case of *Maqam Ibrahim*.

Keywords: Hafs, maqam Ibrahim, Qiraat, Warsh

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INTRODUCTION

The science of *Qiraat* (Quranic recitation) explores the similarities and differences of opinion found among reciters of the Quran, from the basis of *hazaf* (absence), *ithbat* (presence), diacritical marks, dissimilation and assimilation processes, types of pronunciation such as *ibdal*, *tashil* and *raum* and the like, which are taken from *talaqi*

mushafahah from past *Qiraat* scholars going back to the time of the Prophet, the Companions, the Successors, the *tabiin* and subsequently, the inheritors of the Quran (Al-Banna, 1996).

Among the notable figures in *Qiraat* is Hafs bin Sulaiman, who learnt recitation from his teacher, Asim bin Bahdalah Abi al-Najud al-Asadi. The recitation of *riwayah Hafs* is the most common method of reading in the Muslim community, particularly in Malaysia. However, there is also another type of *Qiraat* found in some Muslim societies known as the recitation of *riwayah Warsh*; this is linked to Abu Said 'Uthman al-Misr, who learnt it from his teacher, Nafic bin Abu Ruwaym (Al-Qadi, 1991). It is widely used among Muslims today.

Presently, the development of the science of Quran as a field of study, in particular the science of *Qiraat*, is gaining public attention in Malaysia. This development has grown as a result of the establishment of various *tahfiz* (Quranic memorisation) centres throughout Malaysia. This is also proof that the public are now aware of the importance of *Qiraat* and esteem it highly in the same way that scholars in the past did.

Therefore, the Malaysian government has taken various measures to ensure that the alternative methods of reciting the Quran are made known, especially among contemporary students. This is evident through the establishment of the Islamic Centre under the Tahfiz Institute, such as the various *maahad tahfiz al-Quran* in the country, as well as the privately-owned

tahfiz institutes that are rapidly growing in number.

Despite the increasing appreciation of *Qiraat*, it appears, however, that there is insufficient research conducted in this area. This includes a lack of research in areas such as *Qiraat Asim riwayat Hafs* despite its wide use in Malaysia and *Qiraat Nafi riwayat Warsh* that is currently gaining public acceptance. The study of *Qiraat* is important because the differences in reciting the Quran can lead to differences in rulings and interpretations. Comparing the two methods of *Qiraat*, (*riwayah Hafs* and *riwayah Warsh*) shows that there are some differences in the recitation of a particular Quranic verse, which, in turn, contributes to a debate on the issues of Islamic *fiqh*.

METHODS

This paper is a qualitative study and relied on primary and secondary sources such as books of *tafsir*, *Hadith*, *fiqh* and history, scientific journals, working papers and other relevant academic materials.

RESULTS AND DISCUSSION

Meaning of *Qiraat* and *Al-Quran*

Qiraat and the Quran have an intimate relationship with one another. Thus, it is appropriate that the linguistic definition and its relationship to one another are first highlighted before delving into the discussion.

Qiraat or in Arabic, *al-Qiraat*, is derived from *lafaz jamc* (plural) *qira'ah*, which

means the methods of Qur'anic recitation such as *Qiraat Sab'ah* (seven methods of reading) (Muhyi Al-Din Sabir, 1999). This means الجمع أو الإجتماع, collectiveness. It is a derivative word from قرأ - يقرأ - قراءة (Ibn Manzur, 1999). In terminology, *Qiraat* is a branch of science that explores similarities and differences among people who recite the Quran in terms of *hadhaf* (absence or omission), *ithbat* (present), diacritical marks and the like. In addition, it takes into account aspects such as *ibdal*, *tashil*, *raum* and the like which were taken from the chain of transmitters who learnt it from the Prophet (Al-Banna, 1996). *Qiraat* also refers to the recitation narrated by seven or 10 Qurra' (scholars in *Qiraat*), while *riwayah* refers to the recitation of a narrator taken from the respective Qurra' (Qabah, 1999).

The word *al-Quran*, from the linguistic perspective, is derived from the root word with the letter *hamzah*, namely, قرأ, يقرأ, قراءة (Al-Zarqani, 1942; Muhyi al-Din Sabir, 1999). Nonetheless, some argue that it is read without *the hamzah* (قران) according to Imam Ibn Kathir as narrated by Imam Shafi'i (Ibn Manzur, 1999). This pronouncement (قران) is a reading (*warid*) based on the Prophet Muhammad and is agreed on by scholars. Imam Shatibiyy explained that (Al-Shatibiyy, 1990):

انؤاود نأرقلاب نأرق لقنو

Moving the pronouncement of نأرق (hamzah) to نأرق (i.e. before the sakin letter ر) by Ibn Kathir.

The Rules Governing *Qiraat Mutawatirah*

Qiraat mutawatirah is considered *sahih* (authentic). Both the *salaf* and *khalaf* scholars have determined that *Qiraat mutawatirah* has three basic conditions. If the *Qiraat* does not fulfil one or all of its conditions, it is regarded as *Qiraat shadhdhah* (unusual) (Muhammad, 1999). The rules are:

- i The *Qiraat* must comply with the requirements of Arabic linguistics, at least in its singular reading.
- ii The *Qiraat* is compatible with the 'Uthmani script through the *ithimal* (read with two or more methods of recitation).
- iii The *Qiraat* must have an authentic chain of narrators (*Mutawatirah* according to Imam al-Shatibiyy).

Qiraat is considered *sunnah muttab'ah*, which means it is transmitted through the *talaqqi mushafahah*, a process that traces its narrators from one teacher to another until the chain is linked to the Prophet. This is a difficult process that cannot be achieved unless the chain is authentic. Through rigorous analysis of the chain of transmitters, the *qurra'* scholars have found that only *Qiraat mutawatirah (al-Sab'ah)* and (*al-Asharah*) have met the requirements of having an authentic chain. These two are considered as being part of the Quran and part of the *Ahruf Sab'ah* (seven methods of recitation) that were authentically revealed to the Prophet Muhammad p.b.u.h.

Analysing the Fiqh Debate on *Maqam Ibrahim* as a Place of Prayer

There are many verses in the Quran that are related to the sciences of *Qiraat* and *fiqh*. However, this paper will only discuss one example that is related to the functions of *Qiraat* and the ensuing debate surrounding Islamic jurisprudence. Only one verse will be discussed in this paper and it is a verse related to *Maqam Ibrahim* as a place of prayer.

وَأَذِّنَا لِلنَّبِيِّتِ مَثَابَةً لِّلنَّاسِ وَأَمْنًا وَاتَّخِذُوا مِن مَّقَامِ إِبْرَاهِيمَ

And when We made the House (Kaabah) a place of return for the people and a place of security. And take from the standing place of Abraham (*maqam Ibrahim*) a place of prayer.

(*Surah al-Baqarah* 2: 125)

The first aspect: The rules of reading and its link to the chain of narrators. The Farsh letters in this verse are in the word (واتخذوا) (Al-Rajam, 1994):

Hafs: These words are read with *kasrah* on the *kha* ' of واتخذوا .

Warsh: These words are read with *fathah* on *kha* ' namely واتخذوا .

The second aspect: Observing the readings based on the interpretations. According to *Qiraat Asim riwayat Hafs*, these words are read with *kasrah* on the

kha ' , that is واتخذوا , which indicates it is the imperative verb (*fiil al-Amr*). The command is to take the *maqam* of Prophet Ibrahim as a place of prayer (al-Habs, 1999) as found in the imperative word خذوا contained in the Prophet's utterance خذوا عني مناسككم (Al-Asqalani, 2000) where he read the verse above and subsequently prayed at *maqam Ibrahim* (Al-Qawi, 1997).

According to *Qiraat Nafi riwayat Warsh*, on the other hand, the word is pronounced with a *fathah* on *kha* ' , that is واتخذوا , which indicates the past tense verb (*fi'il al-Madi*). The past tense in the sentence واتخذوا is further strengthened because of its association with the word *fi'il al-Madi* located before جعلنا and after وعهدنا where the sentence describes the act of praying at *maqam Ibrahim* and the act of cleansing the Kaabah, which took place at the time of Prophet Ibrahim (al-Habs, 1999).

The third aspect: The rulings and its effects according to the jurists. The debates surrounding the two methods of recitation have indirectly affected the way the rules are extracted by the jurists. According to the *Qiraat Asim riwayat Hafs*, reciting it with the imperative verb (واتخذوا) is done by four sects. According to Imam Abu Hanifah, praying behind *maqam Ibrahim* is obligatory because of the imperative verb (*fiil amr*) (Al-Qawi, 1997). This is supported by the Prophet's act after he performed the *tawaf* in the Kaabah, after which he prayed behind *maqam Ibrahim*.

Further supporting this is the Prophet's utterance as narrated by Jabir bin Abdullah:

عن أنس رضي الله عنه قال : قال عمر رضي الله عنه، وافقت الله في ثلاث أو وافقتي ربي في ثلاث فقلت: يا رسول الله لو اتخذت من مقام إبراهيم مصلى؟ فنزلت:وَاتَّخِذُوا مِنْ مَّقَامِ إِبْرَاهِيمَ مُصَلًّى (إلى آخر الحديث

From Anas: 'Umar said, Allah has ordained three things or that my Lord has accepted my request in three things, I said, "O Allah's Apostle! Why did you not take *maqam Ibrahim* as a place of prayer? Then the following verse was revealed: *وَاتَّخِذُوا مِنْ مَّقَامِ إِبْرَاهِيمَ مُصَلًّى*. (Al-Bukhari, n. d., Al-Asqalani, 2000)

On the other hand, in the recitation of *Qiraat Nafi riwayat Warsh*, Imam Malik, Ahmad bin Hambal and Shafi'i recommended praying behind *maqam Ibrahim*. This is because only the five daily prayers are mandatory. This opinion is based on the story of an Arab Bedouin (Al-Shaukani, 1994) who asked the Prophet p.b.u.h. about the types of prayer,

قال النبي (ص): "خمس صلوات في اليوم و الليلة"، فقال الأعرابي: هل علي غيرها؟ قال: لا، إلا أن تطوع فقال الرجل: "والذي بعثك بالحق لا أزيد عليها ولا أنقص منها،" (فقال النبي ص) : "أفلمح إن صدق

The Prophet said, "Pray five times every day (night and day)." Then the Arab Bedouin said, "Are there other obligatory practices?" The Prophet replied: "None except that you do the recommended." The Bedouin said again, "By Allah who sent you with the

truth, I will not add nor lessen them (the five daily prayers)." The Prophet said, "He will succeed if he speaks the truth." (Al-Bukhari, n. d., Al-Asqalani, 2000)

A further example is that of the Prophet's p.b.u.h. utterance to Muaz bin Jabal when he was sent to Yemen to inform the inhabitants about the five obligatory prayers. Another is the saying narrated by Bukhari and Muslim about the obligatory prayers that were originally set as 50 before Allah reduced it to five only. This religious obligation on the Muslims was made on the night of Isra'. Regardless, the different rulings extracted from the two methods of recitation have not impelled the jurists to call an end to the debate. In fact, they have even agreed on its importance. The interpretation came down to whether praying behind *maqam Ibrahim* is mandatory or recommended. The various recitations indicate that *maqam Ibrahim* has indeed been a place of prayer dating back to the time of Prophet Ibrahim until today.

CONCLUSION

According to the aforementioned arguments, the researchers believe that praying at *maqam Ibrahim* is recommended but not mandatory. This is based on three pieces of evidence: first is the imperative verb (*fill amar*) that would cause an act to become mandatory unless another interpretation of the rule is brought to bear by another verse that changes its meaning, for example the presence of *fiil madi*; second is the Prophet's p.b.u.h. first utterance that would discount the second and third utterances, which is that there is no other mandatory prayers except

for the obligatory five daily prayers; third is that a majority of the jurists, including Imam Malik, Ahmad and Shafi'i, said that it is only recommended. Only Imam Hanafi argued that it is mandatory because of the *fil amr*.

In considering these differences methods of recitation, it is important to highlight the point of consensus reached by the jurists; none issued a ruling against praying behind *maqam Ibrahim*. This is further proof that there is congruence between the science of *Qiraat* and *fiqh* in the interpretation of the Quran.

As for the *Qiraat Sab'ah* and *Asharah*, these are the readings that do exist and none can on its credibility. The detailed analyses by the scholars indicate the effort taken to preserve the Quran in its original form. There is also a clear relationship between the *Qiraat* and the science of *fiqh* from its *Qiraat*, *lughah* and *fiqh*. In terms of Quranic interpretation, the *Qiraat* indeed plays a major role in it and has helped deepen the interpretation of the Quran. Thus, more effort is needed to deepen and broaden the scope of this discipline in order to enrich the sources and references for the study of *Qiraat*.

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The Scope of an Employer's Liability for Negligence Caused by 'Locum' Medical Practitioners

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ABSTRACT

'Locum' medical practitioners are usually employed to relieve the regular and permanent medical practitioner on leave or due to shortage of staff. Many GP (General Practitioner) clinics opening for long hours deputise services to locums, who usually have permanent employment elsewhere but are employed temporarily at these clinics. Locums tend to be appointed without thought to the legal consequences that may ensue. Hence, when things go wrong in the course of treatment, it is important to establish whether the 'locum' is an employee or an independent contractor. The patient's interests would be protected if the locum is classified as 'an employee' as the GP clinic would be liable for any actions made by their employees. However, GP clinics would prefer to categorise locums as independent contractors as they would then not be liable for any legal consequences that may arise from any negligent acts traced back to the locum. This is considered not to be fair and just as the GP clinics have economically benefitted from the locums, and therefore, they should undertake the consequences as well. Considering the host of legal repercussions that may ensue, there is a need for clear policies and guidelines on the legal position of locums working in GP clinics.

Keywords: Employer, general practitioner, locum, negligence, vicarious liability

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INTRODUCTION

Many GP (General Practitioner) clinics opening for long hours deputise services to locums, who usually have permanent employment elsewhere but are employed

temporarily at these clinics to offer their clinical services. Most of the time, locums are appointed by these GP clinics without any thought given to the legal consequences of the appointment. In particular, when things go wrong, the GP clinics are seen as potential defendants worthy of suing financially, as compared to the appointed locum. Further, since the GP clinics have economically benefitted from the acts of the locums, they should undertake the burden and responsibility when things go wrong. This is due to the fact that the locum advances the economic interests of these clinics, thus, the employers of these clinics should be made to bear the corresponding losses. Further, as an organisation, the clinics can easily distribute the losses they suffer. Nevertheless, the position of the locums has not been entirely clear as to whether they are employed as employees or independent contractors when working in these clinics.

Definition of 'Locum'

A locum is a person who temporarily fulfils the duties of another (Wikipedia, n. d). The word 'locum' is short for the Latin phrase, *locum tenens*, which means 'one holding a place' (Jaganathan, 2008). The abbreviated term 'locum' is common in Australia, Canada, Ireland, Malaysia, Singapore, New Zealand, South Africa and the United Kingdom, whereas in the United States, the full-length term, '*locum tenens*', is preferred. The phrase *locum tenens* was commonly used in the middle ages when the Catholic Church provided clergy to

parishes where there was no priest available and these travelling clergy were called *locum tenens*, or the placeholders for the churches they served (Slabbert & Pienaar, 2013). Subsequently, the term 'locum' started to be used for those who were filling the gap internally within an organisation (McCreedy, 2009). The term also began to be used by medical practitioners who were employed to relieve and act as a substitute for the regular and permanent medical practitioner who was on leave or when healthcare providers were short of staff (Thornton, 2010). Locums today are in demand particularly in General Practitioner (GP) clinics that offer their services for long hours and require staff to be relieved constantly.

Employer's Liability under the Doctrine of Vicarious Liability

Vicarious liability is a doctrine introduced under the common law, which imposes liability upon a party for a wrong committed by another, despite the fact that the party who is vicariously liable may not have been at fault (Stickley, 2013, p. 455). This doctrine is a form of strict, secondary liability that arises under the common-law doctrine of agency, namely, *respondeat superior*, the responsibility of the superior for the acts of their subordinate (Wikipidea, n. d). Therefore, the superior such as an employer, bears liability for the actionable conduct of a subordinate such as an employee because of the relationship that exists between the two parties (Garner, 2009). This is also based on the common-law theory that the

master should be held responsible for the wrongful or negligent acts of his servants as reiterated by *Lord Justice Holt in Middleton v Fowler [1969] 1 Salk 282*, that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given by his master then the act of the servant is the act of the master.

Further, Lord Mansfield stated in *Ackworth v Kemp [1778] Dougl. 42*, that for all civil purposes the act of the sheriff's bailiff is the act of the sheriff. Thus, the doctrine of vicarious liability imposes liability on employers for the torts committed by his employees who are acting in the course of employment. The relationship is naturally that of employment between master and servant or employer and employee and also between principal and agent. In other words, employers are vicariously liable for the torts that are committed by their employees in the course of employment (Talib, 2010, p.368). Consequently, healthcare providers as employers would be vicariously liable for the acts and conduct of their employees such as doctors, nurses and medical attendants provided that they are categorised as employees acting in the course of employment (Fox, 2007). In other words, hospitals and clinics can be held to be vicariously liable for the negligence of their staff provided that it can be shown that the particular staff was employed by the hospital or clinic at the time of the alleged negligence and that the negligence occurred within the scope of the staff's employment with the hospital or the clinic (*Cassidy v Ministry of Health [1954] 2 QB 66*). Similarly, the

doctor who employs a locum as an employee can be held liable for the unlawful or unprofessional acts of the locum (Slabbert & Pienaar, 2013).

The main justification for imposing liability on employers for the fault of their employees is the fact that the employer has bigger and deeper pockets (Tharmaseelan, 2010). Employers are usually large institutions with ample resources to procure insurance and absorb legal costs. They are also able to allocate their losses by increasing the price of their goods and services (Jones, 2002, p. 419). Thus, it is not unreasonable to expect the employer to pay for damages resulting from acts performed by employees (Tharmaseelan, 2010). As Lord Millet stated in the case of *Lister v Hesley Hall Ltd [2002] 1 AC 215*,

“Vicarious liability is a species of strict liability ... It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss distribution device.” (Yang, 2012)

In a way, vicarious liability encourages accident prevention by pressuring employers to ensure that their employees act with regard to the safety of others. By making the employer liable for the act of the employee through the doctrine of vicarious liability, the employer has a financial interest in encouraging his employees to take care of the safety of others. If the employer

is careless in selecting an employee who is by nature negligent, he must accept responsibility for the acts of that negligent employee (Jones, 2008, p. 606). This is because he has set in motion a chain of events which finally culminated in the negligent act of the employee. Further, since employers profit from activities of their employees, they should be made to bear the corresponding losses.

Categorisation of ‘Locum’ as an Employee or an Independent Contractor

Categorising a locum as either an employee or an independent contractor is significant as the legal consequences following each type of appointment differ. Thus, before liability can be imposed on the employer for the tort committed by the locum under the doctrine of vicarious liability, it must be shown that the locum, as an employee, has committed a tort in the course of his employment (Stickley, 2013, p. 462). Consequently, it is crucial to determine the existence of an employment relationship between the employer and the locum as the doctrine of vicarious liability arises from employing an employee under a contract of service and not from employing an independent contractor under a contract for services (Bettle, 1987). Although the distinction between an employee and an independent contractor may seem to be obvious, in certain circumstances the distinction may not be so clear cut. Undeniably, the demarcation between the two has caused the courts great difficulty.

The courts have traditionally applied ‘the control test’ to distinguish between employees and independent contractors. The control test was established in the case of *Yewen v Noakes (1880) 6 QBD 530*, in which Bramwell LJ stated that “a servant is a person subject to the command of his master as to the manner in which he shall do his work” (p. 532). Thus, unlike an independent contractor, an employee can be told by his employer not only what work to do, but also how to do it (*Collins v Hertfordshire County Council [1947] KB 598*). However, this test does not mean that the employer had in fact controlled the employee for every second of his working day, but that he had the right to do so. However, this test became impossible to apply as many employees became more skilful, to the extent of being more skilful than their employers. As the labour market is flooded with more and more skilled workers, the criterion of ‘control’ is no longer adequate to be made the sole indicator for establishing the employer-employee relationship as employers are less able to control their employees on the manner in which they perform their work. The current judicial trend is that no single test is sufficient to distinguish between employees and independent contractors. Instead, the question has to be answered by taking into account a number of factors in each case.

The courts, through a series of judicial cases, have employed the control test, the business integration test (*Stevenson, Jordan and Harrison Ltd v MacDonald [1952] 1 TLR 101*), the economic reality test and the multi-factorial approach (Deakin,

Johnston & Markesinis, 2007, p. 580). The 'multi-factorial' test was introduced in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, in which the courts examine all the facts of the particular case instead of using just one conclusive factor for all cases. The courts consider factors such as whether the employee performing the services provided his own equipment, whether he hired his own helpers, what degree of financial risks he took, what degree of responsibility for investment and management he had, his connection with the business, the parties' agreement, the regularity and nature of the work and methods of payment. How much weight is attached to each factor depends on each case. If on balance the multiple factors point towards one type of relationship, then the courts will accept it even if the parties themselves have given a different label to their relationship (Jones, 2002, p. 423).

The 'close-connection test' has also been introduced to distinguish between employees and independent contractors by the courts in *Lister v Hesley Hall Ltd [2002] 1 AC 215*, which focussed on whether the employee's act was closely connected to his employment and if it would be fair and just to hold the employer vicariously liable. An employer "will be liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes" (paragraph 20, *per* Lord Steyn). This test allows a broader interpretation of vicarious liability in which the courts

will examine the circumstances of the case by taking into account (i) what tasks the employee was employed to do; (ii) whether the act committed by the employee that is deemed to be wrongful was part of the employee's normal duties or reasonably incidental in performance of an authorised act; (iii) if there is expressed or implied authority; (iv) if the risk of liability for the particular act of the employee was created by the employer's business (Tharmaseelan, 2010).

Implications of Being Categorised as an Employee or an Independent Contractor

The employer is only liable for the acts of his employees and not of independent contractors as the employers do not control the manner in which the contractors perform their jobs (Ipp, Cane, Sheldon, & Macintosh, 2002). Generally, independent contractors are responsible for their own actions and any wrongdoing cannot be imputed to the entity that hired them (Prosser, Wade, & Schwartz, 2010). Lord Bridge in *D & F Estates Ltd v Church Commissioners for England [1989] AC 177*, clearly stated that "it is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work" (p. 208). As the doctrine of vicarious liability arises from the employer-employee relationship, it must be shown that a tort has been committed by the employee acting in the course of his employment if liability

was to be imposed on the employer (*Balfour Trustees Ltd v Peterson* [2001] IRLR 758).

The term used to describe the relationship between the employer and the person being delegated the work is not determinative as the courts will look into various factors before determining whether the person is an employee or an independent contractor. However, although in principle an employer may not be vicariously liable for loss or injury caused by an independent contractor, the employer may be personally liable if the conduct of the independent contractor constitutes a breach of a non-delegable duty (*Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16). The duty is said to be non-delegable because it cannot be discharged merely by delegating the task to a competent person. The employer may still be liable if the duty is not properly performed. (*McDermid v Nash Dredging Ltd* [1987] AC 906). In other words, the person who owes the non-delegable duty cannot acquit himself by exercising reasonable care in entrusting the work to a reputable contractor but must actually assure that it is done and done carefully (Fleming, 2011). Therefore, it is a personal duty that will be breached if the task in question is performed negligently by another person. Brennan CJ stated in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, that

“...if the defendant is under a personal duty of care owed to the plaintiff and engages an independent contractor to discharge it, a negligent failure by the independent contractor to discharge

the duty leaves the defendant liable for its breach. The defendant’s liability is not a vicarious liability for the independent contractor’s negligence but liability for the defendant’s failure to discharge his own duty.”

However, as the existence of a non-delegable duty depends on the nature of the relationship between the plaintiff and the defendant, it is not possible to define exhaustively the circumstances in which it may occur. As a result, the courts will decide on case-to-case basis and will not hesitate to impose a non-delegable duty in new situations in the interests of justice. Nevertheless, the concept of a non-delegable duty of care has been said to have developed in a not entirely satisfactory and principled way, resulting in some uncertainty about the circumstances that will give rise to the duty (*Jones v Bartlett* (2000) 176 ALR 137).

Judicial Decisions on Negligence Claims against ‘Locum’ Medical Practitioners

The case of *Liau Mui Mui v Dr Venkat Krishnan* [1999] 1 MLJU 207, discusses directly on the issue of liability of locum medical practitioners. Liau, the defendant was a proprietor of Klinik Wanita-Wanita, which held a hospital licence. A locum doctor, Dr Ramachandran, was employed by the defendant and performed a Dilatation and Curettage (D & C) procedure on the plaintiff, which resulted in the perforation of the uterus and severe injuries to the rectum and small intestines. The court

found the locum doctor negligent. The defendant was found vicariously liable for the negligence of the locum because the locum was employed on a full-time basis and was authorised to use the clinic and instruments. Evidence revealed that the locum doctor was authorised to do the D & C procedure on patients except on the defendant's patients and the plaintiff was found not to be listed among the defendant's personal patients. Further, patients make direct payment to the clinic and not to the locum. The locum was paid a fixed sum of RM150 to RM200 per day and did not have any share in the profits made by the clinic. As the defendant held a hospital licence, the defendant's clinic was treated as a hospital and the doctrine of non-delegable duty applied. The court accepted the views of Denning LJ in *Cassidy v Ministry of Health [1954] 2 QB 66*, in which his Lordship stated that

“...the hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors, but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole time or part time. The hospital authorities are responsible for all of them. The reason is because even if they are not servants, they are agents of the hospital to give the treatment. The only exception is the case of consultants and anaesthetists

selected and employed by the patient himself.”

Thus, the court in *Liau* held that, from the facts of the case, it was evident that the plaintiff had not selected nor employed Dr Ramachandran to treat her and it was clear that Dr Ramachandran was employed by the clinic as a full-time employee. Therefore, the defendant clinic was wholly liable for the acts of Dr Ramachandran as an employee under the workings of the doctrine of vicarious liability,

The court in *Liau* further distinguished a Canadian case of *Rothwell v Raes (1988) 54 D.L.R. 193*. The case of *Rothwell* concerned an infant plaintiff who received immunisation doses of a multi-purpose vaccine (also known as quadrigen) to protect him from diphtheria, pertussis (whooping cough), tetanus and poliomyelitis. The vaccine was administered in the office of the defendant's family practitioner, Dr Raes, although two of the three shots were given by another doctor, Dr Hall, who served from time to time as his *locum tenens*. After the third shot, the infant plaintiff developed an abnormality known as post pertussis encephalitis, which can produce severe brain damage. The infant plaintiff later became blind, almost deaf and severely retarded both physically and mentally. His condition was unlikely to improve and required constant care. The parents sued both Dr Hall and Dr Raes for negligence in failing to warn of the material risks inherent in such vaccination. The courts found both of them not negligent either in recommending the vaccination or in

failing to warn of possible damaging effect as it was at the time of practice considered to be a vaccination with rare possibility of harmful consequences. On the issue on whether Dr Raes could be vicariously liable for the actions of his locum, Dr Hall, the court discussed the facts regarding the employment relationship between Dr Hall and Dr Raes. Evidence showed that Dr Hall, as a locum, was an independent contractor and was not in an employer-employee relationship with Dr Raes. Dr Hall did not make any payments with respect to expenses for office use or the secretary and kept no records of her own to indicate the professional relationship with Dr Raes. Dr Hall was free to see her own patients and was entitled to receive 50% of the gross earning that she had generated. Thus, Dr Hall was considered to be an independent contractor and Dr Raes could not be held vicariously liable for any fault, if any, on the part of Dr Hall. The court further compared Dr Hall's employment against Dr Kennedy's employment in the case of *Kennedy v CNA Ass'ce Co (1978) 88 D.L.R. (3d) 592*. In this case, Dr Kennedy was a retired dentist employed to administer anaesthetics in the dental surgery owned by Dr Stiles and Dr Harris. Linden J. found that Dr Kennedy was controlled with respect to the 'when' and the 'where' although not on the 'how' of executing his work. The court also found that it was apparent that Dr Kennedy was part of the practice of his employers and not in practice for himself. Consequently, he was "an employee and not an independent contractor, however, skilled he may be."

From the cases discussed above, it can be seen that in determining whether the locum medical practitioner doctor was to be considered an employee or an independent contractor would depend on many factors such as the employment agreement, the control and power the employer had over the employee, the method of salary payment and the prerogative of the patient in selecting the particular doctor for treatment. However, with new economic conditions in the labour market, these factors will not be exhaustive and it can be expected for the workings of the doctrine of vicarious liability to develop in congruence with new employer-employee relationships through future judicial cases.

Guidelines for the Practice of 'Locum' in Malaysia

There is no specific legislation governing the issues on the practice of locums in Malaysia. However, the Ministry of Health has introduced Guidelines for the Practice of Locum in 2006 and further amended them in 2010 (Ministry of Health, 2010). The guidelines have been prepared in accordance with the Medical Act 1971 and Civil Servants (Conduct and Discipline) Regulations 1993. Any registered medical doctor (Guidelines 2010, provision 3.2.2) with at least one year's experience after obtaining full registration (provision 4.1.1) may practise as locum provided that the locum work is carried out after office hours, on public holidays, weekends, holidays or during annual study leave (provision 3.3.1). However, before practising as locum, the

medical officer must adhere to the following principles:

- a) The work of locum can only be practised at licensed healthcare facilities and registered dental clinics. The requirements under the Private Healthcare Facilities Act 1998 (Act 586) need to be strictly adhered to if the locum work is conducted at a private facility (provision 3.3.1);
- b) The medical officer practising the work of locum must abide by the Code of Professional Conduct given by the Malaysian Medical Council and the Malaysian Dental Council (provision 3.5.1);
- c) An application to practise as a locum must be sent to the Head of Department to procure written permission. The medical officer must abide by the rules in the Civil Servants (Conduct and Discipline) Regulations 1993. Pursuant to Regulation 5 of the Public Officers (Conduct and Discipline) Act 1993, the Head of Department may authorise officers to carry out work as a locum. However, to facilitate the process, all applications must have Appendix 1 filled in and shall be made by the Chairman of the Unit for assistance and recommendations. Nevertheless, this approval can be terminated by the Head of the Department at any time without having to give any reason (provision 3.1.1);
- d) The premise which employed the locum must be responsible for any post-operative care that is required by the affected patient (provision 4.1.3);
- e) The medical officer practising as locum will not be given additional insurance coverage by the Government in the event of any medico-legal issues arising in the course of practising as locum. Therefore, medical officers who wish to practise as a locum must procure their own insurance coverage for their own protection in the event that medico-legal issues arise from the practice of locum (provision 4.1.4);
- f) Locum work cannot be performed while the medical officer is required to carry out official duties or is on call (provision 4.2.1);
- g) Locum work cannot be practised at hospitals/clinics which the medical officer has vested personal shares in and all earnings procured from the practice of locum need to be disclosed to the Inland Revenue Board (provision 4.2.2).

The Importance of Insurance Coverage and Clear Contractual Provisions

As can be seen from the guidelines above, medical officers who wish to practise as locums have to take their own insurance coverage for protection in the event that they are sued in court. They may ultimately be held to be individually responsible for any negligent acts and without proper insurance coverage, they would face a lot of difficulty in paying compensation if they are found to be liable. Purchasing insurance policies that will cover their circumstances in practice

as locums would help to indemnify them for claims that may be made against them and also for the legal costs of defending the claim (Fox, 2007). If the locum is found to be an employee of the clinic, then the employer may be held to be vicariously liable and will thus be liable to compensate the injured victim for all the loss suffered. Thus, for a start, the contractual provisions that spell out the nature of the relationship between the locum and the employer are of utmost importance. If there is no contract stipulating whether the locum is an employee or an independent contractor, matters can be rather complicated in the event a dispute arises (Slabbert & Pienaar, 2013). Nevertheless, even if the contract of employment stipulates that the locum is an independent contractor but other provisions in the contract are inconsistent with the status of the locum as an independent contractor, then the court may decide the locum to be an employee. Factors such as whether the locum (1) is an integral part of the employer's clinic; (2) is paid a fix amount of salary or has a share in the profits; (3) is free to carry out work for more than one employer at a time; (4) is entitled to sick leave, annual leave and if the salary is tax deductible (Staunton & Chiarella 2013, p. 129); (5) is employed for specific tasks or a series of tasks and maintains a high level of discretion as to how the work is performed (Wilson, 2011) and (5) is doing work subjected to the coordinated control of the employer as to the 'where, when and how' of the work (Fleming, 2011, p. 438). In the event that the locum is categorised

as an employee, then the employer needs to be liable for all financial consequences that result from the negligent acts. The employer can be indemnified by the employee either through a contractual claim for indemnity under the employment contract or a right under the right to contribution under section 10(1)(c) of the Civil Law Act 1956:

Where damage is suffered by any person as a result of a tort (whether a crime or not) - any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought (Section 10(1)(c)).

Thus, the effect of Section 10(1)(c) is that the employer is allowed to claim compensation from his negligent employee but the employee cannot claim contribution from the employer (Talib, 2010, p. 390).

CONCLUSION

It is imperative that healthcare providers including GP clinics ensure that as far as practicable, the way in which they conduct their operations does not put the health and safety of any members of the public

at risk. From the patient's point of view, GP clinics should not allow their staff to treat patients and at the same time be unwilling to accept responsibility for their wrongdoings. This goes against the notion of justice and fairness that holds that a person who employs others to advance his own economic interests should rightly be placed under a corresponding liability for losses incurred in the course of the enterprise. Employers are, after all, in a strategic position to reduce accidents by efficient organisation and supervision of their staff (Fleming, 2011, p. 438). GP clinics should not be allowed to abdicate their responsibility simply because they reserve no control or discretion over the execution of work carried out at their premise. If the work contracted for is inherently dangerous and the employer has to provide a safe system of work for employees, the employer should remain at all times responsible and such duties cannot be delegated even to a reputable contractor (Carbone, 2011). Since the employer derives benefit from the service of his employees, it is only right that he accepts any burden accruing from it as well. Therefore, to protect themselves, employers have to ensure that they are fully insured against all such events. Undeniably, the principle of vicarious liability rests on the fundamental premise that compared to anyone else, the employer is the best person to manage the risks of his own business enterprise and prevent wrongdoing from occurring to others.

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Quest for Independent Directors: Special Reference to their Legal Position in the United Kingdom

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ABSTRACT

The purpose of this research is to analyse current legislation and policies in relation to the appointment of independent directors in Malaysia and to compare their position with that of independent directors in the United Kingdom. Although a board of directors may have a good mix of executive and independent non-executive directors, its independent non-executive directors are often seen to be clearly ineffective, highlighting the fact that ensuring 'independence' of directors is a continuous process and a director's categorisation as 'independent' does not ensure that he is actually independent. The existing literature does not demonstrate a definitive relationship between board composition and corporate performance. This research employs qualitative research methodology, and the authors have conducted a comparative study by referring to the legal position of independent directors in the United Kingdom to determine whether the existing definition of independent director as applicable in Malaysia needs review. The hypothesis of this research is that there is lack of clear definition of what constitutes an 'independent director' in Malaysia. This paper finds that the definition of 'independent director' in Malaysia can be considered at par with that of independent directors in the UK at the current time.

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INTRODUCTION

The balance between executive and independent directors on the boards of publicly listed companies is a key aspect of the corporate governance debate (Nariman & Bidin, 2008). Independent directors are those who are not involved in the full-time management of a company and are not

employees of the company. The proposition that directors should “act independently of management, through a thoughtful and diligent decision-making process,” has been a major preoccupation of corporate governance scholars for several decades.

In Malaysia, the reform of the corporate governance commenced after the economic crisis in the late 1990s. The government adopted an integrated approach to strengthen the country’s corporate governance framework and, as a result, the corporate governance environment in Malaysia has improved significantly since the Asian financial crisis in 1997. The corporate governance movement first gained momentum in California only in the mid 1980s, and the United Kingdom (‘UK’) caught up with the idea soon after. Anglo-American corporate governance then became the popular model of governance outside the USA and the UK. Non-Anglo-American companies believe that unless they align their governance practices to the Anglo-American model, they will not be able to stay competitive in the market for capital. This article seeks to compare the legislation and policies between Malaysia and the United Kingdom in relation to independent directors. This article is divided into several parts.

Definition

Malaysia. Firstly, the newly gazetted Malaysian Companies Act 2016 (the Act) does not define ‘independent director’ except for the meaning of ‘director’ itself. Section 4 of the Act defines a director

as “includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director”. Furthermore, Bursa Listing Requirements defines ‘independent director’ as a director who is independent of management and free from any business or other relationship which could interfere with the exercise of independent judgement or the ability to act in the best interests of an applicant or a listed issuer.¹ It further explains, without limiting the generality, a person is independent who is:-

- a) not an executive director of the company or related to any of the companies within the group; and
- b) not employed with the company for two years prior to the listing (except as a non-executive director) and was not a major shareholder of the company, not a family member of any executive director, officer of major shareholder of the company, never engaged in any advisory work with the company (as a partner or director except as non-executive director) and never engaged in any transaction with the company as a partner, director or major shareholder.
- c) not a major shareholder of the said Corporation;

¹Para 1.01 of the Bursa Malaysia Listing Requirement

- d) not a family member of any executive director, officer or major shareholder of the said Corporation;
- e) not acting as a nominee or representative of any executive director or major shareholder of the said Corporation;
- f) not nor has been engaged as an adviser by the said Corporation under such circumstances as prescribed by the Exchange or is not presently a partner, director (except as an independent director) or major shareholder, as the case may be, of a firm or corporation that provides professional advisory services to the said Corporation under such circumstances as prescribed by the Exchange; or
- g) not nor has engaged in any transaction with the said Corporation under such circumstances as prescribed by the Exchange or is not presently a partner, director or major shareholder, as the case may be, of a firm or corporation (other than subsidiaries of the applicant or listed issuer) which has engaged in any transaction with the said Corporation under such circumstances as prescribed by the Exchange.

In addition, Para (g) of the Practice Note 13 of 2003 states that a person is disqualified from being an independent director if he had engaged personally in transactions with the said corporation (other than for board services as a non-executive director) within the last two years or he is presently a partner, director or a major shareholder of an entity

which has engaged in transactions with the said corporation within the last two years. This further strengthens the notion that an independent director should be free from any relationship with the company. This is in line with the Cadbury Report 1992 where it was suggested that an essential quality that non-executive directors should bring to the board's deliberations is that of independence of judgement. Apart from their directors' fee and shareholdings, they should be independent of management and free from any businesses or other relationship which could materially interfere with the exercise of their independent judgement.

An executive director is a person who is both a director and full-time employee of the company. Meanwhile, the non-executive director is not a full-time employee and is not involved in day-to-day management of the company. Usually, his attendance at board meetings is required to give an independent view for the benefit of the company.

From the above, it can be concluded that in Malaysia an independent director is a member of the board who does not hold any office in the company, has no management responsibility and has no interest in the company before his appointment. Furthermore, he is someone, who, apart from receiving his fee as a director, has no other pecuniary or material interest in the company or its management, dealings, promoters, subsidiaries or in anything else that the company's board finds might otherwise impede such a director's judgement.

United Kingdom. Meanwhile, in the United Kingdom, the Companies Act 2006 is silent on the legal distinction between executive and non-executive directors. Section 250 defines ‘director’ as including any person occupying the position of director, by whatever name called. Any person can be a director as a matter of law without bearing that title. An independent director is also referred to as a non-executive director. The law does not make any distinction between executive and non-executive directors (NEDs).

NEDs are directors for all purposes of legislation. Furthermore, Section 251 defines ‘shadow director’ as “a person by whose directions or instructions the director of the company is accustomed to act.” Para B.1.1 of the UK Corporate Governance Code (UK Code) further states the test to determine the independence of a non-executive director, whereby the board should be able to determine whether the director is independent in character and judgement and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director’s judgement.

It is interesting to note that under the UK Code there is also a term known as ‘independent non-executive directors’. The Code makes a distinction between non-executives who are independent and those who are not. To qualify for the former category, an individual must not only have the necessary independence of character and judgement but also be free of any

connections that may lead to conflicts of interest. To determine whether an individual is not independent, the code has laid down these criteria:²

- they have been an employee of the group within the previous five years;
- they have a ‘material business relationship’ with the company or have had one within the previous three years, including an indirect relationship as a partner, director, senior employee or shareholder of an adviser or major customer or supplier (this would prevent a partner from, for example, the company’s audit firm moving on to the board after retirement);
- they receive remuneration from the company in addition to a director’s fee, or they participate in the company’s share option or performance-related pay schemes, or they are members of the pension scheme;
- they have close family ties with any of the company’s advisers, directors or senior employees;
- they hold cross-directorships or have significant links with other directors through involvement in other companies or bodies;
- they represent a significant shareholder;
- they have served on the board for more than nine years.

²Para B.1.1 of the UK Code

Composition of the Board

Malaysia. The underlying philosophy is that 'independent directors' will bring independent and objective judgement to bear upon the board, it being that such directors will not, at least in theory, be coloured by conflicting interests or financial dependence upon the company when making judgements pertaining to the affairs of the company (Cheang, 2002, p. 504).

It is submitted that a balanced board composition is important for the board to function effectively. In 1998, the Malaysian Finance Committee on Corporate Governance was formed to identify the weaknesses arising from the economic crisis and to propose a recommendation to improvise the corporate governance in Malaysia at that time. A balanced board means such composition is not dominated by board members with executive power and consists of members who are independent of the management and shareholders (Shamsul Nahar, 2001).

Para 15.02 of the Malaysian Listing Requirements states that at least two directors or one third of the board, whichever is higher, must be independent directors. Should there be a vacancy in the position of independent director, the company must find a replacement within three months. Also, Recommendation 3.5 of the Malaysian Code of Corporate Governance 2012 (MCCG 2012) stipulates that the board must comprise a majority of independent directors where the chairman of the board is not an independent director. According to the commentary section

in MCCG 2012, a chairman who is an independent director can provide strong leadership if he is an objective member of the board. Alternatively, if the chairman is not independent, then the majority of the board must include an independent director to ensure balance and authority of the board.

It is interesting to note that the Bursa Listing Requirements also stipulate that a director of a public company is not allowed to hold directorship in more than up to five companies at any one time.³

United Kingdom. Meanwhile, the United Kingdom requires an appropriate combination of executive and non-executive directors and a higher number of NEDs where Para B.1.2 of the UK Code states that except for smaller companies, at least half of the board, excluding the chairman, should comprise NEDs determined by the board to be independent. For the smaller company, it is recommended that the board should comprise at least two NEDs. The code also requires that the audit committee and remuneration committee should comprise at least three non-executive directors; the exact number will vary between three and more than three if a larger number is required to ensure compliance with this provision. It is worth to be noted that the Code requires none of the executive directors to take on more than one non-executive directorship in a FTSE100 company or the chairmanship of a company as per Para B.3.3 of the UK Code.

³Para 15.06 of Bursa Listing Requirement

Appointment and Tenure

Malaysia. For a public company in Malaysia, the appointment of directors is made by members in the company's general meeting as stated in Section 201(1) of the Act. Also, Section 201(1) states that a person shall not be appointed as a director unless he has consented in writing and made a declaration that he is not disqualified from holding position as a director of the company.

According to Para 7.26 of the Bursa Listing Requirements, all directors shall retire once at least every three years, but they are eligible for re-election. Furthermore, Recommendation 2.2 of the Malaysian Code of Corporate Governance states that the Nomination Committee should develop and maintain and review the criteria to be used in the recruitment process and annual assessment of directors.

According to Recommendation 3.2 of the MCCG 2012, independent directors in Malaysia are recommended to hold office not exceeding the cumulative term of nine years. Upon the ninth year, an independent director may continue to serve on the board subject to the director's re-designation as a non-independent director.

United Kingdom. Main Principle B.2 of the UK Code states that there should be a formal, rigorous and transparent procedure for the appointment of new directors to the board. Meanwhile, under Para B.2.1 of the UK Code, it is stipulated that the Nomination Committee should recommend to the board on the potential candidates. It is also

required that the Nomination Committee must comprise of a majority of NEDs. The chairman of the nomination committee should be appointed from among the NED. Para B.2.1 of the UK Code also requires that the nomination committee should evaluate the balance of skills, experience, independence and knowledge of the board and, in the light of this evaluation, prepare a description of the role and capabilities required for a particular appointment.

The NED should also be appointed for a period not exceeding six years. Any term beyond that should be subjected to a rigorous review and the need for progressive refreshing of the board should be considered. The company is required to state in its annual report how the appointment procedures were implemented. In fact, the company is required to state its policy on diversity, gender or any measurable objectives that it has in implementation.

Role of Independent Director

Malaysia. One of the main functions of the director is to ensure loyalty to the company. Generally, the duty of a director is to manage or supervise the management of the business of the company (Nariman & Bidin, 2008). The role of independent director is not clearly regulated, but we may refer to Practice Note 13 of 2002 where more clarity on the requirements relating to the role of independent director is provided. Apart from acting honestly and using reasonable diligence in discharging his duties, an independent director must give effect to the spirit, intention and purpose of the

said definition. The test that can be applied is whether the said director can exercise independent judgement and act in the best interests of the company (listed issuer). When an independent director is appointed to the board, he is expected to lend his views without any restriction or biases.

The board should establish a Nominating Committee (NC) that should comprise exclusively of non-executive directors, a majority of whom must be independent.⁴ Furthermore, it is incumbent for the committee to develop, maintain and review the appointment criteria. In the NC, where the majority of its members are independent directors, it must be ensured that Board composition meets the needs of the company. In fact, the chair of the committee should be a senior independent director.

Furthermore, in the Audit Committee (AC), all the members must be non-executive with a majority of them being independent directors. The role of the committee is, among others, to review and report to the board on matters such as internal audit or any related party transactions on conflict of interest within the company. In short, the committee exerts a check-and-balance mechanism on management so as to safeguard the organisation from management incompetence and corporate fraud (Abdul & Salim, 2010). Their role fits the criteria of an audit committee, which requires a fully independent and functional independent director.

⁴Recommendation 2.1. of the Malaysian Code of Corporate Governance

MCCG 2012 recommends that the composition of the Remuneration Committee be made up wholly or mainly of non-executive directors. Interestingly, the term 'independent directors' is absent from this, implying that independent directors are not required to sit on this committee. It is submitted that the independent director could be considered a non-executive director by virtue of his appointment as the company does not employ him. The significance of this committee is to determine the remuneration package for directors and to provide a safeguard against an excessive salary scheme that is inconsistent with the interest of the company or its shareholders. It is submitted that the independent director should ensure the compensation packages for the executive directors are assessed by formal, transparent and fair criteria to ensure that it is commensurate with the performance of the directors.

United Kingdom. Under the UK Code, the NEDs have a role to play as members of a unitary board, whereby the NEDs should constructively challenge and help develop proposals on strategy. As a member of the board, it is expected that NEDs should play a supporting role whereby they should scrutinise the performance of management in meeting agreed on goals and objectives and monitor the reporting of performance. They should satisfy themselves on the integrity of financial information and that financial controls and systems of risk management are robust and defensible. They are responsible for determining appropriate

levels of remuneration of executive directors and have a prime role in appointing and, where necessary, removing executive directors, and in succession planning.⁵ The UK Code also requires that the board should establish an audit committee of at least three, or in the case of smaller companies, two independent non-executive directors. The function of this committee, among others, is to monitor the integrity of the financial statement of the company and to monitor the company's internal audit function. These are similar to the Malaysian position of providing a check-and-balance mechanism within the company. In relation to remuneration, similar composition criteria are also required in the remuneration committee.

Brief Legal Analysis of Legal Transplant Theory in Malaysia

The impacts of globalisation motivate developed countries to think about regional trade blocs and harmonisation of laws (Farrar, 2001). However, how far is this theory effective in upholding the practice of good corporate governance? Admittedly, legal transplant is a major source of legal development. Historically, laws have been transplanted either forcefully or voluntarily. The imposition of colonial laws is an example of forced transplant, while borrowing laws for the purpose of legal harmonisation is an example of voluntary transplant (Abdul Rahman & Salim, 2010). This theory was

first introduced by Alan Watson when he promoted the idea that legal transplant plays a very important role in developing the law by exporting the laws to other jurisdictions because he claimed that laws were usually borrowed from elsewhere, so that laws often operated in societies and in places very differently from the places where they had initially been developed (Watson, 1993). The sceptics such as Pierre Legrand argued that such a theory is impossible because the law cannot be separated from society and thus it is impossible to simply apply it to another society (Legrand, 1997). In the Malaysian context, it has been argued that both the views of Watson and Legrand are exaggerated and it has been emphasised that what matters the most is how the imported legal rules have been effective in serving the purpose for which they were transplanted (Salim & Lawton, 2007).

Malaysia, or Malaya as it then was called, traced its origin of legal transplant to *adat* and Sharia law. *Adat* law or customary law is further defined as a rule in a particular family or in a particular district that has from long usage obtained the force of law.⁶ Customary law such as *Adat Temenggung* and *Adat Perpatih* were practised alongside Sharia law. Sharia law, also known as 'Mohamedan law' was primarily applied for personal matters such as marriage or estate governance. They had been in practice long before occupation by the Dutch and British in the 17th and 18th century, respectively (Salim, 2006). After Independence Day,

⁵Para A.4 of UK Code

⁶*Low Bee Hoe (w) v. Morsalim and Goh Tien Lim v. Lee Ang Chin [1947] MLJ 3*

Malaya adopted the British legal system by enactment of the Civil Law Ordinance 1956, which provided for the assimilation of common law principles, rules of equity and statutes of general application subject to certain cut-off dates.

With respect to company law, Malaya followed the British companies law. The first codified law was the Straits Settlement Companies Ordinance 1889. Later, many laws were passed and adopted by the Federated and Unfederated Malay States that were substantively similar to the British companies law. The current Companies Act 1965 was enacted in 1966, and resembles the UK Companies Act 1948. For example, the provision on shareholders' remedies in Section 181(1)(a) resembles the old Section 210 of the UK Companies Act 1948. However, effective from 31 January, 2017, the new Companies Act 2016 will replace the 1965 Act, which it substantially revamped.

In terms of a corporate governance framework, Malaysia started to view good corporate governance practice seriously after the 1997 economic crisis. The Malaysian Government formed the High-Level Finance Committee on Corporate Governance in 1998 with the intention to improve the standards of corporate governance practice in Malaysia (Salim, 2006). The committee came up with the Report on Corporate Governance in 1999 and proposed several measures to enhance the standard. To date, the Malaysian regulator, the Securities Commission, has issued a Code of Corporate Governance in 2000, 2007 and 2012, all of

which were modelled on foreign codes of corporate governance such as those of the UK and Hong Kong. Recently, the Securities Commission issued a draft of the Code of Corporate Governance 2016 for the public to scrutinise and comment upon. From a glance at it, it can be seen that the draft requires companies to apply or explain an alternative approach as opposed to the approach under the previous code, the 'comply or explain approach'. It appears that the draft code follows the trend taken by some developed countries in their approach to corporate governance. These countries include the United Kingdom, Australia, Canada, Germany, Hong Kong and Singapore.

In the authors' opinion, adopting the legal transplant theory in addressing corporate governance issues could enhance the standard, but it may not be effective. This is due to the fact that the nature and needs of each society varies one from the other. What could be successful in foreign countries may not be so in Malaysia. UK corporations mainly adopt the dispersed ownership structure. However, most Malaysian corporations concentrate on shareholding, especially in family-owned businesses or government-linked companies. In the MWSG's survey of the top 100 Malaysian companies in Malaysia in 2014, it was revealed that most of the companies retained independent directors for more than nine years. MWSG has stated that in 300 annual general meetings attended by MWSG in 2015, companies had failed to table the resolution to re-appoint

INEDs who had served for more than nine years for shareholders' approval. This non-compliance showed that there is a problem in ensuring that companies in Malaysia adopt MCCG 2012, which is based on the UK Code.

RESULTS

Having discussed the above, a question that needs to be asked is whether our current legal framework could reflect the independence of a director by comparing it with that of the UK? It is submitted that there is no clear and conclusive mechanism to assess the independence of a director except by looking at the legal framework that governs his appointment, duties and roles.

The definition of 'independent director' is clearly spelt out in many rules and codes in Malaysia. The MCCG 2012 and Bursa Listing Requirements provide a clear definition of it. However, the UK Code has further divided 'independent director' into two categories: non-executive directors and independent non-executive directors. Such a division, however, is not defined anywhere in MCCG 2012 or the Bursa Listing rules.

As for the composition of the board, the authors find that Malaysian legislation does not adopt the recognised principle that the majority of the board shall comprise independent directors as practised in the UK. Malaysian legislation requires a smaller number of independent directors on the board of companies, but UK jurisdiction requires at least half of the board to be

independent. Malaysian laws, in fact, allow the independent director to hold not more than five (5) directorships in several public companies, while UK jurisdiction limits it to only one (1) directorship in FTSE 100 companies. In the authors' opinion, the Malaysian position is acceptable because Malaysian companies have the problem of a smaller pool of capable directors to choose from. In Malaysia, the number of public-listed companies is only about 919,⁷ but in the UK it is 2,426.⁸

It is submitted that the appointment mechanism in Malaysia enjoys similar standards as that of the UK. A separate Nomination Committee is established pursuant to MCCG 2012; the authors are of the opinion that the mechanism to appoint independent directors in Malaysia and UK is similar and in tandem with the practice of other jurisdictions. The existence of a separate body to appoint independent directors is essential for balancing between transparency and business needs. The externalisation of the Nominating Committee is to ensure that necessary guards are in place. According to a survey, 19% of respondents agreed that NEDs lack independence for involvement in the corporate governance of the companies (Hairul, 2012). This is because NEDs were chosen to be on the board either by the

⁷<http://www.bursamalaysia.com/market/listed-companies/list-of-companies/main-market/>

⁸<http://www.londonstockexchange.com/statistics/companies-and-issuers/companies-and-issuers.htm>

majority shareholders or the CEOs and because of this, their independence is only in name.

According to Recommendation 3.1 of the MCCG 2012, the board should undertake an assessment of its independent directors annually. In fact, in its commentary section therein, it remarks that the existence of independent directors on the board itself does not ensure the exercise of independent and objective judgement as judgment can be compromised by many factors including familiarity or close relationship with other board members. As such, when assessing independence, the board should focus beyond the independent directors' background, economic status and family relationship to consider whether the independent director can continue to bring independent and objective judgement to the board's deliberations. However, according to the Minority Shareholders Watchdog Group in its 2013 report, only 52 companies or 6% disclosed their criteria for board assessment. This raises the question of how independent a director can be upon his appointment to the board.

The nine-year cap for the appointment is also deemed as one of the mechanisms to determine independence. This works on the reasoning that long tenure as an independent director can impair independence. Upon completion of the nine years, directors can be re-designated as non-independent directors or in exceptional circumstances, the shareholders may decide that an independent director can remain in that capacity. The board should provide strong

justification to the shareholders in such exceptional circumstances. However, it is the authors' opinion that imposing such a restriction is challenging in its implementation because of the small pool of truly independent professional directors in Malaysia. This is further compounded by Bursa Malaysia rules that limit directorships to a total number of five at a time. Hairul acknowledged that the problem of finding a totally independent director is probably due to the dearth of such executives in the country (Hairul, 2012).

CONCLUSION

It can be concluded that, after comparing between the two jurisdictions, it appears that Malaysia has met the high standard set by its UK counterpart. This is because, despite the fact that Malaysia does not have many guidelines or any report on corporate governance, the country has rigorously adopted good corporate governance practices from the UK in its legal framework. Our findings reveal that Malaysia lacks in clearer regulations on independent directors except for the Bursa Listing Requirements and the MCCG 2012, which provide only general reference. However, it is submitted that there is no 'one size that fits all' mechanism in any legal framework anywhere in the world. This is supported by several scholars who have reported on the effectiveness of the legal transplant theory in importing foreign law into local settings. What could be the best corporate practice in the UK may not be so in other jurisdictions. However, credit must be given to our regulators, such as the

Securities Commission and Bursa Malaysia, for striving to meet the best corporate governance practice possible.

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The Role of Malaysian NGOs on Palestinian Issues: Aqsa Syarif Berhad

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ABSTRACT

In the 21st century, discourse on the role of non-state actors in foreign policy has been growing and many scholars recognise that non-state actors such as Non-Governmental Organisations (NGOs) are one of the forces that could contribute to the foreign policy making process. Arguably, the attitude of Malaysian leaders as well as the support of Malaysian that favour Palestinians has led to the proliferation and establishment of numerous Muslim faith-based NGOs. These NGOs subsequently play a momentous role in enhancing the bilateral relationship between Malaysia and Palestine. This paper explores this claim by studying the roles of Aqsa Syarif Berhad, a Malaysian Islamic faith-based NGO. It also attempts to assess the contributions of this NGO to Palestine as well as its role in shaping the future direction of Malaysia foreign policy towards Palestine. The paper contends that the role played by Malaysian NGOs has contributed to the enhancement of bilateral relations between Malaysia and Palestine as well as strengthened Malaysia's stand on Palestine.

Keywords: Aqsa Syarif Berhad, Malaysia foreign policy, non-state actors, Palestine

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INTRODUCTION

Malaysian Non-Governmental Organisations (NGOs) are well-known as being among the most active non-state actor groups in the world that support Palestine. These groups use their non-state platform

to provide humanitarian assistance to the Palestinians. They have planned and conducted substantial humanitarian aid activities that cover most of the important aspects of human security such as the social, education, health, economic and developmental dimensions, especially in Gaza. It is believed that over the years, Malaysia has been relying on the NGOs' initiative to enhance standing relations with Palestine. These NGOs subsequently played a momentous role in enhancing the bilateral relationship between Malaysia and Palestine. The paper explores this claim by studying the role of Aqsa Syarif Berhad, a Malaysian Islamic faith-based NGO, by assessing its contributions as well as its role in shaping the future direction of Malaysian foreign policy towards Palestine.

The Role of NGOs in International Relations

For decades, Non-Governmental Organisations (NGOs) have played an important role in the international community. They were not only involved in and significantly contributed to restoration of emergencies areas or vulnerable conditions, but also actively participated together with many nation states and international agencies in doing so through global developmental programmes. The emergence of civil society organisations and NGOs as a manifestation of social movement organisations on the wider scene has changed dramatically the landscape of global politics and world economy (Teegen, Doh, & Vachani, 2004). According to Paul

(2000) in the Global Policy Forum, today some 2,500 NGOs have consultative status with the UN and many thousands more have official arrangements with other UN bodies and intergovernmental bodies. The UN runs a department dedicated to NGOs, the Non-Governmental Liaison Service (NGLS), with offices in Geneva and New York. Its head reports to a committee only one step removed from the highest administrative committee of the UN administration chaired by the Secretary-General. At the 1992 Rio Earth Summit, around 17,000 NGO representatives participated in the accompanying NGO forum. Some 1,400 were directly involved in intergovernmental negotiations.

A study by Steffek (2013) suggests that NGOs mostly played a third force, rivalling states and other actors in international relations. In general, the role of NGOs is to promote information to government delegations, bring to their notice fundamental issues and environmental problems (Sachdev, 2007), introduce new ideas and lobby for policy changes (Mingst & Snyder, 2004). Some NGO activities raise the cost of international action and others lower them. For example, when NGOs perform as service-delivery in the field by helping government delegations, they lower the cost of international action because they believe they can perform these services more effectively (Vibert, 2001). NGOs are embedded, comprising access to institutions through the presence of influential allies and changes in political alignments and conflicts (Joachim, 2003). In international

relations, NGOs mobilise resources and public opinion to influence policy at the national or international level (Ley, Schmitz, & Swedlund, 2012).

Pease (2008) described three roles of NGOs in world politics: to get information on the field; to negotiate and implement policies set by the state and to establish networking with other international NGOs. Therefore, it is well known that NGOs have gained popularity in the world today because of their positive negotiations, which have led to the successful creation of regimes, or participated in new set of legislations that have led to a solution in transnational problems. Today, NGOs are able to participate in discussions and to some extent, influence decisions that were formally taken by governments. The presence of NGOs is seen as a catalyst across borders for global issues because NGOs can operate like brands, building issues and capturing new ones just as corporations build consumer brands and leverage them to open new markets. Although the NGO as a non-state actor does not receive benefits from any party, there is profit to be donated to society, depending on the type of NGO operation. The attitude of independence that exists in NGOs is not a barrier for NGOs to move freely but makes them more famous as the largest force in international relations.

Palestine-Israel Conflict: Malaysia's Perspective

Nair (1997) explains the issue of war in Palestine after the state gained independence. War in Palestine has attracted the attention

of many, Malaysian policymakers included, as it concerns the issue of a state's national independence. The Yang Dipertuan Agong of Malaysia, in delivering his annual speech in Parliament had always stressed support for the Palestinians as a hallmark of Malaysia's foreign policy. The policy towards Palestine has existed for a long time, at least since the al-Aqsa mosque was set on fire by a Jew. This incident captured people's attention, including in Malaysia. With growing concern towards what was happening in Palestine, Malaysia was visible at the forefront of support for Palestine, together with other Muslim countries, by condemning the incident (Idris, Othman, & Ramli, 2011). To express its concerns on the matter, Malaysia hosted an international conference in 1969 that discussed the legitimacy of Baitul Maqdis; it did this in other conferences around the world. Throughout the 1970s, Malaysia's foreign policy gave more and more prominence to events and conditions in the Islamic world, evolving in its approach and attitude to this sector (Bakar, 1995).

In 1981, Malaysia announced its decision to grant full diplomatic status to the Palestine Liberation Organisation (PLO) and in 1989, the status was upgraded, giving the PLO equal status with other resident diplomatic missions in Kuala Lumpur. Malaysia also continued to be active in the campaign for international support for the Palestinians, including through the OIC Summit. Overall, though it was interpreted as a manifestation of Islamic unity in foreign policy, it is important to note that Malaysia's

foreign policy is based on the principles of self-determination, justice and human rights.

Malaysia's stand on Palestine has attracted world attention for its initiatives to support international efforts in witnessing that the rights of the Palestinian people are respected (Harun, 2009). This has shown that Malaysia's policy towards Palestine remains unchanged i.e. Malaysia supports Palestine as a whole and without any discrimination. On the other hand, the Government has rendered support requested by NGOs especially in logistics and coordination. This support has continued for other NGOs condemning the Israeli blockade against the Gazans. The grassroots' movement coupled with the official foreign policy of the Government of Malaysia is a way of showing its staunch support and solidarity for the Palestinians in achieving their aspirations.

DISCUSSION

Aqsa Syarif Berhad's Contributions to Palestine

Aqsa Syarif Berhad was established in February 2010. It was initiated and formed by a group of Malaysians who were impassioned about the struggle to liberate Palestine from Zionist occupation. It is a non-governmental organisation under the auspices of Pertubuhan IKRAM Malaysia. Aqsa Syarif Berhad's main objective is to lead all efforts for the struggle to free the Al Aqsa Mosque and Palestine. Further collaboration and strategic partnership were built with other leading

international humanitarian work and relief organisations sharing similar aspirations for the Palestinian people. Aqsa Syarif Berhad has a Board of Trustees who monitor its overall administration. The success of Aqsa Syarif Berhad is because of the support and involvement of the public in the Palestinian cause. Today, Aqsa Syarif Berhad remains a solid platform not only for raising funds but for creating awareness on the issue of Palestine among Malaysians.

Aqsa Syarif Berhad also plays an important role in harnessing the resources and expertise of the public through donations to the Palestinians. The impetus for Aqsa Syarif Berhad's establishment was to promote awareness among society of the Palestine issue. According to Khairudin, the CEO of Aqsa Syarif Berhad (personal communication, 2015, May 6), Aqsa Syarif Berhad was a bridge in delivering humanitarian aid from the public to Palestinians in terms of finances, materials and projects in Palestine or Malaysia. Aqsa Syarif Berhad is consistent in providing financial assistance to Palestine on an ongoing basis and is responsible for distributing donations collected from Malaysians to Palestinians. Furthermore, to optimise the assistance to the Palestinians, Aqsa Syarif Berhad created a network of cooperation with various organisations closely linked to the Palestinians in order to implement projects or to collaborate in humanitarian missions. This NGO has set up the opportunities in Malaysia to raise awareness among Malaysians about Palestine and its struggle for freedom.

Another significant struggle of Aqsa Syarif Berhad's is to establish projects to help Palestinians in their daily lives. Ultimately, most of the projects that have been developed are in Palestine in order to provide job opportunities to Palestinians. The latest project by Aqsa Syarif Berhad is House4Gaza (H4G). In 50 days of Israel military aggression in Gaza from 8 July to 26 August, 2014, around 17,132 houses were destroyed, causing 460,000 people in Gaza to be made homeless and to be forced to live in temporary shelters. Aqsa Syarif Berhad responded to an immediate call by The Arab and International Commission to Rebuild Gaza to launch a campaign to provide temporary shelters for Gaza in the form of port cabins. In cooperation with the Malaysian Society for Engineering and Technology (MySET), House4Gaza (H4G) launched a donation campaign and was able to collect RM2.5 million from Malaysians. The amount collected was to benefit more than 400 families in Gaza (Abang & Kadir, 2015). In addition, Aqsa Syarif Berhad has several on-going projects in Gaza. According to Khairudin (personal communication, 2015, May 6) among the on-going projects are:

A. Social Economic Sector

i. Sponsorship of orphans

In cooperation with two local organisations, Salam Palestinian Society and Development and Takaful for Child Welfare, Aqsa Syarif Berhad sponsored more than 2,700 orphans living in Palestine and in nearby refugee

camps. Individuals may sponsor one or more orphans through monthly contributions and this can be done either individually or in groups. Contribution is RM170.00 per month for each orphan. The minimum period of sponsorship is one-calendar year.

ii. Sponsorship of affected families

Aqsa Syarif Berhad in collaboration with the Family Welfare Association in Palestine and Lebanon (WAFRAH) set up a fund through sponsorship programmes for the families of war victims. Fundraising helps families live a normal life with provision of basic needs such as food, water, medicine, shelter and education. Aqsa Syarif Berhad has developed an affordable scheme for this sponsorship. The minimum monthly contribution is RM550.00 per month and the minimum period of sponsorship is one-calendar year. Sponsorship may be done either individually or in groups.

iii. Microcredit-Qardhul Hassan Project

In Gaza, various poverty alleviation programmes are conducted. Based on an Islamic welfare loan system, the Microcredit-Qardhul Hassan Project, which Aqsa Syarif Berhad participates in, provides opportunity to poor families to start small businesses. This is a self-sustaining project that is managed locally.

iv. Iftar Ramadan, Zakat, food parcels and Eid gifts

This project plays an important role in the reconstruction of the social structure by targetting poor families for aid. In 2013, Aqsa Syarif Berhad, with cooperation from Tajammu 'Al Muassasat, developed this project with a budget of USD505,500.00. It was the largest project for that year. Together with its partners, Aqsa Syarif Berhad has distributed aid among poor Palestinian families in Lebanon and the West Bank amounting to almost RM2.5 million.

v. Imams for Ramadan in Malaysia

Imams for Ramadan is one of Aqsa Syarif Berhad's initiatives to collect donations for Ramadan. This annual programme is led by the NGO. Imams are sent to mosques throughout Malaysia, including Sabah and Sarawak, during Ramadan to lead in *Tarawikh* prayers and to give lectures.

B. Education

i. Back to school

This was another project carried out with Aqsa Syarif Berhad's partners in Gaza. Tajammu' Al Muassasat coordinated the work in Gaza, while Aqsa Syarif Berhad collected and sent around RM250,000.00 in 2013 for basic necessities for school such as clothing, bags, shoes and stationery.

ii. Adopt a Hafiz

Aqsa Syarif Berhad, together with Muslims' Professional Forum (MPF), launched a programme named 'Adopt a Hafiz' in May 2013. This was an initiative to increase the number of Hafiz in Gaza. A total of RM394,000.00 was sent and 680 children were registered for this programme in Gaza.

iii. Higher education

Aqsa Syarif Berhad was also invited to join Malaysian delegates from the Ministry of Higher Education on a visit to Gaza in June 2013. During the visit, Aqsa Syarif Berhad signed several MoU with academic institutions in Gaza. In addition, the NGO contributed USD\$227,480.00 to Al Aqsa University, mainly to rebuild the university mosque within the campus and also to build four lecture halls. During the same visit, Aqsa Syarif Berhad presented the University College of Gaza with USD \$184,080.00 to purchase a power generator and to build a science laboratory.

C. Agriculture

i. Cattle livestock

In Jabalia, with the Islamic Society of Jabalia as a partner, Aqsa Syarif Berhad helped to fund a cattle-farming project. The project has been able to produce bread, the local staple food, and dairy products

such as yoghurt and cheese to serve the people of Jabalia. In 2016, Aqsa Syarif Berhad owned more than 110 head of cattle.

ii. Agricultural land rehabilitation

This project was intended to rehabilitate the land with greenhouses and to plant vegetables like cucumber, tomato, capsicum, pepper and eggplant. With a population of 1.7 million in the Gaza Strip, there are a total of 70,000 farmers, including 30,000 farm workers in the state. The direct and indirect losses suffered by the agricultural sector in Gaza amount to USD1 million per day. Gaza's agricultural sector suffered wide-scale damage in every area and farming was no exception. The Palestinian Orphan's Home Association started the rehabilitation of agricultural land to alleviate unemployment among farmers. Aqsa Syarif Berhad supported them with USD50,000 in 2013.

D. Rose2Rose – From women to women

Among the objectives of the Rose2Rose project are the dissemination of accurate and correct information and the building of a network with other NGOs, corporate agencies, individuals and community centres. Rose2Rose hopes for regular contributions because women and children should be exposed to knowledge and skills so that they can generate

income to support their families. This is because many Palestinian women have lost their husbands or their husbands have been imprisoned and are not able to earn a living. Rose2Rose also organises partnerships with official government bodies, the private sector, banks and schools. They have also set up a community in the Gaza Strip in collaboration with other NGOs to restore the people's lives.

To promote awareness among the public on Palestinian issues, Khairudin (personal communication, 2015, May 6) asserted that Aqsa Syarif Berhad organises a few annual programmes:

i. Malaysia Global March to Jerusalem (MyGMJ)

MyGMJ is a global movement that was founded in 2012 and aims to protect Jerusalem against Judaising by the Zionist entity. It provides a platform for world citizens to express their support and solidarity with the Palestinians affected by Israel's apartheid policy in Jerusalem. MyGMJ is the Malaysian version of this campaign and Aqsa Syarif Berhad has been involved in organising the event since its inception in 2012.

ii. Walk for Humanity

Walk for Humanity, popularly known as Walk for Health, is a charity event in aid of the Palestinians, Syrians and Rohingya. It promotes a healthy lifestyle that includes giving to charity

through slogans like ‘Be Healthy, and Do Charity’.

iii. International conferences

Due to Aqsa Syarif Berhad’s global reputation, they have been entrusted twice by their international partners to host two international conferences beginning in 2014. The first was the ‘Annual International Forum for Jerusalem and Palestine’ from 2-4 May, 2014, an international conference attended by delegates from more than 20 Arab and Islamic countries. The conference was organised in collaboration with the Palestine Cultural Organisation Malaysia (PCOM) and the International Coalition for Jerusalem and Palestine (al-I’tilaf). The second was the ‘International Conference on Reconstruction of Gaza’ on 24 January, 2015 in collaboration with the Malaysian Society for Engineering and Technology (MySET) and the Arab and International Commission to Build Gaza (AICBG). This conference was part of a global campaign to raise USD1 billion to fund the reconstruction of Gaza after the 2014 Israel aggression on the state.

In 2014 Aqsa Syarif Berhad successfully implemented several important humanitarian projects. These included the Winter Emergency Relief Emergency Relief, Sponsorship of Hafiz in Gaza and the Qurban Udh-hiyeh Project 1435H, for which a contribution of RM400,000.00 to RM 500,000.00 was collected for each project. Aqsa Syarif Berhad also successfully

organised two humanitarian missions to give assistance to Palestinian refugees in Syria and to deliver aid to Palestinian refugee camps in Lebanon. The total amount contributed was around RM1.5 million. However, according to Khairudin (personal communication, 2015, May 6) Aqsa Syarif Berhad’s best achievement was its project, Operation Badar, for which it successfully raised over RM5.082 million in less than a month. The overall amount of contributions given by Aqsa Syarif Berhad to the Palestinians in the year 2014 was RM20.8 million. This amount represents almost 47% of the total contributions (RM44.52 million) collected by Aqsa Syarif Berhad since it was founded.

For its endeavours, Aqsa Syarif Berhad has received several awards. In November 2014, Aqsa Syarif Berhad received national recognition when it was selected by the Companies Commission of Malaysia (SSM) and Bank Negara Malaysia (BNM) to represent the country in an international audit exercise, Mutual Evaluation Exercise (MEE) On-Site Assessment, which was controlled by an international organisation, the Financial Action Task Force (FATF). FATF is an international organisation whose role is to set standards and ensure implementation of effective measures in terms of regulation, legislation and operation to combat money laundering and financing of terrorism and similar threats in an effort to preserve the integrity of the international financial system (MyCARE, 2015, “Local and international recognition”, para. 4).

CONCLUSION

It is undeniable that the Palestinians have suffered for a prolonged period of time under Israeli occupation, and this has caught the attention of the world. Numerous NGOs have come forward to defend the Palestinians' right and together to convey humanitarian aid in various ways. For Malaysian NGOs, particularly Aqsa Syarif Berhad, their role has widened the scope of Malaysian assistance to Palestinians. Various projects have been initiated and organised by Aqsa Syarif Berhad, financed mainly by funds contributed by Malaysians.

Aqsa Syarif Berhad's objectives are not only to encourage socio-economic reconstruction in Palestine but also to provide them with opportunities to rebuild their lives. Aqsa Syarif Berhad also places importance on showing concern to the Palestinians and raising the level of awareness of the plight of the Palestinians among Malaysians as they believe that helping the Palestinians goes beyond raising funds for them. Ultimately, the programmes initiated by Aqsa Syarif Berhad are to educate the public as to what constitutes violation of human right and to appreciate the values of human right.

All the efforts done by NGOS are very much appreciated by the Malaysian government. The government must redouble their efforts to improve diplomatic relations with Palestine. The efforts of Malaysian NGOs have strengthened support to the Palestinians, and this has been recognised by the government of Palestine. This has improved bilateral relations between

Malaysia and Palestine. The Palestinian people too are extremely thankful for the help they have received from Malaysian NGOs. Doubtless, the work of NGOs to support the Palestinian cause will foster closer diplomatic relations between Malaysia and Palestine.

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Confidentiality of Company Information: Challenges for Nominee Directors

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ABSTRACT

Company directors are subject to certain fiduciary duties discussed under common law and in statutory provisions. Directors' fiduciary duties include duty to protect the confidentiality of company information. Any information that belongs to the company is to be used only by the company for the company. Such information is considered the property of the company and it must be used to the advantage of the company. The objective of this paper is to discuss the duty of nominee directors concerning the confidentiality of company information. Nominee directors who actually represent their nominators on a board of directors will find their duty challenging as they might be expected by their nominators to provide them with certain company information. The study is based on doctrinal and statutory analysis of selected jurisdiction as well as cases based on various jurisdiction. It is argued that nominee directors are in a vulnerable position as directors who are representing their nominators at the same time. Though it has been clearly legislated that their loyalty is to the company they should to a certain extent be allowed to disclose information that would not jeopardise their companies.

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INTRODUCTION

Directors, as responsible persons who manage their company, are subject to certain fiduciary duties provided by the Companies Act as well as Common law. One of directors' fiduciary duties is the duty of avoiding conflict of interests. Under this broad duty, directors are responsible for

protecting the confidentiality of company information. This article discusses the exercise of this duty by nominee directors. Despite the fact that nominee directors are appointed as directors to represent the interest of their nominators, they are subject to the same duties as other types of director i.e. to act in the best interest of the company/ shareholders as a whole (*Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286*).

Nominee directors definitely are duty-bound to protect the interests of the company; however, at the same time they are expected to safeguard the interests of their nominators. They are constantly confronted by the dilemma of whether they should disclose information of interest to their nominators if their nominators were to request such information. Their nominators, of course, would believe that they are entitled to such information. As directors who manage the company they have easy access to all company information, including highly confidential information. The statutory provisions provide that company directors are entitled to certain company information such as the records of the company. Thus, the duty of protecting the confidentiality of company information is crucial for nominee directors, given their dual position.

Nominee Directors

In today's corporate world the existence of nominee director/s on a company's board of directors is inevitable. Nominee directors are those who are nominated to the board by an individual or class of

shareholders or by certain groups such as major creditors or employees of the company (Companies and Securities Law Review Committee, 1987). It is common practice for major shareholders, holding companies, institutional shareholders and joint ventures to have a director as their representative on the board. Lord Denning M. R. referred to a nominee director as a director who is nominated by a large shareholder to represent his interests (*Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606*, pp. 626-7). Since they are representing an individual or a group of persons, they can be described as a trustee of their nominators (*Re Syed Ahmad Alsagoff (1960) 1 MLJ 147*) or as a watchdog of their nominators, appointed to ensure that the nominators' rights are properly safeguarded.

Duty of Nominee Directors

Nominee directors do not act in their own capacity; thus, they may in a way think that they owe a certain extent of loyalty to their nominators, who were responsible for putting them in their present position. However, the chief duty of a director is to act in the best interests of the company. Winslow J. in his dicta said, "A company is entitled to the undivided loyalty of its director. A director who is the nominee of someone else should be left free to exercise his best judgement in the interest of the company he serves and not in accordance of his patron" (*Raffles Hotel Ltd v Rayner [1965] 1 MLJ 60*). Lord Denning mentioned that it would be unlawful for nominee directors to act in

the affairs of their company in accordance with the directions of his nominators (Boulting's at 626).

Section 132(1E) of the Malaysian Companies Act 1965 provides that the nominee director shall act in the best interest of the company and in the event of any conflict between his duty to act in the best interest of the company and his duty to his nominator, he shall not subordinate his duty to act in the best interest of the company to his duty to his nominator. This provision explains the general duty of nominee directors, that their loyalty and allegiance are to the company and not to their nominators.

The Court of Appeal in *Re Neath Rugby Ltd* ([2009] EWCA Civ 291) in referring to nominee directors held that the fact a director of a company has been nominated to that office does not impose any duty owed to his nominator unless provided otherwise by any formal or informal agreement that he has with his nominators. The court conceded that it is normal for nominee directors to act according to the wishes of their nominators who had put them in that position provided they would not be in breach of their duties to act in the best interest of the company.

Street J (at p.310) in *Bennetts v Board of Fire Commissioners of New South Wales* ((1967) 87 WN (Pt 1) (NSW) 307) said that the nominee director should not use his position as an opportunity to serve the group that nominated him. The nominee director should not allow himself to be a mere channel of communication or listening post for his nominators. In this

case, Bennetts had been elected to the Board of Fire Commissioners by the Firemen's Union. Later, the Union was involved in an industrial dispute with the Board. The Chairman of the Board obtained legal advice that he would not disclose to Bennetts unless Bennetts gave an undertaking that he would not disclose it to the Union. Bennetts disagreed and commenced a proceeding for a declaration that he was entitled to the information.

The decision in *Bennetts* was followed in *Harkness v Commonwealth Bank of Australia Ltd* ((1993)32 NSW 543 at 555), where the court held on the same point that "... whether a person is elected by a special interest group, considered to be a representative of one group for another group, or a nominee director, does not alter the fact that the person owes the duty of confidence to the board to which he or she has been appointed." This has been described as a strict rule imposed upon nominee directors. It would be unrealistic to prescribe such a blanket prohibition on all nominee directors because nominee directors are actually the representatives of their nominators and it would be impractical not to expect them to have any regards at all to the interests of their nominators (Crutchfield, 1992). Jacobs J (at p.1663) in *Re Broadcasting Station 2GB Ltd* ([1964-65] NSW 1648) viewed that such a rule would make the position of a nominee director impossible. Jacobs J. observed that nominee directors should be allowed to consider the nominators' interests provided that it would be in the best interests of the

company as well (*Levin v Clark [1962] NSW 686*).

It is worth noting that in a recent case, *Central Bank of Ecuador and others v Conticorp SA and others ([2015] UKPC 11)*, the Privy Council agreed with the lower court decision that a director must act bona fide in the best interests of the company; he must positively apply his mind to the question of what the company's interests are; he must exercise independent judgement and not fetter his discretion; and the same is expected from the nominee director (citing Lord Denning's in *Boulting's*). The court, therefore, in this case asserted that Mr Taylor as sole director and nominee investment adviser of IAMF (the second Appellant) had breached his fiduciary duty by acting on the instructions of the Respondents. Mr. Taylor had a duty to understand IAMF's affairs and to apply his own mind to act in the best interests of IAMF.

Duty to protect confidentiality of information. One of the important duties of a director is to avoid conflict of interest. Under this duty, directors must not put themselves in a position of conflict where he has direct or indirect interest. This duty refers to the exploitation of any property, information or opportunity irrespective of whether the company could gain benefit out of it or not. Section 132(2)(b) of the Malaysian Companies Act 1965 states that a director is not allowed to use any information that he acquired in his position as a director of a company for his own benefit or for the benefit of any other

person or cause detrimental to the company. Though the provision does not elaborate on the meaning of 'information', the meaning may include trade secrets, list of customers and other information that could be deemed confidential (Abd & Samsar, 2007). In *Electro Cad University Australia Pty Ltd v Mejati RCS Sdn. Bhd & Ors ([1998] 3 MLJ 422)*, the defendant (director), without the company's knowledge, had used information about the company's product. The information here refers to technical and marketing data. Subsequently, the defendant manufactured an identical product in direct competition with the plaintiff's product. The High Court issued an injunction to restrain further breach and divulging of any confidential information. The court had also declared that the plaintiff was the true owner of the confidential information and trade secrets. The court further ordered the defendant to relinquish any documents or materials related to the products and to pay damages to the plaintiff. The court agreed that the first and second defendants owed an equitable obligation to the second plaintiff in relation of the confidential information they received in their capacity as consultant and director, respectively. The confidential information had been used by the defendants in designing, manufacturing, marketing and promoting their product 'Stopcar', which was in competition with the product belong to the plaintiffs, 'Stopcard'.

In defining what is confidential, Kalamathan J (at p. 441) perceived that confidential information refers to information that is the object of an obligation

of confidence and is used to cover all information of confidential character, for example, trade secrets. The judge further explained that it is not necessary for the confidential information to be patentable; it was simply necessary to show that the information was confidential and could not be found in the public domain.

Goulding J (at pp117-8) stated that information that was gained while in the course of employment was characterised by three identifiers: first, it is information that is easily accessible to the public and thus, an employee would be at liberty to impart it during or after his employment; second, it is confidential information that cannot be used or disclosed during the nominee director's employment but in the absence of an express restriction, the nominee director is free to use the information, once his employment has ended; and third, it is information regarding specific trade secrets that a nominee director should not use or disclose either during or after his employment (*Faccenda Chicken Ltd v Fowler* [1987] 1 Ch. 117).

According to Young J. in *Harkness v Commonwealth Bank of Australia Ltd* ([1993]32 NSW 543 at 553),

What is confidential is not to be found merely by looking to see whether someone has marked 'confidential' against an item. The obligation of directors is to keep secret any matter which is discussed, the communication of which might detrimentally affect the company, indeed, even the issuing of information as to who

voted in what way on a particular resolution may detrimentally affect the working of a company if it is breezed abroad.

Confidential information has been further specified in *Canterbury-Hurlstone Park RSL Club Ltd v Roberts* ([2008] NSWSC 845), where the court considered the discussion at Board meetings concerning the sale of particular assets, a review on the performance of the Chief Executive Officer and views of the Board members to be confidential as they were not known to the public. Thus, confidential information can be construed as material corporate information, and the disclosure of such information would be detrimental to the company. As emphasised by the Corporate Director's Guidebook (2007), the disclosure of non-public information by directors would damage the trust among directors and management and jeopardise boardroom effectiveness and directors' collaboration. It is deduced that whether a piece of information is confidential or not would depend on whether it is available to the public or not as well as whether its disclosure would be detrimental to the company or not.

Nominee Directors and Confidential Company Information

To avoid conflict of interest a director is bound by the duty of protecting the confidentiality of company information. With regards to nominee directors, their loyalty or priority is to the company; they cannot disclose confidential company

information to anybody, even their nominators (who might be the majority shareholders) who have put them in their present position. Nominee directors would be in breach of duty if they disclosed information that would affect the company's interests. In most circumstances, it would be expected that the nominee director would report back to their nominators, which is the primary purpose of putting nominee directors in their position. The nominee directors are given the task of controlling or supervising the company on behalf of its nominators. The duty of directors not to disclose company information or use confidential information without the consent of the company is incompatible with the nominee directors' position (Thomas, 1997, pp. 149-150).

In comparison to other jurisdiction, New Zealand has taken a liberal approach concerning the duties of nominee directors. Section 145(2) (a) of the New Zealand Companies Act 1993 deals with the disclosure of information by nominee directors. It allows a director of company to disclose company information to his nominator, unless prohibited by the board of directors. In addition to this, a director of a company that is carrying out a joint venture between the shareholders may act in the best interests of the shareholders even though it may not be in the interests of the company if the constitution of the company allows him to act as such.

An important case on this matter is *Berlei Hestia (NZ) Ltd v Fernyhough* ([1980] 2 NZLR 150). In this case an

Australian Company had 40% shares in a New Zealand company and the articles of association of the latter allowed the Australian company to appoint directors in the New Zealand company. Later, there was a dispute between the two companies, which resulted in a breakdown in their relationship. Subsequently, the nominee directors were refused access to the company's records and premises on the grounds that they were in a position to act in derogation of their duty to the company. In determining the nominee directors' access to corporate information, Mahon J (at pp. 162-6) opined that to perform his duties as a director, it would be necessary for the director to be given access to corporate records and premises. His Justice further asserted that on the basis of the facts there was no evidence that showed that the Australian directors intended to act in breach of their fiduciary duty towards the company. The court in its decision relied on the decision of Jacobs J in *Levin and Re Broadcasting Station* that a nominee director should prefer the interests of the company rather than of their nominator; however, the nominee director may act for the interests of the nominator if there is no conflict.

Besides *Levin and Re Broadcasting Station*, *Molomby v Whitehead* ((1985) 63 ALR) is also essential as in this case, it was held that the nominee director, Molomby, was entitled to information relating to the management and affairs of the company. In this case, Molomby had requested director access from the managing to documents relating to legal fees and various legal actions. The managing director refused

to supply all the documents requested, asserting that they were confidential. Beaumont J of the Federal Court highlighted that the case was different from *Bennetts*, which involved clear conflict of interest on the part of the director, and there was no such conflict in *Molomby*. This has been viewed as a pragmatic approach compared with *Bennetts*, which has been described as a strict view (Sievers, 1993).

Similarly, in an American case, *Kortum v Webasto Sunroofs, Inc.* (Del. Ch 2000), the court held that a director who represented 50% of shareholders in a joint-venture corporation was entitled to inspect all books and records without any restrictions. It would be unreasonable to restrict Kortum's inspection with an undertaking that he would not disclose the information to his nominator. The court agreed that in the absence of conflict Kortum may disclose the information to his nominator.

The Australian Corporation Act 2001 makes no provision discussing specifically about nominee director; however, Section 187 has implied concerns related to the issue. According to the section, a director of a wholly-owned subsidiary may act in the best interests of the holding company if:

- The constitution of the subsidiary expressly authorises the directors to act in the best interests of the holding company;
- The director acts in good faith in the best interests of the holding company; and
- The subsidiary is not insolvent at the time the director acts and does

not become insolvent because of the director's act.

The above provision allows a nominee of a holding to act in the best interests of the holding while acting as a director in a subsidiary by fulfilling certain requirements. This can be construed to include disclosing the company's information to the holding company.

In the United Kingdom, Section 173(2) of the Companies Act 2006 elucidates that directors would not be in breach if they acted in accordance with an agreement duly entered into by the company that restricts future exercise of discretion by its directors or if they acted in a way authorised by the company's constitution. Based on this section, directors' duties could be qualified by an agreement or by the company's constitution. In *Cobden Investment Ltd ([2008] EWHC 2810 (Ch))*, the court held that interests of the company could be qualified if there were unanimous consent of the shareholders but not to abrogate the duties owed to the company. This section, to a certain extent, will minimise the challenges faced by nominee directors in protecting the company's confidential information. This means that nominee directors may disclose certain information to their nominators provided that it will not undermine the company's interests. The position of nominee director in relation to company information has been elaborated in *Richmond Pharmacology Ltd v Chester Overseas Ltd ([2014] EWHC 2692)*. In this case Chester held 44 % shares in Richmond.

As agreed in the shareholders' agreement, Chester appointed two nominee directors to the Company's board. The agreement provided that all commercially sensitive information should be treated as strictly confidential. However, the agreement provided that any party to the agreement may disclose the confidential information to its professional advisers and bankers and should procure that those persons should treat the information as confidential as well. Chester decided to sell its shares in Richmond, and for that purpose Chester appointed a financial advisor to whom it disclosed confidential information. The financial advisor then disclosed the information to the prospective buyer of Chester's shares. Richmond brought action against Chester for breach of shareholders' agreement and breach of directors' duties against the two nominee directors as stated under Section 172 (duty to promote the success of the company), Section 174 (duty to exercise reasonable care, skill and diligence) and Section 175 (duty to avoid conflict of interests).

The defendants in this case argued that the information could be treated as confidential even if it were communicated to a third party, provided care was taken to ensure that the third party was trustworthy and undertook to keep the information confidential. On that point, the court held that the ordinary and natural meaning of an obligation to treat information as confidential is that it may not be disclosed to anyone else.

The court emphasised that the nominee directors owed to Richmond the duties set out in sections 172, 174 and 175 of the Companies Act 2006. The nominee directors in performing this duty could take the interests of Chester (their nominator) into account, provided that their decisions were in what they genuinely considered to be the best interests of Richmond (citing *Hawkes v Cuddy* [2009] EWCA Civ 291). As for Section 175, which demonstrates duty to avoid conflict of interest that relates to exploitation of any property, information or opportunity, this duty is not infringed if the matter has been authorised by the board of directors. The court further explained that the test of whether there is a breach of Section 175 is an objective one and it is immaterial that the nominee directors acted in good faith or in the mistaken belief that they are entitled to do so. In other words, it does not depend on whether the director is aware that what he is doing is a breach of his duty.

On the other hand, there is a provision in the Singapore Companies Act (revised 2006) allowing nominee directors to disclose to their nominators information they have obtained as director of the company. Section 158 of the Act states that a nominee director may disclose information to his nominator provided:

- The director declares at a meeting of the directors of the company the name and office or position held by the person to whom the information is to be disclosed

and the particulars of such information (Section 158[3][a]);

- The director receives prior authorisation by the board of directors to make the disclosure (Section 158[3][b]);
- The disclosure will not be likely to prejudice the company (Section 158[3][c])

The existence of this section is approved as it may ease the challenges faced by the nominee directors especially when their nominators enquire about certain information. However, it would not be easy for the board of directors to authorise the disclosure and it is also not easy to ascertain whether the information would prejudice the company or not (Kala & Foo, 2004).

As for the Malaysian Companies Act 1965, Section 132(1E) merely explains the general duty of a nominee director. In relation to confidential information it could be implied that nominee directors may disclose the information so long as it will not conflict with the interests of the company. To determine whether it is conflicting or not it would be necessary for the nominee directors to obtain approval from the board of directors. The provision has not been elaborated on and this requires the court to further interpret the provision. In the new Malaysian Companies Act 2016, to be enforced in stages by 31st January 2017, there are no changes regarding the responsibilities of nominee directors. The provision in Section 132E is now in Section 217(1) of the Companies Act 2016.

CONCLUSION

It is indeed obvious that the fiduciary duty to act for a company's best interest and to avoid conflict of interest is very much related with the duty to protect the confidentiality of company information. Similarly, the vulnerable position of nominee directors, who are subject to dual loyalty, would be a great challenge for them as they seek to discharge their duty. Case laws and earlier writings have suggested that in facing the challenge, the task of the nominee director would be feasible by the existence of express contractual consent. Such a confidentiality agreement would be the threshold for nominee directors in disclosing company information and would also prevent misuse of company information (Moscow, 2011). In the absence of express consent, the existence of implied consent could be assumed. Implied consent would be based on accepted business practices and whether the information were confidential or not.

The legislation and decided cases highlight that the directors, whatever name they are called, are subject to the same fiduciary duties. However, certain legislation and case laws allow the nominee directors some flexibility by allowing them to consider the interests of their nominator, which may include sharing certain company information with their nominators. However, this is only possible if there is no conflict with the best interests of the company. This shows that in whatever circumstances, the interests of the company are paramount and the flexibility given should not be

considered discrimination of duties among the directors.

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The Theory of Harm under the Malaysian Competition Act 2010

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ABSTRACT

The Malaysian Competition Act 2010 (CA 2010) seeks to promote the process of competition in the market by preventing anti-competitive conduct that harms competition. However, 'harm to competition' is not clearly defined in the Act and neither are its subsequent guidelines. Without proper application of the theory of harm, the competition authority will not be able to provide a consistent approach to the assessment of the competition issues especially in determining whether or not a conduct is anti-competitive. This paper aims to analyse how and to what extent the Malaysian Competition Commission (MyCC) applies the theory of harm in competition law analysis. This paper argues that there is no standard definition of what 'harm to competition' means in the context of Malaysian competition law. 'Harm to competition' may be interpreted as harm to the competitive process and consumers (final consumers). It may also be narrowly interpreted as harm to market mechanism or the ability to compete, through, for example, unjustified exclusion of rivals from the market without the need to prove that conduct was harmful i.e. reduced aggregate consumer welfare. In most situations, the issue of competitive harm is not about interpretation but rather of proof that a particular conduct really harmed competition and consumers.

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INTRODUCTION

Competition law is the Magna Carta for market players to compete in the market. Competition law seeks to protect the process of competition from any conduct that has an effect on or harms competition.

In competition law analysis, the application of the theory of harm is important to assist the competition authority to determine whether or not a particular conduct is anti-competitive. The theory of harm will be used as a parameter to determine whether conduct by firms in the market contravene competition law provisions. The proper application of the theory of harm may result in legal consistency and predictability. It constraints the competition authority from prohibiting pro-competitive conduct or protecting inefficient firms or competitors in the market, which by itself harms competition. However, 'harm to competition' is hard to define and has been a source of debates among competition law scholars around the world. In the area of anti-competitive agreements such as a cartel, harm to competition may simply mean harm to consumer welfare through price increase or output limitation.

The application of the theory of harm in competition law analysis becomes more complicated in the case of exclusionary practices under the abuse of dominant position prohibition. There has been continuous debate on what 'harm to competition' means in developed jurisdiction such as the United States and the European countries. In the United States, the current approach to competitive harm in the context of exclusionary conduct is that there should be non-interference by the competition authority in the market unless the exclusionary conduct reduces aggregate consumer welfare in the form of output limitation (Fox, 2002). Unjustified

exclusionary conduct without consumer harm may not be anti-competitive in the USA. This is important to ensure that the law will not protect inefficient firms that harm consumers. Similarly, in the EU, the main objective of the European competition law is to ensure that dominant undertakings do not abuse their dominant position by foreclosing their competitors from any market, thus having an adverse impact on consumers in the form of higher price and output or quality reduction (Commission, 2009, para 19). However, there have been arguments that the application of the theory of competitive harm in the EU is wider than output reduction or price increase. In some cases, conduct that restricts the freedom or ability to compete (or economic freedom) is considered anti-competitive even though it does not reduce consumer welfare (Fox, 2002; Gormsen, 2007; Forum, 2006).

This paper will explore the application of the theory of harm under the Malaysian Competition Act 2010. The rest of the paper will be arranged as follows: Part 2 will explore the application of the theory of harm in the area of restrictive agreement under Section 4 of the CA 2010. Due to limited space, the discussion will focus on anti-competitive by 'object' and will not cover anti-competitive by 'effect'. Part 3 will explore the application of the theory of harm in the area of abuse of dominant position under Section 10 of the CA 2010, focussing on the exclusionary conduct of a dominant firm. Part 4 of this paper will explore the application of the theory of harm in a new category of abusive conduct known

as ‘discriminatory abuse’. Part 5 will offer a final conclusion.

Anti-Competitive Agreement

Section 4 of the CA 2010 prohibits anti-competitive agreement that has the object or effect significantly restrict, prevent or distort competition in the relevant market. It is obvious that Section 4 is concerned with conduct that affects or harms competition in the market. Competition law differentiates between restrictions by ‘object’ or ‘effect’. Section 4(2) of the CA 2010 laid down conduct that deemed to have the object of significantly restricting, preventing or distorting competition. This provision is considered a deeming provision and MyCC is under no duty to carry out detailed economic analysis to determine whether conduct that is listed under Section 4(2) is anti-competitive (MyCC, Guidelines on Chapter 1 Prohibition, 2012). Does this mean that the theory of harm does not play an important role in competition law analysis under the object rule? The answer is no. The theory of competitive harm under ‘object’ rule is rather obvious. The legal structure of Section 4(2) was built on the premise that the objects of cartel agreements such as price fixing and market sharing are so obviously preventing competitors from competing with each other. There is a legal presumption (based on experience, for example) that the conduct creates a harmful effect on consumers, leading to price increase and output reduction with a low possibility of countervailing efficiency benefits (Walker, 2012).

The categorisation of certain conduct under the ‘object’ rule allows MyCC to dispense with full-fledged analysis of competitive harm in determining whether or not a particular conduct is anti-competitive. The issue is not whether there is proper application of the theory of harm but rather to what extent the competition authority should prove that there is actual harm suffered by the consumers. The issue of the theory of harm becomes the issue of proof rather than of application. Under the object rule, MyCC will proceed with its case against anti-competitive conduct based on speculation or abstract competitive harm without even the need to substantiate the allegations with evidence. The plausible reason for this is to reduce the burden of the competition authority to prove each and every serious cartel case and shift the burden to parties to the agreement to prove that the agreement has countervailing efficiency benefits and fulfil all the criteria under the balancing test regime of Section 5 of the CA 2010.

In order to further illustrate the application of the theory of harm, this paper will analyse the MyCC’s decision against Malaysia Airlines System Bhd (MAS) and AirAsia Bhd (AirAsia) for their market sharing agreement.

Case of MAS-AirAsia

MAS and AirAsia were charged under Section 4(2) of the Competition Act 2010 for entering into a market sharing agreement (known as Collaborative Agreement) on 9 August, 2011 followed by a supplemental

agreement dated 2 May, 2012. Based on Clause 5 of the Collaborative Agreement, the parties to the agreement, MAS, AirAsia and AirAsia X, agreed to allocate the following markets: MAS would focus on being a full-service premium carrier (FSC), AirAsia would focus on being a regional low-cost carrier (LCC) and AirAsia X would focus on being a medium-to-long haul LCC (MyCC Final Decision, 2014). The effect of this agreement was that each party to the agreement agreed to focus on their market segment and not to enter into the area that was specifically allocated to the competitors. Clause 9 of the Collaborative Agreement establishes a Joint Collaboration Committee (JCC) to implement, manage and monitor compliance with the agreement. Based on the Collaborative Agreement, MyCC found that MAS-AirAsia had breached Section 4(2) of the Competition Act 2010 for sharing the market of air transport in Malaysia between each other to rationalise their business operations. Market sharing is considered hardcore restriction and anti-competitive by 'object'.

Before the collaboration agreement was entered into, MAS' subsidiary, FireFly, was formed to compete with AirAsia in the domestic market. The competition had reduced AirAsia's market share drastically (MyCC, Final Decision, 2014). Therefore, instead of competing with each other, they entered into a cooperative arrangement "to maximize their commercial revenue, by sharing market." MyCC was of the view that "the restriction [was] obvious; MAS and AirAsia [had] agreed not to compete with

each other, either themselves or through their subsidiaries, thus eliminating any possibilities of competition between the parties" (MyCC, Final Decision, 2014).

Did MyCC spell out the theory of harm in this case? The competition authority elaborated further on what we call the 'theoretical harm of market sharing': MyCC stated that "it provides them the freedom to impose higher prices to maximize profitability without any competition. This will eventually leave consumers to face the increased likelihood of higher airfares and fewer choices." (MyCC, Final Decision, 2014). However, this theoretical harm was actually substantiated with evidence of output limitation. Subsequent to the Collaboration Agreement, MyCC found that MAS through FireFly's operation withdrew its operation for flight from Kuala Lumpur to Sabah and Sarawak route, leaving AirAsia as the sole low-cost carrier for the routes.

The demand substitutability is somewhat limited for domestic flight services due to the government cabotage policy, which only allows locally-owned airlines operators to carry passenger between any two points within Malaysia and between Peninsular Malaysia and both Sabah Sarawak. In addition, flights between Peninsular Malaysia and Sabah and Sarawak are not substitutable for other transportation means. To this point MyCC found that "consumers who travelled between Malaysia and both Sabah and Sarawak were directly affected following the market exit of FireFly" (MyCC Final Decision, 2014). Even though, the MAS-Air case showed that MyCC took

into consideration the actual consumer harm, it is still not clear whether MyCC are bound to consider the same in all cases that fall under the 'object' category since the regulatory scheme of Section 4(2) is based on the presumption that hardcore cartel harms consumers.

Abuse of Dominant Position- Exclusionary Conduct

The application of the theory of harm can be extended to the case of abuse of dominant position under Section 10 of the Competition Act 2010. Section 10 of the CA 2010 prohibits a firm in dominant position from abusing its position in any market for goods or services. This means that being a dominant by itself is not an offence under the Act. However, the dominant firm has special responsibilities not to act in a manner that may hamper competition by, for example, engaging in exclusionary practices. Unlike anti-competitive behaviour under Section 4, Section 10 regulates unilateral action by a dominant firm. 'Harm to competition' under Section 10 may be different from 'harm to competition' under Section 4. Section 10(2) of the CA 2010 lays down a non-exhaustive list of abusive conduct.

Based on the Guidelines issued by MyCC, abusive conduct can be categorised into exploitative and exclusionary (MyCC, Guidelines on Chapter 2 Prohibition, 2012). Exploitative means the ability of an enterprise to maintain price above the competitive level for some time without worrying about whether consumers will switch to other producers or new competitors

will enter into the market offering the same products. Exploitative conduct refers to excessive price imposed on consumers to gain higher profits and not a result of innovation. In regulating this exploitative behaviour, it seems that MyCC will look at the extent to which the abusive conduct harms consumers in the form of higher price (MyCC, Guidelines on Chapter 2 Prohibition, 2012). Exclusionary conduct, on the other hand, means the ability of an enterprise to dictate the level of competition in a market by preventing new competitors from entering into the market or significantly harming the existing equally efficient competitors by preventing them from effectively competing in the market. Based on MyCC Guidelines, the Commission will adopt the effect-based approach to determine whether or not a unilateral conduct is anti-competitive (MyCC, Guidelines on Chapter 2 Prohibition, 2012).

In order to assess the effect of exclusionary conduct, MyCC will use two main tests: whether the conduct adversely affects consumers and whether the conduct excludes competitors that are just as efficient as the dominant firm. Based on these guidelines, it can be safely concluded that 'harm to competition' in the context of exclusionary conduct is harm to competitive process, namely, the impairment of the ability of efficient firms to compete and also harm to consumers. It was argued that the competition authority should consider the competitive process and consumers together because it is difficult to infer consumer harm from harm to competition in the case

of exclusionary conduct (Majumdar, 2008). Focus on consumer does not mean that the competition authority should ignore harm to efficient competitors. In fact, harm to efficient competitors is important because in exclusionary cases, the impairment of rivals' ability to constraint the dominant firm from exercising its market power is a way that harm to consumer is caused (Jacobson, 2002). On the other hand, the impairment of the ability of the rivals to compete does not necessarily reduce consumer welfare.

Jacobson (2002) offers a three-step analysis to determine whether or not an exclusionary conduct is anti-competitive. The first step is to assess the market position of the dominant firm and the condition of the relevant market. For example, if the dominant firm captures a significant part of the upstream market, it is most likely that the conduct of the dominant firm contributes to the foreclosure of the market from other competitors in the downstream market. The second step is to analyse whether the conduct impairs the ability of the competitors to compete. The impairment can be measured by taking into consideration whether the conduct: lowers the rivals' price; increases the rivals' cost or lowers the rivals' demand (Buccirossi, 2010). The main important consideration is to assess the effect of the conduct on the rivals' costs, namely, the extent to which the conduct raises the rivals' cost and the cost increase cannot be avoided through reasonable practical means (Jacobson, 2002). For the proper application of the

theory of harm and to further strengthen the competition enforcement, the competition authority may support its assessment with the possible evidence of foreclosure such as the evidence which indicates that market share of the dominant firm is maintained or expanded, actual competitors may have been marginalised or may have exited or potential competitors may have tried to enter the market and failed (Commission, 2009).

The third step is to assess whether the impairment of the rivals' ability to compete leads to consumer harm in the form of higher price or in some other forms such as limiting quality or reducing consumer choice or preventing new products and innovations from being offered to the market (Commission, 2009). There should be a direct link between the foreclosure effect and consumer harm. To further illustrate the application of the theory of harm in exclusionary conduct, this paper will discuss the decision made by MyCC against two giant companies, Megasteel Sdn Bhd (Megasteel) and MyEG Services Bhd (MyEG).

Case of Megasteel

Exclusionary conduct denotes that there must be some forms of competition between a dominant firm and non-dominant firms. In Megasteel's case, MyCC has decided in its proposed decision that Megasteel had infringed Section 10(1) of the Competition Act 2010 by engaging in a margin squeeze in the Hot Rolled Coil ('HRC') market in Malaysia. Margin squeeze is considered

an abusive conduct even though it is not listed under Section 10(2) or in the MyCC Guidelines on Chapter 2, Prohibition.

Margin squeeze happens when a firm that controls the raw material market, supplies the raw material to other firms in the downstream market to produce another finished product at a price that those who purchase it do not have a sufficient profit margin (Commission, 2009) (*Industrie des Poudres Sphériques v Commission*, 2000). This happens because, most of the time, the dominant firm also produces the finished product in competition with the firms in the downstream market. Megasteel is the sole supplier of Hot Rolled Coil (HRC). Entry barriers in this market are quite high. Firms need to get a licence from the Ministry of International Trade and Industry (MITI) to supply the HRC. Even though three other companies had been given a licence to produce the HRC, Megasteel remains the sole supplier due to high sunk costs and high capital investment to build a HRC plant. HRC is an important raw material to produce another kind of steel, Cold Rolled Coil (CRC). Megasteel sells HRC to the downstream players that produce CRC. However, Megasteel plays a dual role as a wholesaler and internal buyer as it also produces CRC, competing with other players in the downstream market.

In order to determine whether Megasteel has engaged in margin squeeze, MyCC applies the 'equally efficient test' by assessing whether the dominant enterprise could not offer its downstream product

(CRC) otherwise than at loss if it had been forced to pay its own price for the output. It is important to show that the dominant's downstream business could not operate profitably based on the price that it charged the downstream enterprises.

In the proposed decision, MyCC found out that the margin between Megasteel net selling CRC and net selling HRC was lower than the costs that it must incur in transforming HRC to CRC (MyCC, 2013). Therefore, MyCC concluded that Megasteel's conduct had the effect of hindering the competitive process at the downstream market as an equally efficient firm cannot operate its business without incurring losses (MyCC, 2013). It can be concluded that harm to competition in this case meant harm to the competitive process of any market especially the market in which Megasteel was participating. However, there was no direct evidence to show that the competitors had been marginalised by, for example, raising their costs of operation or lowering their demand. There was also no direct evidence to suggest that the conduct had resulted in consumer harm in the form of higher price and output reduction. After conducting further analysis and taking into consideration both written and oral representation submitted by the Megasteel, MyCC found no evidence to support the allegation that Megasteel had engaged in margin squeeze by undercutting its CRC price that could hamper the competition in the downstream market (MyCC, Non-Infringement Decision, 2016).

Case of MyEG

MyCC had taken action against MyEG for abusing its dominant position in the provision and management of online renewal of Foreign Workers Permits (PLKS) in breach of Section 10(2)(d) of the CA 2010. MyEG is a monopoly in the provision of the PLKS renewal service. In order to renew the permits, the employers are required to purchase mandatory insurance, including the Foreign Workers' Insurance Guarantee (FWIG), Foreign Workers' Compensation Scheme (FWCS) and Foreign Workers' Hospitalisation and Surgical Scheme (FWHS). MyEG had established a subsidiary, MyEG Commerce, to act as an agent for RHB Insurance, competing with other insurance companies and agents in providing the mandatory insurance.

MyEG had induced the employers of foreign workers to purchase both FWHS and FWCS through MyEG if the employers wanted faster and easier renewal. MyEG had also invariably created difficulties by adding additional steps for the employers to purchase the Mandatory Insurance through other insurances companies. "The other insurance companies as well as their agents who are competing with both RHB Insurance and MyEG are facing unfavourable conditions as it would invariably take a longer time to obtain PLKS approval as their policies would have to be verified" (MyCC, Final Decision, 2016).

MyCC was of the view that MyEG had been leveraging its market power at the downstream market, which is the market

for the sale of the mandatory insurance. The economic evidence showed that the commission earned by MyEG for the sale of mandatory insurance has increased tremendously during the period in which MyEG started to gain its dominant position in the upstream market, which is the market for the provision of PLKS renewal service. Evidence also showed that due to this discriminatory practice RHB Insurance via MyEG had captured increased sales within a short period of time, snapping larger market shares from its competitors. MyCC found that the discriminatory conduct practised by MyEG had harmed competition in the market for the sale of Mandatory Insurances for online foreign workers' permit renewal (downstream market) in which MyEG, through its subsidiary MyEG Commerce, was a participant (MyCC, Final Decision 2016). However, MyCC did not offer any evidence that the discriminatory conduct engaged in by MyEG had reduced consumer welfare in the form of high price or output reduction.

Discriminatory Abuse

In the previous part, we have stated that in exclusionary conduct, there must be at least some form of competition between the dominant and non-dominant enterprises. The requirement to carry out 'equally efficient test' is to make sure that the law will not be used to protect inefficient competitors. However, there is a situation where a dominant enterprise may abuse its dominant position in a market without

even competing in that market by favouring third-party distributors over others (Colomo, 2014).

Section 10(2)(d) of the CA 2010 prohibits a dominant firm from engaging in discriminatory practices that may not only harm competition in which the dominant firm is participating, but also harm any upstream or downstream market. Based on the wording of Section 10(2)(d), the law does not require the competition authority to establish the competitive nexus between the dominant firm and other firms in a particular market. Firms may discriminate based on various reasons such as nationality, geographical area or even race etc. For example, in the EU case of British Airways (BA), the court held that BA had breached Section 101(d) for applying different commission rates to travel agents operating in the United Kingdom, even though BA did not compete with the travel agents (*British Airways v Commission*, 2007).

In this situation, even though the dominant firm may not be competing in the impaired market (for example, the downstream market), the abusive conduct (discriminatory practice) will interrupt the normal process of competition in the downstream market, impeding the ability of one or more firms to compete in the downstream market by increasing its costs and lowering its profits. This leads to the emergence of a new category of abusive conduct, namely, discriminatory abusive.

There are also cases where even firms in a market in which the abuse occurs do not compete with each other. But, each

firm may use the important materials to produce different products and therefore, not compete with each other. In the EU regime, there were numerous occasions in which the Commission and court applied a broad interpretation of 82(c) (now Article 102) to exploitative discrimination between customers who were not competing in the same market (Akman, 2006).

In the case of United Brands for example, it was found that conduct can be discriminatory even though the market players in the downstream market, such as distributors from different member states, did not compete with each other (*United Brands v Commission*, 1978). In the case of Corsica Ferries I, it was held that Article 102(c) applies even though local and international shipping lines did not compete with each other (*Corsica Ferries Italia Srl v. Corporazione dei Piloti del Porto di Genova*, 1994). In the case of Deutsche Post-Interception of Cross-Border Mail, it was held that “in any event, the Court of Justice has stated that the list of abuses mentioned in Article 102 itself is not exhaustive and thus only serves as examples of possible ways for a dominant firm to abuse its market power....Article 102 may be applied even in the absence of a direct effect on competition between undertakings on any given market” (*Deutsche Post-Interception of Cross-Border Mail*, 2002).

In this situation, the discriminatory conduct may impair the ability of firms in the different markets to compete for important inputs. They are not competing for the business but competing for the

inputs to produce outputs at the lowest cost possible. If the discriminatory behaviour impairs the ability of a firm or firms to get the supply that they want and prevents them from operating as efficiently as possible, the firms will eventually leave the market. Under this new abusive category, it is clear that competition is harmed in one way or another. However, the main issue here is whether harm to competition under the third category includes harm to consumer. Discriminatory practice may not necessarily increase price and may be in certain circumstances welfare enhancing.

CONCLUSION

From the study, it can be concluded that 'harm to competition' generally means harm to competitive process. The consumer harm test may play an important role in competition law assessment to determine whether a particular conduct is anti-competitive. In exclusionary abuse, for example, taking into consideration consumer harm may safeguard the risk of false conviction and over-deterrence (Nazzini, 2015). However, proving actual consumer harm is a demanding task and could hamper the effectiveness of competition law enforcement. Perhaps, what the Competition Commission needs to prove is the potential rather than the actual effect of certain anti-competitive conduct on consumers. For example, consumer harm may be implied from the fact that the exclusion of equally efficient competitors may lessen competition and further strengthen a firm's

dominant position in the market. This in the end may create a harmful effect on not only the competitive process but also consumers in the long run in the form of high price and output reduction.

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Predicting Mobile-Learning Culture Model at Institutions of Higher Learning: Implications on Curriculum Design

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ABSTRACT

Advances in computer and communication technologies have enriched communication and learning methods, demanding further improvement in curriculum design. This study explores mobile-learning (m-learning) culture among students of Malaysian institutions of higher learning (IHL). Two objectives are set: Firstly, to establish a culture of mobile wireless technology (MWT) application in tertiary learning; and secondly, to design a curriculum and validate the m-learning model incorporating the learning culture at higher learning institutions involving components such as ethics, social norms and attitude. A survey was carried out on 490 random samples drawn from students of five universities and one community college in Malaysia. Data collected were analysed using descriptive statistics to address the first objective of the study. A Structural Equation Model (SEM) of mobile-learning culture at institutions of higher learning (IHL) was designed and validated to fulfil the second objective. The findings suggest that: The model is able to explain significant contributions from all predictors on the actual use of MWT in learning. In conclusion, the study confirms that educators should include ethics and behavioural components while designing curriculum for institutions of higher learning in Malaysia.

Keywords: Behaviour guideline, curriculum design, ethics, mobile wireless technology, learning attitude, social norms

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INTRODUCTION

The term curriculum refers to the lessons and academic content taught in a school (Oxford Dictionary, 2015). A curriculum

is conceptualised as the planned learning materials designed in prescribed instruction to be taught (Marsh & Willis, 2003). According to Petrina (2004), what is to be learnt and how it is organised are discussed in curriculum and instructional design. Both learning theories and design are said to play equal importance in a curriculum. Thus, the existing curriculum for any subject must be well addressed and periodically revisited to ensure the needs of learners and the larger goal of nation building are being achieved.

The existing curriculum content of higher learning institutions is structured to fulfil employability skills and economic aspirations. Nevertheless, when learning content is too structured and created, students no longer enjoy the space to be creative. It is important that lecturers and curriculum developers revisit the structure of curricula with integration of computer technology and applications to ensure authentic learning resources and experiences.

In early writings on curriculum integrity, Eisner (1970) and Eisner and Vallance (1974) outlined five specific orientations of curriculum design, namely, academic rationalist, cognitive processes, self actualisation, social reconstruction and utilitarianism. Firstly, for the academic rationalist, the primary concern is on the disciplinary knowledge and cultural aspects. Secondly, cognitive processes relate to intellectual reasoning skills such as problem solving. Thirdly, self-actualisation involves personal relevance orientations where psychological conditions are emphasised

and focus is on individuality and personal expression. Fourthly, social reconstruction deals with critical pedagogy and stresses sociological conditions, social justice and collective reforms. Lastly, the utilitarian orientation is primarily concerned with the functional competencies, performance, procedure and instructional efficiency. No specific curriculum emphasises on all five orientations. The orientation that fits is the orientation that answers the demands of the economic and global pressures of the era. Thus, a curriculum designer must be aware of employability needs and demands to ensure that the products of higher learning institutions are well received by industry and society when they graduate.

The main objective of this study is to comprehend the learning culture that requires curriculum designers to engage in the utilitarian orientation where instructional efficiency is concerned. Technological advancement in computer and communications has changed the culture of communications and learning. Thus, we need to address the issue of learning culture and how it may affect the curriculum design of higher learning institutions. "A learning culture is a set of organizational values, conventions, processes, and practices that encourage individuals and the organization as a whole to increase knowledge, competence, and performance" (Oracle, 2013, p.1). This study was designed with a focus on predicting the model of a learning culture where ethics, attitude and social norms affect the use of mobile wireless technology in learning. The

following discussion is based on related research and how it moulds the framework of the study.

Ethics of Using Mobile Wireless Technology

Mobile technology has impacted people in many ways, from reducing geographical distance and expanding social connection networks to placing information on one's fingertips and improving one's lifestyle. Previous research included the importance of mobile technology in learning (Ismail & Idrus, 2009; Tan & Kinshuk, 2009; Alvarez, Alarco, & Nussbaum, 2011). Very little discussion and elaboration on research has been explored in terms of ethical use of mobile technology in the context of social connectivity and information sharing. Ethics relates to the rules of behaviour about what is good and bad (Merriam-Webster, 2011). In another context, ethics relates to culture that is embedded with values. In this world without boundaries, one can easily invade the privacy of others and disclose information without permission. However, in mobile technology, which uses wireless Internet connectivity, other bigger issues arise such as unsecured passwords that a wider audience access to information from individual mobile sets. In the context of social behaviour, the use of mobile technology in inappropriate situations creates unhealthy social environments. These include driving distractions (Young, Regan, & Hammer, 2007; Lam, 2002), annoying use of mobile phones in public

and its applications in public restricted venues (Turner, Love, & Howell, 2008) and also boundaries between work and social life (Gant & Kiesler, 2002). There is no guided rule of ethical use of mobile phones except that the action becomes acceptable behaviour that moulds changing social norms.

Social Norms

Social norms relate to culture or communication norms. In the context of Asian countries, religion plays a very important role in shaping the culture. Ribble, Bailey and Ross (2008) related the norms of behaviour with technology as digital citizenship. They have identified nine areas of behaviour in digital citizenship i.e. i. Etiquette, which involves procedure or standards; ii. Communication, which relates to the exchange of information; iii. Education processes, which involve teaching and learning; iv. Access to technology and society; v. Business and commercial use; vi. Responsibility for actions taken; vii. Autonomous freedom for the digital world as well as safety and security. They have also explained that there is no written rule for all the aspects of behaviour in using mobile technology. Thus, its benefit lies in using it correctly and for socially beneficial purposes. In this present study, social norms indicate parental involvement, religious influence and the people around the individual who mould his decision to use or not to use mobile technology as part of his lifestyle.

Attitude in Using Mobile Technology

Abouzahra and Tan (2013) propose a framework of mobile technology use in personal health records. They refer to attitude as the extent to which the individual values the use of mobile technology in the context of health. MacCallum and Jeffry (2013) analysed the construct of attitude in the study of ICT skills and adoption in mobile learning. Attitude has been confirmed as a construct developed by items related to self efficacy and perceived usefulness. Their findings also indicate the importance of specific ICT skills in the adoption of mobile learning. Other research has shown that attitude and subjective norms affect mobile banking adoption (Aboelmaged & Gebba, 2013). However, Aboelmaged and Gebba also found that behavioural control and usefulness were not significant predictors to mobile adoption in banking. Evaluating the concept of using mobile technology as lifestyle, attitude in this study relates to the agreement among individuals that using mobile technology is positive or negative. This includes motivational incentives of mobile use based on its main features such as needing to take a digital device everywhere, being willing to spend money, being able to communicate easily and finding it useful in daily life. Thus, using mobile technology calls for being willing to invest money and time, even to purchase the most updated/latest gadget or software in the market. Thus, the construct of attitude comprises not only self reflection on beliefs but also the usefulness of mobile technology and the

ability to control behavior through the skill of using mobile technology to communicate.

Applications of Mobile Technology in Learning

In providing evidence of mobile technology use in learning, one must be able to relate to the individual control or skills needed for its use and application. The use of mobile technology in learning requires specific skills such as downloading the application of Moodle to access a Learning Management System (LMS) and learning tools such as dictionaries, note-taking features and other necessary tools. In any organisation, the use of mobile technology is becoming a necessity and is no longer a choice as learning and teaching is now firmly established in the use of websites or learning portals designed for mobile applications. The application of a LMS, for instance, provides learning and teaching in a comprehensive specially designed package that allows resources and information to be quickly and conveniently uploaded, updated and downloaded.

Previous studies have shown the adoption of mobile technology in learning related to ICT skills (MacCallum & Jeffrey, 2013), language learning through noticing and recording (Kukulska-Hulme & Bull, 2009), learning design frameworks (Alvarez et al., 2011), virtual laboratories in engineering education (Alkouz, Al-Zoubi, & Otair, 2008), LMS as a learning package (García-Peñalvo, Conde, Alier, &

Casany, 2011) and usability consideration (Mostakhdemin-Hosseini, 2009). However, applications such as Google map, social network sites for communications and Picassa to store picture libraries can also be used and applied for learning purposes. Mobile technology allows the learning community to remain connected with lecturers as well as learning engagements.

The place of attitude, ethics and social norms in learning culture can be better understood by studying the theory of Planned Behaviour (PBT) by Ajzen and Fishbein (1975). This theory explains the psychological and social factors that are pertinent in the context of Mobile Wireless Technology (MWT) using a model based on attitudes, subjective norms and control beliefs. PBT postulates that attitude is the component that explains the value of self-performance, whether positively or negatively, while subjective norms shape the individual's perceptions about behavior, which is influenced by the judgement of others (parents, people, friends). Control beliefs conceptually relate to the self efficacy that facilitates or impedes behaviour. The model of attitude, subjective norms and control beliefs is said to predict the intention to act and the actual behaviour. In this study, control belief is replaced with the perceived usefulness of MWT. Thus, the hypothesised model is postulated to indicate three predictors (social norms, attitude and ethics) on the actual use of MWT in learning.

Predictors of Planned Behavioral Theory (PBT)

Linking the concept of beliefs and behaviour, Ajzen and Fishbein (1975) explored a model that predicts the deliberate behaviour of an individual. They expanded the original idea behind the Theory of Reasoned Actions by including an additional factor, perceived behavioural control. Perceived behavioural control or control beliefs is an expansion of the theory of self-efficacy by Bandura (1986), which is explained using social cognitive theory. Thus, it is about the confidence and ability to control behaviour. Specifically, Fishbein and Ajzen (1975) referred to human actions as being influenced and guided by three factors, namely, behavioural beliefs, normative beliefs and control beliefs. Behavioural beliefs include consideration of the consequence of behaviour that directly affects attitude. Normative beliefs are the consideration of what people think about the action. Control beliefs relate to which factors impede or facilitate the behaviour. It involves the behavioural control of feeling confident to carry out the behaviour, whether or not it is thought to be easy to perform. Thus, the theory helps us to explain which action would work and which would not. It also helps us understand how we may change the behaviour of an individual.

However, Schepers and Wetzels (2006) asserted that PBT explained only 40% of variance of behaviour. Thus, Ajzen's PBT model can be used by researchers to predict individual behaviour or actions, but with inclusion of other variables for higher model prediction.

Expansion of PBT: What Do Others Say?

Buchan (2005) explored individual, social, moral and organisational factors to predict ethical intentions in the public accounting domain. On the other hand, Broaddus, Schmiede and Bryan (2011) expanded PBT from demographic variables, namely, gender to predict the intention to use a condom among high-risk factor adolescents. Moral norms were included in a study where the findings showed the strongest predictor to charitable intentions. This finding was shown in the expansion of PBT by Van der Linden (2011). Baker and White (2010) studied adolescents' engagement in frequent SNS use. They expanded the role of group norms and self esteem. Thus, Ajzen's PBT is applicable not only in the social sciences but also in health sciences and other fields. More factors need to be studied to predict the intended behaviour of an individual.

In terms of attitude in predicting the intention to behave, Fishbein and Ajzen (1975) related it to the evaluation of the behaviour i.e. whether it is positive or negative and the motivation to trigger the attitude. Attitude is said to be influenced by many beliefs but only the salient belief will dominate at certain times (Ajzen & Fishbein, 1975). However, it is difficult to determine which salient belief is affecting the attitude. Further, Sutton (1994) asserts that past behaviour rather than cognition as assumed by PBT influences present behaviour. Past behaviour includes habits that are repeated. However, when people are knowledgeable and informed about what

is good and bad, bad habits will no longer serve as the source of information to predict the attitude. Thus, this present study will not look into beliefs but will, rather, determine the attitude of individuals in terms of their ethics in the use of MWT. Attitude refers to preference for the technology and how it applies in the individual's lifestyle.

Perceived behavioural control (PCB) is postulated to be based on a similar concept as self-efficacy by Ajzen (1991), which relates to skills and ability. Conner and Armitage (1998) critically reviewed the literature on PCB and asserted that Dziewaltowski, Noble and Shaw (1990) and McCaul, Sandgren, O'Neill and Hinsz (1993) made clear distinction between self-efficacy and PCB. This is explained from the perspective of self-efficacy as determining academic achievement. However, PCB determines exercise behaviour. Thus, the inconsistency of the prediction of intended behaviour in the findings indicates a careful need to assess whether skills or the need for volitional control of the behaviour is relevant.

In PBT, subjective norms function in the normative beliefs of of people when they are considering whether or not to engage in a behaviour. Thus, whether or no the behaviour is acted on depends on which is greater i.e. the need of the individual to accommodate the perceptions of others or the extent of the motivation to comply with the behaviour. Conner and Armitage (1998) show that subjective norms are the weakest predictor of intention to act out behaviour in PBT. This, however, could be due to the

way it was measured and operationalised in the study. Ajzen (1991) further discussed the issue by suggesting moral norms included in normative beliefs. This relates to the ethical dimension, which has direct influence on attitude. As elaborated by Raats, Shepherd and Sparks (1995), moral obligation not only affects intention but also directly influences attitude. Thus, PBT model needs further attention to empirically prove the evidence of a new link between ethics and attitude. However, Conner and Armitage (1998) further highlighted that these antecedents may not be the case if personal values or personal norms that shape individual self-identity are involved. Thus, the present study seeks to empirically address the influence of ethics on attitude and ethics on the intention to carry out behaviour in the context of mobile wireless technology usage.

Theory of Planned Behaviour in the Context of Mobile Technology

Batthi (2015) explored the use of mobile technology in banking, showing an indirect relationship between social norms and the intention to adopt use of mobile technology in banking with ease of use as the mediator. In the Theory of Acceptance Model, Schepers and Wetzels (2006) also found a similar relationship between social norms and perceived usefulness but somehow, social norms can also directly influence the intention to use the specific computer technology. In Kim, Jin and Park (2009), the perceived ease of use, usefulness and enjoyment, and subjective norms directly

influenced attitudes towards mobile communication and mobile commerce. Attitude was said to influence the use of mobile technology in shopping. Based on previous research underpinning the Theory of Acceptance Model and the Theory of Planned Behaviour, social norms can function both as a direct and indirect predictor to the intention of carrying out behaviour particularly in mobile technology use.

METHODS

Research Design

The questionnaire used in this study was self-constructed based on the operational definitions from Ajzen's Theory of Planned Behaviour. The items (47) were constructed based on four dimensions, namely, attitude, social norms, ethics and actual use of mobile in learning. The questions were based on a 5-point Likert scale from strongly disagree (1) to strongly agree (5); (3) was designated as neutral (neither agree nor disagree). The demographic information was also identified. Upon validation, 100 samples of the questionnaire were sent to one university in Kuala Lumpur as a pilot study with a reliability of Cronbach's alpha of 0.67 (acceptable value at 0.60 by Hair, Black, Anderson, & Tatham, 2006).

The final survey was carried out among five universities and one community college in Malaysia. A letter of consent was sent to each organisation, from which the study samples were randomly stratified and selected. A meeting was arranged to meet the respondents, distribute copies of the

questionnaire and administer the survey process with the assistance of the respective university lecturers/college instructors.

The structural equation modelling (SEM) was applied to predict the m-Learning Culture Model shown in Figure 1, which implicates the design of curriculum involving components such as ethics, social norms and attitude. A statistical requirement of 250 samples had been fulfilled since a sample of 490 was randomly selected and responses from these samples were analysed.

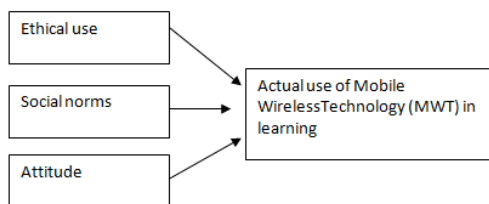


Figure 1. Hypothesised model of m-learning culture

Analysis Procedure The data analysis involved descriptive statistics to display the distribution and breakdown of demographic information derived from replies given by the study samples. Structural equation modelling (SEM) was used to validate the adequacy and fitness of the hypothesised model. The following steps were conducted to assure the model's goodness of fit.

- i. Delete the offending estimates that contributed to the negative error variances, standardised coefficient exceeded or approaching to 1.00 and very large or too small standard errors indicating approaching 0.00 or 1.00 (e.g. Byrne, 2005).

- ii. Assess the overall model fit.
 - a. The acceptable model fit measures include X² statistics with $p > 0.001$ (e.g. Hair, Anderson, Tatham, & William, 1998). Root mean square error of approximation (RMSEA) with values < 0.08 were acceptable (Hair et al., 1998), while Levesque et al. (2004) suggested values < 0.05 were a good fit, < 0.08 were reasonable and > 0.10 were a poor fit.
 - b. The incremental fit index applied in this study included: the goodness-of-fit index (GFI), incremental-fit index (IFI) and comparative-fit index (CFI) with the values approaching 0.9 and above as a good-fit model (Hair et al., 1998).

iii. Structural model fit

Once the parameter was estimated concerning the identification of the items loaded on each factor in the measurement model, the full latent structural model was estimated and all measures of good-of-fit were accomplished. The accepted critical ratio (CR) with the t value for the one-tailed test at 1.645 for the 0.05 significant level and 1.96 for the 0.01 significant level were used.

RESULTS AND DISCUSSION

Frequent Usage of Social Communications Applications

To plan and design a curriculum based on mobile technology, one must understand

mobile-usage culture among students of higher learning institutions. This study focussed on behaviour relating to the use

of the WhatsApp application among 490 sampled students at five selected universities in Malaysia.

Table 1
Frequent usage of social communications applications with number of students

	Whats Apps	Skype	Wechat	Line	Oovoo
Never	131	329	379	224	277
Once a month	65	223	150	30	17
Once a week	21	80	39	70	72
Twice a week	321	71	122	350	245
Every day	241	76	89	105	168
Total	779	779	779	779	779

Source: Responses on questionnaire

Table 1 shows that WhatsApp was the most frequently-used social network app (241 responses/daily) followed by Oovoo, Wechat and Line. The lowest daily usage was of Skype. The finding suggests that further research is necessary to integrate the new finding in the curriculum.

Predicting M-Learning Culture Among Students in Higher Learning Institutions

The hypothesised model was tested to determine whether or not all the three factors, namely, ethics, attitude and social norms directly affected the use of mobile technology in learning. The results indicated that the hypothesised model had to be rejected due to non-significant relationship between ethics and m-learning ($\beta=0.11$, critical value <1.96). Thus, the overall results showed a discrepancy of model fit with the sampling where $IFI=0.83$ (results

were expected to show non-significant model with $IFI>0.9$ and $GFI >0.9$).

A re-specified model was tested such that social norms and attitude affected ethics and ethics directly affected m-learning (Figure 2). The results satisfied the guidelines of the model fit, where $IFI=0.905$; $GFI=0.939$; and $RMSEA=0.052$. Despite $p <0.05$, it was ignored due to the sensitivity of the chi square values having been affected with a big sample size of greater than 250 (Kline, 2005) (see Figure 2).

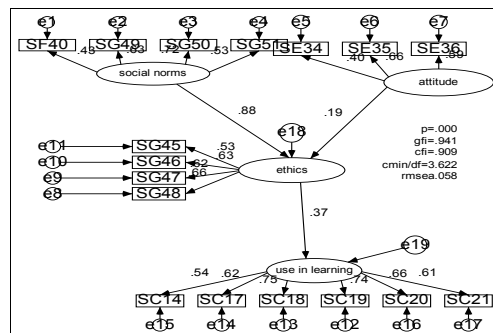


Figure 2. Re-specified model of m-learning: Accepted

Table 2
Standardised parameters with critical ratio >0.96

Relationships			Parameters
Ethics	<---	Social norms	0.763
Ethics	<---	Usefulness	0.124
Use in learning	<---	Usefulness	0.186
Use in learning	<---	Ethics	.0311
SG49 I believe people read faster in Sms text than free message applications such as Whatsapp/Viber.	<---	Social norms	0.578
SG50 My religion helps me to be aware of my behaviour in using mobile technology.	<---	Social norms	0.732
SG51 My parents' advice ensure ethical mobile usage.	<---	Social norms	0.446
SF40 People around expect me to update my activities via mobile technology.	<---	Social norms	0.435
SE34 I have no problem paying the bill/post paying for my mobile.	<---	Usefulness	0.00406
SE35 I am able to sit down anywhere peacefully without my mobile device.	<---	Usefulness	.623
SE36 I am willing to pay any cost for mobile communication.	<---	Usefulness	.673
SG48 I will use free applications in mobile technology for short messages to reduce my mobile use bill.	<---	Ethics	0.654
SG47 I am brief when using mobile technology to reduce my mobile use bill.	<---	Ethics	0.496
SG46 I only reply any call or message if contacted at an appropriate time.	<---	Ethics	0.539
SG45 I use my mobile when I am in restaurants only when necessary.	<---	Ethics	0.508
SC19 I access course tutorials.	<---	Use in learning	0.729
SC18 I access course assignments.	<---	Use in learning	0.686
SC17 I access educational games.	<---	Use in learning	0.600
SC14 My teacher/lecturer gives me important information for learning.	<---	Use in learning	0.531
SC20 I access course tutorials.	<---	Use in learning	0.649
SC21 I always explore mobile applications to be used in learning.	<---	Use in learning	0.581

Relationship Between Social Norm Factor and Ethical Use of Mobile

The influence of social norms on ethical use showed significant value where $\beta=0.73$. On further investigation, the study found that:

- i. The results showed a greater impact of social norms on the ethical justification

for the use of mobile technology. This suggests that social norms played an important role in improving access to education and promoting new learning that promoted digital and ethical behaviour among students (Attewell, 2005; Ribble et al., 2008; Valk, Rashid,

& Elder, 2010; Ling & McEwen, 2010). The corollary of this to education is the attempt to recognise and assess the value of non-curriculum learning that may question the legitimacy or supremacy of formal education (Sharples, Arnedillo-Sánchez, Milrad, & Vavoula, 2009).

- ii. People around, religion and parents played an important role in shaping the students' action in mobile use. Nowadays, many parents see the potential and value of mobile devices, and as such they help their children with appropriate use of mobile phones at school in order to receive moral and religious instruction away from school.
- iii. Student awareness of ethical use of mobiles in daily life indicates a positive culture among students in Malaysian higher learning institutions. It suggests that students' interactions through the mobile phone have added new scope to ethical considerations. Understanding the values that govern the application of daily ethics via mobile-phone use have provided opportunity for the students to see the positive side of society's ethical norms and behaviour, as well as reflect on the social contexts in which these norms and behaviour emerge (Ling & McEwen, 2010). The mobile phone has resulted in tighter ties with friends and family (Ling, 2008). The use of the mobile phone in daily life has brought about socially consistent etiquette that is based on a reflexive sense of what we expect of others and vice versa (Ling & McEwen, 2010; Nordal, 2000).

Relationship Between Attitude (Perceived Usefulness) Factor and Ethical Use of Mobile Technology

The calculated value ($\beta=0.124$) measured the students' attitude (perceived usefulness). Based on this measure, it can be concluded that:

- i. Respondents chose to use mobile technology in daily life, were not able to sit down anywhere peacefully without their mobile device and were willing to pay any cost for mobile communication. This attitude influenced their actions in terms of ethical behaviour to talk briefly to reduce mobile use bills, replying calls or messages at an appropriate time, using mobile devices in restaurants when necessary and using free applications for short messages. This finding was consistent with findings reported in Alhabahba, Mahfoodh, Pandian, Mohammad, Enas, Ali and Hussein (2014), which revealed that Saudi Arabia students enjoyed the benefits of using Smartphones in learning activities. This finding also supported reports from various sources that the interaction between students and communication technology while using mobile phones might allow actual behaviour and ethical development in learning and formation of social ties (Albirini, 2006; Alhabahba et al., 2014; MacCallum and Jeffry, 2013). However, the findings from this study seemed contrary to what had been revealed in Underwood, Luckin and Winters (2012), where students

- perceived that the problems related to the use of the interface design; login to use or purchase the product required performing some other tasks. Due to this requirement, students developed the notion that they could no longer restrict the use of mobile phones only for learning purposes.
- ii. Despite their willingness to invest money in mobile technology, the students were still careful not to spend unnecessarily. Teenagers' investment in mobile technology compelled their decisions and choices to be dependent on the underlying ethical reasoning employed because they no longer relied on a single decision as they re-aligned the positive and the negative aspects of talking versus texting (Ling & McEwen, 2010).
- ii. Ethical behaviour in persons or society allow students to think critically about the use of mobile technology in learning. Jones, Issroff, Scanlon, Clough, McAndrew and Blacke (2006) stated that mobile technology users adjusted the gadget in accordance with their way of life, belief and practice. This suggests that the use of mobile technology is shaped by ethics and norms that govern the outcome of these activities. Ethical or appropriate activities are viewed as being a very important part of constructing identity among younger mobile users (Jones et al., 2006). Thus, there are usability and cultural issues that could be derived from the trends in youth culture.

Relationship Between Ethical Use of Mobile Factor and Mobile Learning

The relationship between the ethical use of mobile technology and its actual use in learning shows $\beta=0.311$. It can be concluded that:

- i. When students talk briefly to reduce mobile use bills, reply calls or messages at the appropriate time, use mobile devices in restaurants when necessary and use free applications for short messages, they learn to use mobile technology (access course tutorials, access course assignments, access educational games, aware that

The above findings asserted that the overall prediction of the model was re-specified with the factors of social norms and attitude towards the use of mobile technology, which directly affected the ethical use of mobile technology. With these relationships, it can be said that ethics directly influenced mobile learning. Thus, curriculum designers in higher learning institutions need to address the ethical usage of mobile technology and inculcate social norms before embarking on the real and actual use of mobile technology in learning.

CONCLUSION

This study revealed that WhatsApp was used by 241 respondents as their most frequent daily social network site. This was followed by Oovoo, Wechat and Line while the lowest daily usage was of Skype. Since there was no specific reason given for these choices, further research should be conducted to enrich the findings on the culture of using mobile applications to determine whether or not these choices were influenced by friends or were mainly due to the culture. The findings showed that there was a greater impact of social norms on the ethical justification for the use of mobile phones in higher learning institutions. This suggests that social norms played an important role in improving access to education at the institutions that were surveyed. This finding is consistent with the report by Attewell (2005), Ribble et al. (2008), Valk et al. (2010) and Ling and McEwen (2010). Thus the use of mobile technology should promote new learning and ethical behaviour among students.

The study indicated that the respondents were aware of the usefulness of MWT, and were, therefore, willing to invest in the use of mobile technology for learning purposes. In addition, the people around, religion of parents and schools were important factors in shaping the students' behavior in using mobile phones in the course of their daily lives. This implies that curriculum design should include ethical use of mobile devices and behavioural guidelines for the use of mobile devices as components or subjects in the tertiary-level curriculum. Further

enhancement, encouragement and wider accessibility to using the Internet would further expand the use of m-learning at the tertiary level of education.

The model of m-learning culture tested in this study found that ethics, attitude and social norms affected the use of mobile devices in higher learning institutions. This finding explains the importance of the culture of m-learning, which should be addressed implicitly in designing curriculum for tertiary level education. The significant contributions of ethical use and behaviour guidelines are also necessary for inclusion in the said curriculum as they affect the actual use of MWT in learning. The findings also showed that respondents were willing to invest in mobile technology. This suggests that the education system should accommodate the integration of technology in teaching, learning and assessment. These findings have contributed to the expansion of the Theory of Planned Behaviour (PBT) to include use of mobile technology in learning activities.

Implications of Study

This study embarked on investigating the issue of technology integration in curriculum design for higher learning institutions. The findings from this study imply that curriculum designers should include a learning module specifically on the ethics of using mobile technology and they should address the issue of the social norms among students to ensure that learning goals and needs be achieved. Further research needs to be carried out

to improve the instrument with greater emphasis given to the actual implementation of mobile learning and applications of mobile technology in learning. A larger population and sample size is needed to improve empirical evidence with respect to variables such as social norms, attitude and ethical use of mobile technology.

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Unqualified Audit Report and Non-Compliance with IFRS: Interview Evidence

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ABSTRACT

This study aims to explore the reasons why an unqualified audit report was issued despite non-compliance with the International Financial Reporting Standards (IFRS) disclosure requirements. To achieve this objective, a semi-structured interview was used to gather opinions of auditors. Our findings suggest that materiality and true and fair view could be the reasons for issuing a clean audit report despite significant non-compliance with accounting standards. The findings of this study might assist regulators, standard setters and professional accounting bodies in monitoring and safeguarding the quality of financial reporting.

Keywords: Audit report, IFRS, materiality, true and fair view

INTRODUCTION

Compliance with accounting standards or the International Financial Reporting

Standards (IFRS) in the preparation of financial statements implies that companies provide sufficient information to enable stakeholders in making economic decisions about the company. Non-compliance with the IFRS either would result in misleading, inadequate or inaccurate disclosure in the financial statements. Hence, compliance with the IFRS is said to be as important as the standards themselves (Hodgdon, Tondkar, Harless, & Adhikari, 2008). Generally, non-compliance with accounting standards would lead to qualification of audit opinion or audit report (Cairns, 2001; Forker, 1992).

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Prior literature, however, has shown that companies may not necessarily comply with accounting standards (e.g. Ahmed & Nicholls, 1994; Tai, Au-Yeung, Kwok, & Lau, 1990). Worryingly, prior studies also highlight that auditors sometimes issue an unqualified or clean audit report despite significant (or material) non-compliance with accounting standards (e.g. Abdullah, Sulaiman, Ismail, & Sapiei, 2012; Al-Shammiri, Brown, & Tarca, 2008; Glaum & Street, 2003). Siddique and Podder (2002) in their study of the effectiveness of audit of banks in Bangladesh also found that clean audit reports were issued although the banks had overstated their profits. Therefore, it is questionable when non-compliance with accounting standards does not warrant qualified audit opinion. The following research question was addressed in this study: Does non-compliance with IFRS disclosure requirements warrant a qualified opinion?

To the best of our knowledge, the issue has not been investigated in any study so far. This study aims to contribute to the extant literature on compliance with mandatory disclosure and audit report by exploring the potential reasons why an unqualified (or clean) audit report was issued despite significant non-compliance with accounting standards disclosure requirements. The findings of this study might help regulators, standard setters and professional accounting bodies in monitoring and safeguarding the quality of financial reporting.

LITERATURE REVIEW

Accounting Standards and True and Fair View

Reporting requirements, rules and regulation on accounting in Malaysia are stipulated in the Companies Act 1965 (CA1965) and the Financial Reporting Act 1997 (FRA1997). CA 1965 requires the directors of companies to prepare their accounts in accordance with the approved accounting standards and the accounts must give a *true and fair view* (TFV) of the state of affairs of the companies. The approved accounting standards are defined in the FRA1997 as accounting standards, which are issued or adopted by the Malaysian Accounting Standards Board (MASB). Subsequent to the full convergence announcement in 2008, the MASB issued the Malaysian Financial Reporting Standards (MFRS), which is fully IFRS-compliant and applies to all companies other than private entities¹ beginning 1 January 2012.² The MASB accounting standards are mandated by law and the enforcement of the standards were

¹Private entities are private companies incorporated under the Companies Act 1965 that are not required to prepare and lodge any financial statements under any law administered by the Securities Commission (SC) or Bank Negara; and are not subsidiaries or associates or jointly controlled by an entity that is monitored or administered by the SC or Bank Negara

²Prior to 1 January 2012, all companies other than private entities applied the Financial Reporting Standards (FRS)

entrusted to the three regulatory agencies, namely, the Securities Commission (SC), the Central Bank of Malaysia (Bank Negara) and the Companies Commission of Malaysia (CCM). The companies' financial statements shall be deemed not to have complied with the requirement of any law administered by these bodies unless they have been prepared and kept in accordance with MASB approved accounting standards. The company that complies with the approved accounting standards is also required to make an explicit and unreserved statement of such compliance in the notes to accounts, and the financial statements shall not be described as complying with the approved accounting standards unless they comply with all the requirements of the standards.

Despite the paramount importance of TFV in the preparation of financial statements, the definition of TFV is not given in any law (Alexander, 1993; Evans, 2003). Hence, TFV or fair presentation of financial statements is normally achieved by compliance with accounting standards. Though compliance with accounting standards is emphasised, the CA1965 also provides relief for directors for not complying with the accounting standards if they believe that compliance would not give a true and fair view of the results of the business and the state of affairs of the company or group.³ This relief is also referred to as 'true and fair view override' of accounting standards (Nobes, 2009; Alexander & Archer, 2003). The directors who choose to use this relief are required by the CA1965⁴ to state the reasons for

non-compliance with approved accounting standards in the notes to the accounts of financial statements.

Audit Report

The Companies Act 1965 requires auditors to state in the auditor's report whether the companies' accounts are prepared in accordance with the provisions of the Act so as to give a true and fair view of the company's affairs and in accordance with the applicable approved accounting standards.⁵ An unqualified (or clean) opinion is expressed when the auditor is able to conclude that the financial statements give a true and fair view (or are presented fairly in all material respects) in accordance with the applicable approved accounting standards. In other circumstances, the auditor is required to either disclaim an opinion or qualified or adverse opinion depending on the nature of the circumstances. According to the International Auditing Practice Statement (IAPS)⁶, the auditor does not express an unqualified opinion if the financial statements contain any departure from the IFRS⁷ and the departure has a material

³Subsection 166A (4)

⁴Subsection 166A(5)

⁵Section 174 of CA1965

⁶IAPS is a supplement to ISA700, "The Auditor's Report on Financial Statements". IAPS provides guidance on the application of ISA700 in cases where financial statements are prepared using the IFRS or include a reference to the IFRS

⁷For convenience, this paper refers to MFRS, IAS and FRS as IFRS

effect on the financial statements. Such a departure results in a disagreement with management regarding the acceptability of the accounting policies selected, the method of their application or the adequacy of financial statement disclosures.

Materiality Concept

Materiality is an important issue because it involves an auditor's decision of whether an item should be disclosed or adjusted in the financial statements, and accordingly, affects the audit opinion (Nelson, Smith, & Palmrose, 2005). According to the materiality concept, the approved accounting standards need not be applied to immaterial items. Disclosure or formal adjustment error is not required if the item is immaterial and does not affect users' decision making (Acito, Burks, & Johnson, 2009). Hence, it can be assumed that an item was immaterial if it was not disclosed in the financial statements (Icerman & Hillison, 1991). It is important to note that the concept of materiality is also closely related to the characteristics of relevance. Thus, the management may have the tendency not to disclose information if they perceive users to have no interest in such information (i.e. it is irrelevant to the specific user's needs) (Ernst & Young, 2010).

Despite the importance of materiality in auditors' reporting decisions, there is no clear guideline for determining materiality (Ernst & Young, 2010; Acito et al., 2009). The accounting and auditing standards only provide general guidelines on how to determine materiality; thus, many of

the decisions regarding materiality depend on the professional judgement of auditors and preparers, where both quantitative and qualitative factors⁸ must be considered (Acito et al., 2009). Therefore, whether an item is material or not in a particular context is perhaps a highly subjective decision and depends on professional judgement (Alexander & Nobes, 2007).

Since materiality depends on the auditor's judgement, it is not surprising that Iskandar and Iselin (1999) found that the magnitude of disclosure materiality threshold varies among auditors; it ranges between 2.7% and 20%. Several researchers also argue that the vagueness in determining materiality provides an opportunity for both companies' management and auditors to misuse the materiality concept to achieve their financial reporting objectives, such as meeting earnings forecasts (e.g. Acito et al., 2009; Wright & Wright, 1997). A concern regarding the materiality issue was raised by the Securities and Exchange Chairman Arthur Levitt; it was quoted by Messier, Martinov-Bennie and Eilifsen (2005) as follows:

...some companies misuse the concept of materiality. They intentionally record errors within

⁸Quantitative factors normally are based on 5% of net income (rule of thumb), whereas examples of qualitative factors that must be considered are regulatory requirements, whether it involves unlawful transactions and whether it affects loan covenants or other contracts (Acito et al., 2009)

a defined percentage ceiling. They then try to excuse that fib by arguing the effect on the bottom line is too small to matter. If that's the case, why do we work so hard to create these errors? Maybe because the effect can matter, especially if it picks up the last penny of the consensus estimate. When either management or the outside auditors are questioned about these clear violations of GAAP, they answer sheepishly... "It doesn't matter. It's immaterial." In markets where missing an earnings projection by a penny can result in a loss of millions of dollars in market capitalization, I have a hard time accepting that some of these so-called non-events simply don't matter. (p. 153)

In line with this argument, several studies provide evidence that auditors were less likely to adjust detected errors or earnings management manipulations before the publication of financial statements, although the errors exceeded the materiality threshold (e.g. Wright & Wright, 1997; Braun, 2001; Nelson et al., 2005). Prior studies also reported that auditors often used a reason of immateriality as an excuse for not incorporating potential misstatements (e.g. Weinstein, 2007; Elder & Allen, 1998). Libby and Kinney (2000) found that auditors were less likely to ask for correction of misstatements that could cause earnings to fall below analysts' forecast, even though they were objectively measured. Weinstein

(2007) reported that in the case of Waste Management Corporation (WS), the auditors simply reconsidered the materiality limit when their proposed adjusting entries were rejected by the WS management, and accordingly, an unqualified audit report was issued to the company. Braun (2001) highlighted that auditors were more likely to waive the proposed adjusting entries when they knew that the litigation risks from doing so were low.

In sum, the above studies not only show that the concept of materiality was abused by the management of companies and their auditors, they also demonstrate that the assumption that companies did not disclose certain items in financial statements because the items were considered immaterial by the auditors may not necessarily be true. Prior studies on the IFRS have also raised the issue of unqualified audit reports when there was non-compliance with the IFRS. Cairns (2001) assessed a sample of 165 companies that used the IFRS in their 1999-2000 financial statements. He observed that several companies still claimed that their financial statements complied with the IFRS, although their accounting policies did not comply with the IFRS. He revealed that 29% of surveyed companies followed 'implied IFRS lite', where companies claimed to have used the IFRS but in fact had not complied fully with the IFRS. He also observed that some auditors issued unqualified audit reports for companies that did not comply with the IFRS.

Glaum and Street (2003) examined the extent of compliance with both the

International Accounting Standard (IAS) and the United States Generally Accepted Accounting Principles (US GAAP) for companies listed on the Germany New Market. They used a sample of 100 companies that applied the IFRS and 100 companies that applied the US GAAP for the year 2000. They found that the extent of compliance for companies that applied the US GAAP was significantly higher than for companies that applied the IFRS (86.6% versus 80.9%). Similar to Cairns (2001), they also observed that none of the audit reports was qualified with respect to non-compliance with IFRS or US GAAP disclosure requirements. They acknowledged that 'materiality' could be a reason for unqualified audit reports, but they argued it should not be the case when there was significant non-compliance. Glaum and Street (2003, p. 93) argued, "...there can be no serious doubt that, at least in the extreme cases where New Market firms reported less than 60% or even 50% of the required disclosure items, qualifications should have applied."

Similarly, Al-Shammiri et al. (2008) examined the extent of disclosure and measurement compliance with the IFRS in six Gulf Co-operation Council (GCC) countries and also found that auditors issued a clean audit report despite non-compliance with the IFRS. Abdullah et al. (2012) examined the extent of compliance with IFRS disclosure requirements of 225 public-listed companies in Malaysia. They found that the minimum compliance score for FRS136, FRS117, FRS119, FRS114 and

FRS2 was zero, which indicates that there were companies that did not provide any part of the information required by these standards. They also documented that a considerable number of companies have compliance scores below 70%, but none of these companies received a qualified audit opinion despite non-compliance with IFRS disclosure requirements.

METHODS

A semi-structured interview was used in this study, whereby an interview guide was used to ensure important issues were covered and that the same basic questions were pursued with each interviewee. The questions used in the interview guide were open-ended questions to allow interviewees to express their views in their own words. A sample of auditors was selected from those who assumed the position of Audit Partner or Audit Manager because their vast experience in auditing and in discussions with clients would assist this study in understanding the issuance of clean audit reports in the case of non-compliance with accounting standards. Auditors from the big four and medium-size audit firms in the Klang Valley were contacted by one of the researchers. Finally, 11 auditors consisting of four from the big four firms and seven from the medium-size firms were interviewed to gauge their views regarding the issue. Each interview session lasted between 30 and 90 minutes. Each interview was recorded and subsequently transcribed verbatim for review. To address the ethical concern in the interview research, we followed

the following research protocol. First, we obtained approval from the research unit of the university before embarking on the interviews. Second, we informed the interviewees of the objectives and procedures of the study, which included their right not to answer specific questions, the anonymity and confidentiality of the interviewees and organisations they represented, how the information would be used and quoted in the study and the plan to publish the findings in journals. To guarantee anonymity and confidentiality of interviewees, their name and the organisation they represented were not disclosed in this study. Instead, they were assigned a number and letter for identification, for example, the first auditor from a medium-size firm was designated AM1 and the first auditor from a big firm was designated AB1.

RESULTS AND DISCUSSION

To the question, “Does non-compliance with IFRS disclosure requirements warrant qualified opinion?” the responses from all interviewed auditors indicated that qualification of audit opinion is not a result of non-compliance with IFRS disclosure requirements. The typical responses of auditors regarding the issues are best illustrated with the following quotation:

So far we have never qualified audit report because of non-compliance with accounting standards. Normally we issued qualified audit report if there is a limitation of scope. If our clients do not want

to disclose certain information, we look how severe the information and how material it is...we cannot qualify the audit report just because of non-disclosure issue.

(AM7)

The responses from auditors implied that non-compliance with IFRS disclosure requirements does not lead to qualified opinion when the non-disclosure item is considered immaterial by auditors. This is consistent with the concept of materiality that disclosure is not required if the information is perceived as immaterial and does not affect users’ economic decision-making. Thus, non-compliance with IFRS disclosure requirements for immaterial items does not affect the status of unqualified audit opinion.

However, it is puzzling in cases when non-compliance is material and yet the company receives an unqualified opinion as reported in prior studies (e.g. Glaum & Street, 2003). As mentioned earlier, the concept of materiality is vague and can be misused by auditors and/or preparers. This suggests that the auditors may use legal means to conform to their clients’ wishes without violating the laws or rules. In other words, the auditors may use loopholes in the laws or standards to achieve their (or the clients’) objective. Therefore, there is a possibility that materiality is also used as an excuse by auditors to justify the unqualified audit opinion despite material non-compliance with IFRS disclosure requirements.

In light of this, the auditors were also challenged by the findings of prior studies regarding unqualified audit reports despite significant (material) non-compliance with IFRS disclosure requirements. In response, while some auditors stated that they could not give any comment about the findings, two auditors believed that materiality could be a reason for non-qualification audit opinion. As one auditor argued:

I think the auditors did not qualify the report may be in his opinion non-disclosure items are not material... though the rule of thumb is 5% of PBT [profit before tax]... we cannot apply one threshold to all cases. The auditors may have their own judgement about the [materiality] threshold they used... the auditors may lower or increase the threshold depending on the companies' condition.

(AM9)

Another auditor remarked:

I think it depends on materiality judgement. The standard said the omissions are material if they affect economic decisions of users where the users here are assumed to have reasonable knowledge of business and accounting and willing to study the information with reasonable diligence...but do you think we have these characteristics of users

in Malaysia?...perhaps this is an issue here... .

(AB10)

Two inferences can be made from the above responses. The first response (AM9) suggests that the materiality concept is subjective and that there is no clear-cut materiality threshold to be used. It is, therefore, possible that certain issues may be deemed immaterial by some auditors but not others (Kranacher, 2007). In this regard, it is possible that materiality is misused or used as a reason by auditors to justify non-compliance with IFRS disclosure requirements. The second response (AB10) implies that the characteristics of users⁹ must be considered in assessing whether or not non-disclosure items are material and affect the economic decisions of users. Given that the users of financial statements in Malaysia are perceived as passive investors, it is possible that auditors use the requirement prescribed in the standard to argue that (non-disclosure) items are immaterial and that they do not influence the economic decisions of users. In other words, the auditors may argue that (non-disclosure) items are irrelevant in the economic decision-making

⁹The accounting standards prescribed the users of financial statements "...are assumed to have a reasonable knowledge of business and economic activities and accounting and a willingness to study the information with reasonable diligence" (FRS101-Presentation of Financial Statements)

of Malaysian users since these users do not possess the characteristics of users as prescribed by the standard.

Nevertheless, three auditors suggested an alternative reason why material non-compliance did not lead to the qualification opinion, referring to the relief in Section 166A (4) of the Companies Act 1965 that allows companies not to comply with the accounting standards when compliance would result in misleading the true and fair view (TFV) of financial statements. Auditors' arguments regarding a TFV are illustrated below:

Compliance with accounting standards is required by law so technically if you're not complied you will get a qualified audit report. But if you look at Companies Act 1965, there is an avenue for them [companies] that said if the compliance with accounting standards does not reflect to the true and fair view to the companies then they can depart from complying... but they can justify a lot of things why the disclosure is so unfair for them...so non-compliance will not necessarily lead to qualified audit report...

(AB4)

Normally we take stand on materiality whether to qualify or not...but sometimes the company did not want to disclose it because it contradicts with the company's

policy ... according to the rule it can be considered as non-compliance case...but in Malaysia we have another clause in the Companies Act 1965...if there is a contradiction between the company's policy and the accounting standards and leads to misleading about the company, then the Companies Act can overrule the standards. So in this case, we cannot simply give a qualified audit report.

(AB3)

The responses by the auditors suggested that companies may opportunistically use a TFV to avoid compliance with certain accounting standards, as mentioned by auditor (AB4) above: "they can justify a lot of things why the disclosure is so unfair for them." The preparers may perhaps have had the incentive to do so because there was no clear definition of a TFV.

As mentioned earlier, though a TFV is fundamental in the preparation of financial statements, it has never been defined in law. The TFV, it is argued, depends on the professional judgement of individuals; its meaning and significance are also affected by cultural, legal and accounting attitudes and perceptions (Alexander, 1993). It is, therefore, not surprising when a TFV has been interpreted and understood differently both within a country and internationally (Evans, 2003; Aisbitt & Nobes, 2001). A different interpretation of a true and fair view among auditors and finance directors is also highlighted in the literature (e.g. Parker

& Nobes, 1991). This indicates that the TFV definition is vague and thus, provides an incentive for preparers and auditors to take opportunities to abuse the true and fair view override (Nobes, 2000; Evans, 2003). Although non-compliance with accounting standards is permitted by law to achieve a TFV presentation, it is also likely that a TFV override is misused by both preparers and auditors. In this case, the auditors may have argued that unqualified audit report was appropriate because non-compliance did not contravene the law.

CONCLUSION

This study aimed to explore the reasons why an unqualified audit report was issued despite significant non-compliance with IFRS disclosure requirements. Overall, the interviews with auditors suggested that non-compliance with IFRS disclosure requirements does not lead to qualification of audit reports on the basis of materiality and true and fair view override. However, it is important to note that the concept of materiality and a TFV definition are both vague and can be abused or misused by preparers and auditors alike.

The indefinable nature of the TFV concept may give an avenue for preparers or auditors to argue many reasons why compliance with accounting standards would lead to misleading financial statements. Furthermore, the Companies Act 1965 also leaves the justification of TFV override to the judgement of

company directors, thus creating a wider interpretation of TFV. Hence, auditors and preparers might use the letter of the law and accounting rules to escape compliance with accounting standards without actually violating the law and rule. Alexander and Archer (2003) referred to this practice as 'creative accounting or creative compliance' where they note:

Creative accounting may involve the use of ingenious arguments to justify a departure from an accounting standard (i.e. an 'override') or 'creative compliance', which is the use of the letter of an accounting standard to disregard its 'spirit'.
(p. 10)

To conclude, while materiality and TFV override reasonably justify the issue of unqualified audit reports despite (material) non-compliance with IFRS disclosure requirements, this study argues that both materiality and TFV override can also be used as an excuse (or misused) by preparers and auditors to justify departure from compliance with IFRS disclosure requirements without risking the status of clean audit report. In other words, the auditors and preparers may use creative compliance to avoid compliance with accounting standards while maintaining the status of unqualified (clean) audit report. Although creative compliance is not violating the law, the intention is to deliberately mislead the users of

financial statements, thus undermining the spirit of the law and accounting standards (Alexander & Archer, 2003), and this issue must be addressed by regulators, standard setters and policy-makers.

The limitations of this study are acknowledged. The samples included only 11 auditors, thus the findings may not represent the professional opinion or practice of all auditors. Further, the questions posed to auditors could only inform on the perceptions of auditors and thus, the answers provided might be biased. Any generalisation of the findings of this study must, therefore, be made with caution.

Despite these limitations, this exploratory study has provided some answers to the puzzling question raised in prior studies as to why unqualified audit reports were issued despite significant non-compliance with accounting standards. This study may be of interest to regulators, standard setters and professional accounting bodies as its findings indicate that there is a possibility that the concepts of true and fair view override and materiality might be misused by preparers and auditors to justify non-compliance with IFRS disclosure requirements without risking the status of unqualified audit report.

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Determinant of Criminal Activities by Some Nigerians Residing In Malaysia: A Socio-Economic Perspective

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ABSTRACT

Even when statistics from various international institutions indicate a relatively higher prevalence of crimes among the locals, the increasing trend of a spike in crime rates among immigrants especially of African descent in Malaysia is also bothersome. Given the rise in the number of reported criminal activities involving, specifically, Nigerians in Malaysia, it becomes necessary to understand the underlying motives for such behaviour as part of the attempt to arrest this trend. The current study explores the factors contributing to criminal behaviour among some Nigerians residing in Malaysia. In view of the prominence of socio-economic factors in explaining criminal behaviour, this study explores this rising phenomenon from a socio-economic perspective. In addressing this objective, this study employs the Analytical Hierarchy Process (AHP), whereby the socio-economic factors are ranked according to their contribution to the crime rate. It is expected that the findings of

this study will shed light on the root causes of this menace, thereby offering policy makers greater information and insight with which to more effectively curb such criminal activities.

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INTRODUCTION

Malaysia's economic growth, especially after the Asian financial crisis of the late 1990s as well as the accommodating disposition of its people, apparently made it a popular destination for immigrants. Without prejudice to the economic benefits that such surge in migration has brought to Malaysia, the issue of unintended social menaces and outcomes it has had to grapple with in recent years has also received both policy and research attention. When viewed in the context of the rise in the incidence of criminal activity in Malaysia, a corresponding increase in the number of immigrants is easily viewed as a possible anecdotal explanation (Del Carpio et al., 2013).

The increasing trend in crime is an ongoing threat to the security and prosperity of Malaysia (Habibullah & Baharom, 2009). The cost of crime is felt by both the citizens and the government. While it may result in emotional disturbance and psychological insecurity for the people, crime is also a significant factor in the lack of confidence besetting the commercial sector, thereby likely reducing foreign investment in Malaysia. Moreover, an increase in crime calls for larger budgets to address it that could have been utilised for more productive endeavours. The opportunity costs associated with the cost of curbing crimes are, thus, enormous.

Even though evidence in the extant literature is mixed regarding the relationship between crime rate and increasing number of immigrants, the comprehensive study

carried out by Del Carpio et al. (2013) in a World Bank-commissioned study found no such significant correlational relationship. This is, however, at variance with the prejudice if not apparent stereotype among the locals in a nation that the immigrants are the likely culprit of any criminal activity noted in the society (Nikolaos & Alexandros, 2010).

In the case of Malaysia, such stigma seems to be attached to immigrants from some countries apparently due to the frequency of involvement of the nationals of those countries in crime. For instance, the current Deputy Prime Minister, Datuk Seri Dr Zahid, while he was serving as the Home Minister, was reported to have reeled out some statistics and informed Parliament in November 2014 of the worrying increase in crime rates involving Nigerian students¹. With such unfortunate statistics, the perception of locals about their migrant guests from Nigeria cannot, therefore, be faulted. However, the stigma and stereotype created would obviously also subsume the many positive contributions that notable Nigerians are also making to the Malaysian economy.

¹The Home Minister reported that Nigerian students were involved in more than 40 criminal cases, while about 400 were behind bars. He also noted that Nigerian students accounted for more than a third of the cases of immigrants overstaying their visas. <http://www.thestar.com.my/News/Nation/2012/03/27/Tighter-visa-rules-for-foreigners-seeking-to-study-in-Msia/>

The efforts of the Malaysian government to strengthen crime control and prevention are commendable. These are important for reducing the long-term impact of crime on society and the government. Crime prevention, especially, is an important mechanism for minimising the cost of crime. A thorough understanding of the causes of crime is needed to achieve effective intervention in terms of controlling and preventing crimes. The contribution of socio-economic factors to criminal behaviour is among the important determinants explaining criminal behaviour. Such a line of inquiry posits that unemployment, a general lack of basic needs and absence of means of sustainable livelihood are among the major factors that instigate criminal behaviour. Focussing on data collected from certain Nigerians convicted of crimes while residing in Malaysia, this study adopts the Analytical Hierarchy Process (AHP) model to rank the collected data according to the various categories of socio-economic variables based on their likely intensity to contribute to criminal behaviour.

Literature Review

Social-economic factors have often been emphasised as an important factor contributing to criminal behaviour. Alonso-Borrego, Garoupa and Vasquez (2011) examined the relationship between immigration and crime rate using an econometric model. The findings of their study indicated that cultural proximity, economic conditions and education play

significant roles in the tendency of a person's becoming involved in criminal behaviour.

In similar vein, Freedman, Owen and Bohn (2013) suggested there was a high tendency of criminal behaviour among immigrants with limited opportunity to legal jobs. Immigrants with little education are more likely to engage in criminal activities due to their limited opportunity of securing a legal job in a highly literate environment like Malaysia. The existence of academic fraudsters who engage in smuggling migrants make it easy for people who have little or no education to secure student visas in order to legalise their status (European Commission [EC], 2010).

In a related study by Buonanno and Montolio (2008) where socio-economic factors were explored in terms of their contribution to criminal activities, it was revealed that unemployment is highly and significantly related to crime rate. This has been explained in terms of committing crimes in a situation where opportunities to secure legal income are greatly limited compared to the number of illegal opportunities available. In addition, the study found that lack of education played a key role in influencing criminal activities. This is based on the belief that the more educated a person is, the greater his chances of earning higher income, which consequently reduces the propensity to commit crime. More so, the study concluded that education incorporates civic components that increase the individual's moral stance and affect his perception of crime.

Dutta and Husain (2009) in their study on crime in India revealed that high conviction rates potentially increased crime rates. This may be explained in terms of deficiencies in the criminal detection and corrective system. Among the economic variables, economic growth was an important factor of criminal behaviour. This is because strong economy presents many opportunities for earning a legitimate income, thereby minimising the incentive to commit crimes. The opposite is true in times of economic difficulty when unemployment rates are high (Freedman et al., 2013).

Gilbert and Sookram (2009) explored the socio-economic determinants of crime rates in Jamaica. The crime variable was represented by the rate of violence per 100,000 persons. Social economic factors were represented by expenditure on education and healthcare. According to the findings of the research, the size of the police force, economic conditions and clear-up charge significantly contributed to the economic conditions in Jamaica. As indicated in the article, economic hardship in the 1970s made it difficult for the majority of Jamaicans to bear the cost of living, which pushed up the crime rate in Jamaica. Those with lower income in particular sought alternative means of survival, which often translated into criminal activity of various kinds. The findings of Weatherburn (2001), who indicated the significant impact of poverty on criminal activities, support the above finding.

Based on the study by the Centre for the Study of Democracy (CSD) (2010), which assessed the contribution of corruption to organised crime in some selected European countries, public offices influenced by some external and internal factors significantly aid organised crime by immigrants. The finding of a study located in Spain revealed the presence of widespread corruption within the social, economic and political spheres, which attracts organised criminal groups, encouraging them to participate in corrupt exchanges and indirectly boosting other illicit activities. As a result of corruption by those supposed to abate and prevent crimes, criminals become more confident and derive more gains from criminal activities due to the reduced probability of being apprehended for their crimes.

Similar cases have been reported in the case of Bulgaria, where those involved in organised crime secured much political influence. According to the study, organised crime generated wealth from drugs, smuggling and prostitution and merged with corporations and groups that owned privatised state-owned assets. Through such means, they were able to transform their accumulated wealth into political and administrative power. This influence in the political and administrative structures provides opportunities for companies to use corruption to win public tenders, avoid taxes and systematically break laws to gain competitive advantages. According to the report, organised crime networks

have found their way into most public institutions, including the police, customs and prosecutors' offices. As a result, all levels of politics and government administration are under some degree of their influence.

Most extant literature on crime make use of secondary data to investigate criminal behaviour with econometric models to examine criminal behaviour. Notable among such studies are Dutta and Husain (2009), Gilbert and Sookram (2009) and Buonanno, (2003). The present study differs from other studies as its approach is based on primary data using the Analytical Hierarchical Process (AHP). The AHP framework ranks the factors contributing to criminal behaviour. Therefore, the researchers anticipate that the findings of this study will serve as a potential guide for policy makers towards more informed decision-making regarding combating criminal behaviour in Malaysia, especially that involving Nigerians.

METHODS

This study explored the socio-economic factors that significantly contribute to

criminal behaviour among some Nigerians residing in Malaysia. The identified factors were then ranked according to their effect on crime based on the opinions of several selected Nigerians, who by the virtue of their experience both at home in Nigeria and residence in Malaysia, were expected to understand to some degree the motivations that lead to criminal behaviour among some Nigerians residing in Malaysia. Through the AHP framework, the following factors were identified: poverty, education, law enforcement, unemployment, probability of arrest and cultural influence.

The application of the AHP framework involved the pairwise comparison of the elements within the matrix regarding which compared element contributed more or less to criminal behaviour. Table 1 depicts the input matrix of the respondent judgement. Each of the elements in the matrix is compared with another.

AHP has gained popularity among researchers because it has a number of advantages, such as, in particular, its ability to accommodate subjective criteria. It is systematic and thorough, easy to apply and

Table 1
Input matrix of the respondents' judgement

	Poverty	Education	Law Enforcement	Unemployment	Probability of Arrest	Probability of Conviction	Culture
Poverty	1	A	k
Education	1/a	1					p
Law enforcement			1				
Unemployment				1			
Probability of arrest					1		
Probability of conviction						1	
Culture	1/k	1/p					1

can accommodate multiple decision makers in solving a particular problem (Islam & Rasad, 2005).

The above matrix indicated that attribute 1 was a times more important than attribute 2 and k times more important than attribute 6. All the diagonal elements of the matrix must be equal to 1 because the element is compared with itself, indicating equal importance. The elements at the lower triangle of the matrix are the reciprocal of the upper triangle. The above matrix containing all the elements identified for prioritisation consisting of a 7x7 matrix. The pairwise comparison of the element was then used to obtain the priorities for the seven elements. In order to obtain the priorities, the geometry mean of the pairwise comparison was computed and served as an input in the pairwise comparison matrix.

Table 2
Rating on the verbal judgement of importance

Verbal Judgement of Importance	Numerical Rating
Equal importance	1
Equal to moderate importance	2
Moderate importance	3
Moderate to strong importance	4
Strong importance	5
Strong to very strong importance	6
Very strong importance	7
Very strong to extremely strong importance	8
Extreme importance	9

RESULTS AND DISCUSSION

This section presents the results of the AHP. We start by presenting the descriptive

statistics. Table 3 below provides information about the respondents:

Table 3
Profile of the respondents

Variable	Category	Freq.	(%)
Gender	Male	9	75
	Female	3	25
Marital status	Single	2	16.7
	Married	10	83.3
Age	25-30yrs	2	16.7
	31-35yrs	5	41.7
	36-40yrs	5	41.7
	41 & above	0	0
Region	North	3	25
	South	9	75
Level of education	Bachelor	1	8.3
	Master's	5	41.7
	PhD	6	50.0
Type of employment	Public Sector	9	0.75
	Private Sector	2	0.22
	Self Employed	1	0.03

Table 3 shows that the total number of respondents who were perceived as having a relative understanding of some of the conditions that can influence criminal behaviour among some Nigerians residing in Malaysia is 12. The number of males and females who participated in filling the AHP questionnaire was nine and three, respectively, representing 75% and 25% of the total number of respondents. Two of the respondents were single while 10 were married. Regarding the age of the respondents, two were within the range of 25-30, five were in the range of 31-35, while five were in the age bracket 36-40. In relation to the state of origin of the

respondents, three were from North Central Nigeria while the remaining nine were from Southwestern Nigeria. Half of the respondents held PhD degrees. Regarding the type of employment of the respondents, the majority worked in the public sector while one was self-employed.

Table 4
The results of the AHP ranking of the socio-economic factors

Categories of Socio-Economic Rank	Factors	Weight
Poverty	0.381	1
Education	0.208	2
Law enforcement	0.161	3
Unemployment	0.106	4
Probability of arrest	0.75	5
Probability of conviction	0.42	6
Culture	0.028	7

Out of the seven socio-economic factors identified, poverty was ranked the highest with a weight value of 0.381. The lowest ranking variables were probability of arrest, probability of conviction and culture. Literature that investigated the contributing factors to criminal behaviour emphasised the variable of poverty (Weatherburn, 2001; Freedman et al., 2013). Poverty is an interplay of many factors, for instance, unemployment. As explained by Nikolaos and Alexandros, (2010), a person who is unable to meet basic needs has a higher likelihood of engaging in criminal activities. For instance, *The Star*, a newspaper, dated Tuesday, 27 March, 2012 reported the move by Malaysian authorities to impose tighter visa rules on selected countries, including

Nigeria, due to the increasing cases of visa violation. Some of the Nigerians involved in crime probably enter Malaysia on a student visa with the intent of working rather than studying. This finding is consistent with that of Adewale (2011), who noted that the Nigerian students' academic sojourn in Malaysia is more often than not moderated by economic consideration and the possibility of simultaneously working and studying. Quite a number of the student respondents in the qualitative study acknowledged that the student visa was meant to grant them entry and legal stay, while their main intent was to work to pay back the source from which they got the money to travel to Malaysia in the first place. There is a high possibility that such kinds of people will resort to criminal activities after unsuccessful attempts of securing a job due to the lack of the requisite qualifications.

The three highest probable contributions after poverty are education, law enforcement and employment with the weight 0.208., 0.161 and 0.106, respectively. Regarding the effect of education on deciding to become involved in criminal activities, many studies indicated a negative relationship between education and criminal behaviour. This indicates that greater education means reduced likelihood of engaging in criminal activities (Machin, Marie, & Vujic, 2011). The following three reasons explain why education serves as a deterring factor to crime: income, time and patience or risk averseness. A person with a high level of education has greater opportunity of securing a job that would facilitate regular

income and as such finds less incentive in becoming involved in crime. Furthermore, such a person has limited time to invest in criminal behaviour. This finding suggests that most Nigerians with a low level of education are more likely to become involved in criminal activities.

The effectiveness of law enforcement plays a significant role in curbing criminal activities. The significance of law enforcement in explaining criminal behaviour has been emphasised by Freedman et al. (2001) and Levitt and Miles (2006). The perception of criminals about the ineffectiveness of law enforcement could induce criminal activities. The increasing crime rate signifies weakness in law enforcement.

The limitation of this study is the inconsistency of its ratio of 0.31, which is above the maximum of 0.1. In such a situation, a re-voting is preferable, whereby the respondents are informed about the result and asked to check and revise their rating (Abduh, 2013). The inability to meet with the respondents due to time limitations prevented a re-voting. Nonetheless, it is envisaged that such inconsistency would not have serious negative implication on the findings in this study.

CONCLUSION

This study explored the determinants of criminal behaviour based on selected microeconomic factors obtained from previous studies on criminal behaviour.

The objective of the study was to rank the identified factors in accordance with the degree to which they contribute to crimes using an AHP framework. Questionnaires were distributed to 12 respondents to discover their views on the importance of the identified variables in accordance with their level of contribution to crime. Our findings indicated that a low level of education, which prevents people from securing legal jobs and decent earnings, induce criminal behaviour among some Nigerians residing in Malaysia. In addition, the findings suggest that ineffective law enforcement is among the reasons for a surge in criminal activities. Since prior literature indicated no consensus regarding the factors that make an individual likely to commit crime, no single strategy can be recommended as an effective means of combating criminal activities. In line with the findings of this study, policy makers are recommended to incorporate the identified factors in their approach to combatting crime.

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Warranty: The Hidden Shield and Sword for the Insurer to Retain Profit under Marine Insurance

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ABSTRACT

Marine insurance is the medium to safeguard and protect the interest of the assured for any damage suffered during the valid policy. It will restore the insured to the same financial position enjoyed before the loss. However, the insurer is only obliged to indemnify the insured based on the damage suffered. An issue arises when the insurer tries to escape payment by adding terms and conditions known as warranty. This is different from the warranty under the contract of a charter party as it refers to a promissory warranty. It is an embedded shield-and-sword under the law for the insurer to deny payment of claim. The warranty is either used for defence in a denial claim or to initiate the stand to escape liability to pay. The concept of suspensive effect adopted under the Insurance Act 2015 was proposed by jurists and scholars to deviate from the strict compliance of warranty. It is hoped that it will bring justice for both insurer and insured. This is doctrinal research which is qualitative in nature. The paper will discuss this matter by referring to the main sources of law under the law of marine insurance.

Keywords: Marine insurance, suspensive effect, warranty

INTRODUCTION

Marine insurance is a contract whereby the insurer undertakes to indemnify the insured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure (Hodges, 1996, p. 1). It is a promise or agreement of compensation for specific potential future losses in exchange for

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a periodic payment known as premium. Marine insurance is designed to safeguard and protect the financial well-being of an individual, company or other entity in the case of unexpected marine losses. However, in all cases the insurer will control the risks and perils by negotiating and inserting limitations i.e. a warranty before the contract is concluded (Hodges, 1996, p. 95).

Warranty is originated from English law drafted in the 17th century and has been adopted by other countries influenced by English law (Dover, 1982, p. 1). Warranty according to marine insurance means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negates the existence of a particular state of facts (Hodges, 1999, p. 269).

When the warranty is introduced, the element of materiality signifies nothing. It means that the insurer has full autonomy to decide the terms and conditions to be part of written policy even though there is no connection with the risks. In *Newcastle Fire Insurance Co v Macmorran & Co.* it was given:-

It is a first principle of the law of insurance, on all occasion, that where a representation is material it must be complied with- if immaterial, that immateriality may be inquired into and shown; but if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore,

the materiality signifies nothing. (Soyer, 2001, p. 8)

The concept of warranty has become the binding precedent and has been adopted in every case. For instance, in the *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* breach of warranty put risk to an end automatically as from the time of breach. This rule has been held appropriate to both marine and non-marine insurance contracts. The unique distinctive of warranty is that materiality and causation are irrelevant. Once the warranty has been made part of policy, it must be exactly complied with. There is no defence and no act of restoration if the breach is acceptable. The rationale of warranty is that the insurer only accepts the risk provided that the warranty is fulfilled. It means that even though the undertaking is made by the insurer, the insurer will only accept the risk and agree to insure the subject matter after the warranty is agreed by the insurer. The warranty will be used as a defence for the insurer in rejecting the claim either during the defence of claim by the assured or commencing the stand that the contract is void (Soyer, 2001, p.11).

The Attempt to Reform Promissory Warranty

The issue of marine insurance warranty has been a main topic of discussion from the beginning of its establishment. The direct effect on the valid contract was the insurer's intention to avoid liability. In all cases, the insurer will discharge from any liability

automatically even for the slightest breach of the warranty. It is due to the nature of warranty as a promise (Hodges, 1996, p. 96). In other words, it must be exactly complied with without any defence and opportunity to restore the breach even for the breach of promise which has no causal connection with the loss. In addition, the insurer is free to introduce any subject of promise to be undertaken by the assurer even though it is immaterial to the risk. This hardship has led to several attempts made by the scholar and judges via their verdict (Hodges, 1996 p. 95).

For instance, Soyer (2001) proposed the reformation to amend S. 33(3) of the Marine Insurance Act 1906, which states that breach of warranty that does not lead to loss or damage will not repudiate the contract. In addition, the assurer must prove that the breach has not caused or contributed to loss in order to enjoy the policy coverage. The second suggestion by the writer was to repeal S. 34(2) of the Marine Insurance Act 1906, which states that in a case where the breach is remedied before the loss, the assurer will be able to recover loss in the absence of a causal link between remedied breach and loss. The suggested reformation was to amend the promissory warranty that caused conflict to the concept of warranty (Soyer, 2001, p. 293).

The literature shows that many efforts have been made by scholars and judges during the process of delivery of judgement to reform or amend the concept of promissory warranty. However, the attempt was technically parallel or similar.

For example, in the case of *Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd* [2006] WASC 104 (Pilbara Pilot), Justice EM Heenan specified four reasons why the insured should have been indemnified: 1) the Plaintiff's actions were reasonable, 2) the loss was caused by the same cyclonic peril the Plaintiff was escaping from, 3) the Plaintiff was acting to avoid damage and protect the insured property and 4) the loss was caused by a peril of the sea and not by the breach of warranty regarding the mooring. The judge ruled that the legislation was not to be taken too literally, stating "a warranty... is a condition which must be exactly complied with, whether it be material to the risk or not." It is merely a trend based on the discretion of judges. It clearly breached the Marine Insurance Act 1906 since it was a promissory warranty and it had to be exactly complied with without defence for the breach to have been automatically discharged from liability. Ruling based on the trend of rulings past by justifying the existing rule in terms of the application is not a credible solution. This approach is simply by way of interpretation, which is open to disagreement and divergence.

The ruling in *Hong Kong Nylon Enterprises Ltd v QBE Insurance (Hong Kong) Ltd* (2002) HCCL 46/1999 suggested that when there is conflict between policy and warranties, then the former will prevail. The insured "warranted that this is a container load shipment." However, it was actually a bulk shipment. As it turned out, the cargo was damaged, but the insurer

refused indemnity. The insured claimed that the Institute Cargo Clause (A) 8.3 overrode the warranty. Clause 8.3 states, “this insurance shall remain in force ... during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to ship-owners or charterers under the contract of affreightment.” Justice Stone agreed with the insured. His Honour stated that the general Clause 8.3 made an exception to the specific warranty. However, to respond to the matter, once mentioned expressly, it is considered an express warranty. Since it is a promissory warranty, it must be complied with exactly and enforced as promised.

In the case of *The Newfoundland Explorer, GE Frankona Reinsurance Limited v. CMM Trust 1440* [2006] Lloyd’s Rep IR 704, the High Court of England and Wales (in Admiralty) allowed breaches of warranty to not interfere with the insured’s indemnification, where that breach was remedied before the loss claimed had happened, and where that loss was unrelated to the breach. The reformation only involved some element of warranty that was not a new concept. In addition, eventually the concept of promissory warranty would have prevailed as it was the main concept of warranty under the Marine Insurance Act 1906 (Hodges, 1996, p. 95). The reformation cannot simply be made by changing the element without considering the whole concept of promissory warranties.

With reference to the case of *Staples v Great American Inc Co, New York*, [1941] SCR 213, Kerwin J said:

In the case at bar, I cannot read the statement in the margin of the policy as a condition that upon the yacht being used for other than private pleasure purposes the policy would be avoided even though at the time a loss was suffered the yacht was not being so used.

According to the case, the breach of warranty without being linked to the loss was permissible and was not considered a breach of promissory warranty. The judge tried to eliminate the element of the promissory warranty, whereby the causal connection between the breach and loss did not need to be established. However, it was the same attempt to reform that had been taken by others.

The UK Law Commission Insurance, in a report written with the Scottish Law Commission, “Contract Law: The Business Insured’s Duty of Disclosure and the Law of Warranties” (2012), stated that almost every country in the Common Law world using an unmodified (or almost unmodified) form of the UK Marine Insurance Act 1906, brought disrepute to UK law “in the international market place” (p. 167). It further criticised the harshness of the law by stating that “the consequences [of the UK’s equivalent of s. 39 of the MIA] 37 lack[ed] logical reason and [could] not be explained in terms of

either legal fairness or economic efficiency” (Law Commission, 2011, p. 1-245).

Bind by law Marine Insurance Act 1906. The solution is by creating a new concept of warranty. To abolished “promissory warranty”.

Insurers should not be able to rely upon marine warranty to deny indemnity to their insured where the breach of warranty is not causative of the loss claimed i.e. the suspensive effect. However, an issue arises when it involves the classification of promissory warranty according to the time of undertaking i.e. “warranted that there must be 3 crew at all time” (Law Commission, 2011, p. 22-26). Therefore, it is the breach of the concept of promise.

Later on, in the case of *ICS v West Bromwich Building Society* [1998] 1WLR, 897, Lord Hoffman attempted to modify the concept by interpreting the wording according to the audience:

The meaning which a document would convey to a reasonable man is not the same as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

However, this is a matter of interpretation. After it was clearly interpreted, the concept of exact compliance under the marine insurance was applied.

A further attempt to reform the warranty via judgement was in the case of *The Milasan* [2002] Lloyds Rep 458, where Mr Justice Aitkens, speaking about “warranted professional skippers and crew” said that they had to be in charge “at all times.” He ruled that, “The warranty obliged the defendant to keep at least one crew member on board the vessel 24 hours a day, subject to (i) emergencies rendering his departure necessary or (ii) necessary temporary departures for the purposes of performing his crewing duties or other related activities.” The judges further explained in order to assist the exact content of marine insurance. The explanation was used as justification when exact compliance with the express warranty stipulated by the insurer in the policy was not met.

The same approach of considering it a matter of interpretation was made in the case of *The Newfoundland Explorer* [2006] EWHC 429 by Mr Justice Gross and in the case of *Pratt v Aigaion Insurance* [2008] EWCA Civ.1314 by Lord Justice Clarke and Lord Justice Burnton. However, the moment the cases concluded, the parties were subject to the concept of promissory warranty. According to the case, the insurance policy had a warranty express term that mentioned that stipulated: “Warranted owner and/or owner’s experienced skipper on board and in charge at all times and one experienced crew member.”

It was found that, “It cannot have been thought that the vessel would be crewed while she was aground or at a place of storage ashore, while being dismantled

etc. It follows that the warranty...cannot be read literally. Some qualification to the term 'at all times' must have been intended." Burnton LJ further explained that, "In the circumstances, the clause should be construed *contra proferentem*...At the time the crew left, the vessel was safely tied up alongside as must happen very often. I would hold that that the insurer has not established that there was a breach of warranty."

Warranties in Marine Insurance

Christopher J. Giaschi, presented to the Association of Marine Underwriters of British Columbia at Vancouver on 10 April, 1997, introduced judicial amendment on the element of warranty. Recent developments in the law in relation to warranty in policies of marine insurance indicate that there is judicial amendment, if not complete revocation, of the Marine Insurance Act. It is only in very rare circumstances that a Canadian court will find a policy to contain a true warranty. These circumstances will essentially be limited, where the warranty is material to the risk and the breach has a bearing on the loss. However, the amendment will jeopardise the concept of promissory warranty under the Marine Insurance Act 1906 (Giashi, 1997).

Suspensive Effect

Shearwater Marine Ltd. v Guardian Insurance Co. (February 28, 1997) No. C935887 (B.C.S.C.) was illustrative of a restrictive approach to warranty. The

policy in this case provided: "Warranted vessel inspected daily basis and pumped as necessary." Although the court found that this condition had been complied with it did consider whether the condition was a true warranty or merely a suspensive condition and held that it was a suspensive condition.

Suspensive effect was mentioned in "The Prospective Reform of Marine Insurance Law in the UK", a study by Professor D. Rhidian Thomas, Emeritus Professor of Maritime Law Founder Director of the Institute of International Shipping and Trade Law at Swansea University. He proposed that breach of warranty was to be treated as 'suspensive' i.e. the insurer should not be liable for the period the assured is in breach of a warranty that is designed to decrease a particular risk (e.g. fire), in which case, the insurer is entitled to reject only claims relating to that risk. Suspensive condition is technically an amendment to element, where 1) the insurer is automatically discharged from liability; 2) the breach can be remedied; and 3) the warranty must be material to the risk (<https://www.swansea.ac.uk/media/IISTL%20Report%202013-30jan-2.pdf>).

Even though there were attempts made by scholars and jurists to reform the warranty, such reformation involved only alteration or amendment of the element of warranty without change being made to the wider concept of warranty. The reformation was to create balance between the parties involved in the insurance agreement in order to uphold the core concept of protection and indemnity.

Insurance Act 2015

In 2006 the Law Commission was asked to think through the existing insurance law regime in the UK to consider whether it was still fit for perseverance in the modern insurance market (Law Commission, 2011). The Commission's decision was that the current law is obsolete, being inconsonant with the realities of 21st century commercial practice. As a result, the Law Commission published The Insurance Bill 2014, which was first put before Parliament in July 2014. The Bill received Royal Assent on 12 February, 2015 to become the Insurance Act 2015 but will only enter into force on 12 August, 2016 to allow the market time to regulate its practices. The Act seeks to extend reforms made in 2009 to consumer contracts of insurance. It will make it more difficult for insurers to avoid claims as a result of technical breaches by the insured (Law Commission, 2011).

The current position as stated in the Marine Insurance Act 1906 is that the warranty is a promissory warranty. The insurer claim will be rejected due to non-strict compliance on express or implied warranty regardless of the materiality of the promise. Unless the insurer waives his right, the insured in no circumstances will be entitled to make a claim (Hodges, 1996 p. 95-106; Wilson, 2010).

Under sections 9 to 11 of the Act the effect of a breach of warranty will be less severe. Any warranty breach by an insured now merely suspends the insurer's liability until the breach is remedied. The insurer will have no liability for any claim arising

if the policy is suspended but once the breach has been remedied then the policy resumes in full force. The Act also stops an insurer from avoiding an insurance contract if a warranty ceases to be applicable to the circumstances of the contract due to a change of circumstances or if it is rendered unlawful or is waived by the insurer.

A further amendment to the existing law under the Act arises from the Law Commission's proposal. Section 11 states that the element of materiality of warranty must be taken into account. This means that non-compliance of the warranty, which has no connection with the risk and does not increase the frequency of risks, is permissible.

CONCLUSION

The introduction of new rules on warranty pursuant to the legislation of Insurance Act 2015 will offer balance between the parties. The insurer has absolute right upon breach of warranty to reject the claim of the insured (shield); however, this requires justification and explanation. In addition, to allege that the claim is void due to breach should be limited to specific circumstances.

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The Impact of Malaysian Foreign Policy on Palestine during Tun Mahathir's Era

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ABSTRACT

During the tenure of Mahathir Mohammed as Prime Minister, the Palestine issue was made a special cause to Malaysia. It was during Mahathir's administration that the government and the country became highly committed to helping to bring world attention to and to resolving the Palestine-Israel crisis. This paper discusses the impact of Malaysia's involvement in the Palestine cause during Mahathir's era and highlights the impact it had on Palestine, Mahathir as Prime Minister and Malaysia as a whole. Malaysia's pro-Palestine cause has helped the world gain in awareness of the Palestine issue; nevertheless, the conflict in Palestine continues, showing no sign of ending.

Keywords: Foreign policy, Mahathir, Malaysia, Malaysia Foreign Policy, Palestine

INTRODUCTION

Since Malaysia's independence in 1957, the country has fought for the Palestinian cause and continues to do so today. During

the period of Tun Mahathir Mohamad's administration as Prime Minister (1981-2002), Malaysia was vocal in championing the cause on both the domestic and international front.

Through careful review of the literature, this paper presents a discussion of the extent to which Malaysian foreign policy has impacted Palestine with regards to helping the Palestinian cause and the impact it had on Mahathir and Malaysia on the whole. This discussion is presented in four sections, namely, 1. Method; 2. Results, which looks at the political and social impact of

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Malaysian Foreign Policy on Palestine; 3. Discussion; and 4. Conclusion.

METHODS

The researchers began this study by looking at the historical roots of Palestine, which is the story of the origin of the conflict between the Palestinians and the Israelis. By looking at the historical records, the researchers hope to bring this conflict to the awareness of Malaysians.

This research depended on primary and secondary data. Primary data were collected from various government institutions as well as the speeches of Malaysian ministers. Secondary data was derived from books, journals, magazines, reports and papers presented at seminar and conferences, local and foreign newspapers as well as diverse material from the Internet.

RESULTS

Political Impact

Since the administration of the first Prime Minister of Malaysia, Tunku Abdul Rahman up to that of Abdullah Ahmad Badawi, the fifth Prime Minister of Malaysia, the country was consistent in championing the Palestinian cause. Although Malaysia's efforts did not bring an end to this conflict, it did, however, bring about significant awareness of people towards this issue on the local and international front.

It was, however, during the administration of Mahathir Mohamad, the fourth Prime Minister, that Malaysia took its commitment towards the Palestinian

cause to another level. He did what other Prime Ministers did not do, which was to speak openly on the issue. To a certain level, he even created controversies at any given opportunity on various international platforms to draw world attention to the issue, even condemning the major world powers including the United Nations. According to him, the Palestinians should be given their rights and Israel should withdraw from a territory that does not belong to it (Rajendran, 1993). Furthermore, those who opposed had no valid reason because the land belonged to the Palestinians (Rajendran, 1993). Perhaps his arguments were based on an open secret as he was the only one with the audacity to voice them aloud. In many international conferences, Mahathir insisted that something needed to be done because if it was not properly addressed, the problem would never be over for the Palestinians. Through Mahathir, the international community was made to realise that this issue revolved around the basic principles of human rights.

Mahathir also argued that when the Palestinians resorted to the use of force, it was not an act of terrorism but rather an act of self-defence. According to him, it was different for the Israelis because the Israelis possessed all the weaponry compared to the Palestinians. If the Palestinians detonated themselves and killed Israeli civilians, it was because they had no helicopter, gunship and rockets to respond to the Israeli ground and aerial attacks. Despite this unfair advantage, the media still described the Israeli attacks as responses to the Palestinian attacks on them

(Rajendran, 1993). Mahathir even urged the world to conduct a proper assessment on the issue of Palestine. In his argument, he included other conflicts faced in the world especially ones that involved the Muslims and global terrorism. In one of his letters to the then President of the United States of America, George W. Bush, he wrote:

While you should hunt down the terrorist and bring them to justice, an all-out war is unlikely to do this. The only effective counter to possible future terrorist attacks and to depleting the ranks of the terrorists is to eliminate the causes of their terrible anger and bitterness. The world must solve the problems of Palestine, Chechnya, Iraq, Iran, Sudan, Libya and others. One can argue that the Muslims brought all these upon themselves but that is not going to get us anywhere. We have to sit down and tackle the problems, whether they are real or they are merely wrong perceptions by the Muslims. It is just as likely that the perceptions of others are equally wrong.... I should imagine that if there is a serious attempt to solve the Muslim problems, the danger of terrorist attacks would be diminished. (Abdullah, 2008)

It is apparent that Mahathir wanted the world, especially the major powers, to look into the problem of terrorism specifically as it affected Palestine and generally as

it affected the world from a different perspective. What he was suggesting was that the oppression of Muslims all over the world had made them angry and vengeful and that because they had no recourse to a solution, they opted for actions that were deemed violent. In many international conferences, Mahathir continuously mentioned that to solve the terrorist problems, issues such as inequality and Muslim oppression must first be addressed.

Through his vocal criticism, Mahathir presented to the world an alternative perspective of Islam. What Mahathir did with the issue of Palestine was not just to support the Palestinians' struggle to win their rights but also to serve as an opportunity for the Muslim world, as led by the initiative from Malaysia, to correct the perception and perspective of the world towards Islam. In one of his speeches (Mahathir, 2003), he criticised the world for associating terrorism with Muslims and Islam. He said:

But acts of terrorism or even simple self-defence by Muslim in Palestine are invariably described as Muslim terrorism. The terrorists, if they are terrorists and in many instances they are not, are labelled Muslim terrorist. Terrorism by others, by ethnic Europeans, by intolerant Christians and Jews and by Buddhists, is never linked to their religions. There are no Christian terrorists, or Jewish terrorists, or Buddhist terrorists, or Orthodox Christian terrorists, which the Serbs no doubt are. (p. 13)

Clearly, Mahathir was not impressed by people who referred to terrorism as acts by Muslims and Islam. This misconception and misrepresentation of Muslims and Islam was the very issue that Mahathir wanted to correct all over the world.

His outbursts came to be seen as common to him and expected of him. As a result, some developed countries did not favour Malaysia. In fact, the Western media also targetted him through their negative portrayals and reports. However, things did change when they began to understand Malaysia's policies. For example, they did not vote against Malaysia when Malaysia voluntarily offered its involvement in certain critical situations (Chamil, 1989). When Malaysia was selected as a non-permanent member of the UN Security Council, no major powers vetoed this decision (Chamil, 1989). Again, this stands for proof that by being vocal, Mahathir earned for Malaysia a form of respect from the world. In addition, the reaction shown by the developing countries grew more encouraging. They supported Mahathir, which in turn made Malaysia and Mahathir more famous on the international stage. Even the Prince of Wales, Prince Charles, wrote a letter to him after Mahathir's lecture at the Oxford Centre for Islamic Studies (Abdullah, 2008). The letter expressed his support of Mahathir and his criticism of the Islamophobic representations in the media. In the letter, the Prince of Wales wrote:

Believe it or not, I think I do understand some of the frustrations

that Muslims experience as a result of apparent Western misunderstanding and misrepresentation. I have, for a long time, despaired of the ignorant and thoroughly evil "role" of the tabloid media in deliberately misrepresenting Islam and in reducing everything to the level of absurd.... In an attempt to show how much we share in common and how much we can learn from each other, I have discovered how easy it is to be misunderstood and misrepresented. I have even received several letters accusing me of becoming a Muslim! However despite this, I am determined to continue the battle to spread the message that, as you say, proper fundamentalism is in the best interest of the future of our world – especially as we now face a world, in my part of it at any rate, which is increasingly without meaning, without roots, without a spiritual dimension and which worships the God of Technology. (pp. 36-37)

The attention given by Prince Charles proved that Mahathir's initiative to introduce the true image of Islam had successfully gained their attention through his speeches, lectures and blatant remarks on this issue.

Furthermore, Malaysia was recognised on the international front when the country was selected as the Chairman of the Organisation of Islamic Conference and the Non-Aligned Movement (Sanusi, 2008).

This was an honour for the small-sized country i.e. to be able to lead countries that are bigger than Malaysia in size. This recognition was also seen as a form of trust by other countries towards Malaysia, and would not have been possible without an inspired leadership and loyal followers and supporters. Therefore, it is not an overrated statement to say that Malaysia deserved to lead other countries because of its virtues as displayed on the international level when addressing the Palestine issue and issues concerning the Muslim world.

It is also interesting to point out that the support for Palestine put Malaysia in centre-stage to address issues concerning Muslim countries that were affecting Muslim unity and brotherhood. According to Mahathir, the Islamic world is suffering a crisis of confidence and despite possessing an abundance of resources, many Muslim countries are still poor and economically weak (Hng, 2008). Many Muslims live in poverty despite the many breakthroughs in sciences and technology. Therefore, what Mahathir wanted to bring about was an exemplary quality through Malaysia and provide some degree of leadership for a Muslim revival. In Mahathir's many speeches on Palestine, while he would fiercely and blatantly criticise Israel and its allies and supporters, he would also remind the Muslim countries of unity and cooperation that were needed to overcome the crises and improve the conditions of the Muslims.

Another impact on Malaysia as a result of supporting this cause was the image

projected that Malaysia is an Islamic country. Although this does not mean that the previous administrations did not portray the nation as Islamic, the effort was much more apparent during Mahathir's administration. Perhaps, this image was reflected when he treated this support as an intimate cause and that he was willing to do anything in his power as an individual as well as the Premier to support this cause. In addition, there was Mahathir's ability to govern Malaysia, a multi-ethnic, multi-cultural and multi-religious country, peacefully and harmoniously.

Perhaps one of the biggest impacts that Mahathir had by supporting the Palestinian struggle was on local politics. Murugesu Pathmanathan (1984) highlighted the strong link between internal political factors and external policy measures. While Tunku Abdul Rahman, the first Prime Minister of Malaysia, saw this issue as an opportunity for the ruling party to win the support of the Muslims in Malaysia, it was Mahathir who took the government's involvement to a different level. During his tenure as Prime Minister, Mahathir intensified support for this issue by being active in various international organisations like the OIC. Mahathir, being a different kind of leader from his predecessors, saw foreign policy as an extension of domestic policy.

Thus, his support for the Palestinian struggle served as a formula for winning the hearts of Muslims in Malaysia. The people's support had always been divided and influenced by another Malay dominant political party, the Pan Malaysian-Islamic

Party (PAS), who were pro-Islam in their mission and vision. The intense competition between these two political parties was aroused during the Islamic resurgence in Malaysia. The underlying issue between these two rival political parties was the role of Islam in Malaysian society (Liow, 2003). Mahathir, during his administration, saw it as an advantage over PAS to pursue this course of action, which was exactly what he did.

By assessing the foreign policy of Mahathir's administration with regard to the issue in Palestine as well as a way to side-line the challenge posed by PAS, it was very important and effective in legitimizing as well as giving his administration the image of championing the cause of the *Ummah*. Earlier Premiers did have their hand in this issue but it was Mahathir who raised the level of Malaysia's commitment to the issue. Mahathir, at many international conferences lashed out at Israel for its actions towards Palestine. He also accorded full diplomatic status to the Palestine Liberation Organisation (PLO) and hosted the UN-sponsored Conference on Palestine in Kuala Lumpur in May and July, 1983. He also invited Yasser Arafat to Malaysia, an offer that Yasser Arafat accepted. However, what he did in August 1984 was far more astounding. He cancelled a performance by the visiting New York Philharmonic Orchestra when the latter refused to remove the composition, "The Hebrew Rhapsody for Cello and Orchestra" from its programme (Liow, 2003).

In many of his presidential speeches at the UMNO General Assembly, the Islamic image of UMNO was vocalised and consistently highlighted. This proved to be beneficial for UMNO because it legitimised the party's religious identity (Nair, 1997). Hence, support from people continued for the ruling party since the time of the country's independence.

Through his efforts, on the international and domestic scale, Malaysia was always referred to as a model of a Muslim country by other fellow Muslim countries. This consequently strengthened Malaysia's relations with other Muslim countries. Visits from Muslim delegations were received so that they could observe the ideal model of a Muslim country. When Malaysia hosted several OIC meetings and summits, the foreign delegations were able to observe Malaysia's image as a Muslim country. Hence, cooperation of Malaysia with and among the Muslim states strengthened and as a result, a strong Islamic brotherhood was formed. Mahathir's intermittent criticism of Muslim countries for failing to provide for their own people was taken as constructive criticism instead of as destructive remarks.

Malaysia's foreign policy on Palestine as well as Malaysia's support for the Palestinian struggle later served as precedents for dealing with other Muslim countries that faced similar conflicts. The first example of such similar policies, actions and support shown was for Afghanistan. Prior to the Soviet Union invasion of Afghanistan in December 1979, Malaysia practised the

policy of non-interference (Nair, 1997). However, this changed when Russia began their invasion of Afghanistan. This policy change was seen in the Parliamentary debates over amendments to the Diplomatic Exclusivity Act 1966 when Members of Parliament drew the attention of the House to the similarity between the Afghanistan issue and the Palestine issue. The Members of the Parliament called for equal support for the plight of the Afghans (Nair, 1997). In reacting to this, the government established similar initiatives such as donations and programmes. By 1982, Malaysia had donated RM400,000 to a special fund for Afghan refugees and even designated 21 March as 'Afghanistan Day'. Furthermore, the voice of Malaysia was heard in defending the rights of the Afghans at international forums, seminars and conferences (Nair, 1997).

In 1991, the Muslims experienced conflict in former Yugoslavia between the ethnic Bosnians and the Serbs. The intensity of the conflict was parallel to the issue of Palestine and Afghanistan. The number of Muslims massacred reached hundreds of thousands, including the elderly and children. The Serbs aimed at wiping out the entire ethnic community from the world and they were very close to achieving this had the major powers not taken stern action. This conflict also saw the Malaysian government following the precedent it had taken on Palestine and Afghanistan in showing strong support for Bosnian Muslims.

The Malaysian government, NGOs and the public began to initiate donations

and funds to help the Bosnian Muslims. The level of commitment shown by the government at the time was heightened by the decision to dispatch Malaysian soldiers as part of the UN's peacekeeping forces, namely, the United Nations Protection Force (UNPROFOR) (Nair, 1997). Sending Malaysian soldiers into the conflict zone was unprecedented. Compared to the Palestine and Afghanistan issues, with the Bosnian Muslims, the Malaysian government went the extra mile by remaining in the conflict zone even after the UNPROFOR peacekeepers withdrew from some zones. During this period, the government bore the expenses of some 10,500 Malaysian troops (Abdullah, 2008).

Social Impact

While Malaysia's support for the struggle of the Palestinians had various political impacts, it also brought significant impact on the social perspective. This was perhaps something inevitable and expected, especially when the Malaysian government attempted to bring some Palestinians to Malaysia.

In one of the humanitarian aid exercises given to the people of Palestine, one of the initiatives was different from the usual; it came in the form of scholarships for learning at Malaysian universities and places in various occupational training centres. This was an attempt at bringing vast improvement to the lives of the Palestinians (Nair, 1997). Through this initiative, many Palestinians were brought to Malaysia for education opportunities, which consequently boosted

the Palestinians' employment opportunities in and out of Malaysia. A number of Palestinians even became academics in some Malaysian universities. From this perspective, this effort is seen as significant because education not only equipped the Palestinians to compete in the job market, it also gave them hope of attaining the rights that they had lost in their homeland. This initiative was also boosted by the setting up of the Palestinian People's Fund by the Foreign Ministry in 1988 for educational resources to support the educational process of Palestinian children (Nair, 1997).

Another impact, which was equally important to the education of the Palestinians, was the awareness created by the government for Malaysians to understand the Palestinians' suffering and misery. The launch of the nationwide Palestinian Week was an important step in creating this awareness (Nair, 1997). This was a worthwhile effort, especially for educating the people that the conflict in Palestine went beyond the issue of religion. Although many of the Muslims in Malaysia supported the Palestinians because they empathised with their Muslim brothers and sisters, it was important that they knew that the conflict was also felt by the Palestinian Christians, and that the conflict was a humanitarian issue. Today, Malaysians from different ethnicities and religions have rallied against the cruelty of Israel towards the Palestinians. In events organised in conjunction with the Palestinians, Malaysians of Chinese, Indian and Malay ethnicities participate equally.

Therefore, the impact of this process of awareness as initiated by the government has been generally successful. The role played by NGOs in contributing to the change in behaviour of the people towards this issue should also be highlighted. Together with the government, NGOs have organised many awareness programmes for Malaysians.

Another significant impact of the continuous support for this issue was the way Malaysia was perceived by the Palestinians. Based on a narrative by Dolly Fong, a Malaysian volunteer who attended to Palestinian children who were injured in the conflict in Lebanon, the children perceived Malaysia as their good friend and they felt that Malaysia was arm and arm with them in the conflict. Fong said she often heard people who stayed in the refugee camp say, "Malaysia is beautiful, Malaysia is always with us" (Alijah, 2003). Malaysia also participated in a project that involved sponsoring more than 1,000 Palestinian children through a shelter called the Bait Atfal As-Samoud (BAS) (Alijah, 2003). One of the children who received aid from this centre was Hanan Al-Kott. She lost her mother and quit school to look after her siblings. It was BAS that offered help (Alijah, 2003). This was just one of the stories reflecting that Malaysia was perceived as a 'good friend' of the Palestinians.

The social impact of Malaysia's support for the Palestinians was also seen in a statement by the late Yasser Arafat, the leader of the PLO, who highlighted the impact of Malaysia's foreign policy on Palestine.

During his visit to Malaysia, Yasser lauded the long history of excellent relations and friendship between Malaysians and Palestinians. He also noted that "compared with some Arab countries, Malaysia is even closer to us" (Nair, 1997). This is proof that Malaysia had rendered adequate support in the Palestinian cause and struggle to reclaim their rights over their invaded homeland.

DISCUSSION

Perhaps the reason why Malaysia was ever so willing to help the Palestinians was for the benefits reaped by the ruling party in local politics. It is a fact that the foreign policy of Malaysia is the extension of its domestic policy. This was not something new during the administration of Mahathir as it was pioneered by Tunku Abdul Rahman, the first Prime Minister of Malaysia. However, only after Mahathir took office as Prime Minister did this particular conflict contribute greatly to this policy. When Mahathir took office in 1981, the people were still in the wake of an Islamic revivalism across the country. The support shown by the government for the cause of another Muslim country could not have come at a better time. Consequently, Malaysia was portrayed as fighting for the *ummah* (Muslim community), thereby solidifying UMNO's status as a political party that also fought for Islam. This consequently raised Mahathir Mohamad as one of the great Muslim leaders.

Malaysia's efforts have contributed towards a positive image of Malaysia. Indeed, the favour and support shown by Mahathir for the Palestinian struggle

have made Malaysia popular, while the criticism hurled by Malaysia, especially by Mahathir Mohammad, from various international platforms has also increased the popularity of Malaysia in the eyes of the world. Despite being a small developing country, Malaysia came to be regarded as a courageous country that wanted to influence the way things worked on the international front. This realisation also gave hope to other developing countries when they recognised Malaysia and Mahathir as their spokesperson and the man who championed their agenda.

As such, it was during Mahathir's administration that much recognition was given to Malaysia. This was shown in Malaysia's selection as a non-permanent member of the UN Security Council and the appointment of Tan Sri Razali Ismail as the President of United Nation General Assembly (UNGA). Malaysia was also selected by the UN and OIC to be a member of a committee in their discussion on the Iran and Iraq conflicts. Malaysia was selected as the Chairman of OIC as well as Chairman of NAM, which are two of the most important international organisations. Malaysia's selection for participation on the world stage shows that Malaysia was respected by other countries. Malaysia had gained the trust and confidence of the world because of its commitment to championing large causes despite its small size.

CONCLUSION

The image of Malaysia as one of the models of a Muslim country was projected through

its support for the Palestinians. Since one of the reasons for helping the Palestinians was religion, Malaysia has been well received by other Muslim countries. When Malaysia went on to show more commitment to this cause than other Muslim countries, its popularity rose further and the country became a model for other Muslim countries.

However, the support and help rendered to the Palestinians by Malaysia, which brought much impact on Malaysia, has not helped to end this conflict. The suffering and misery of the Palestinians might have been reduced through the support and aid given by Malaysia and other countries. The conflict, however, does not show any signs of coming to an end. What Malaysia succeeded in doing is making the world realise that this conflict was concerned with humanitarian issues and that it was an issue that went beyond religion.

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The Role and Position of Fatwa in Malaysian Court

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ABSTRACT

The institution of *fatwa* in Malaysia has been regarded as an important institution in dealing with any matters on Islamic Law. The Administration of Islamic Law Enactments in the Federal Territories and other states in Malaysia has provided for the establishment of *fatwa* institutions in order to issue binding *fatwa* and regulate Islamic verdicts in Malaysia. Once *fatwa* is gazetted by the *Fatwa* Committee, it becomes binding on all Muslims in a particular state. The issue arose as to whether the *fatwa* given is also binding on the courts in making their judgement. In reaction to the above issue, this paper attempts to examine the practice of judges in dealing with *fatwa* issued by the *Fatwa* Committee or Mufti in a state on any particular issue. The authors adopted the qualitative research method to gather data for writing this paper. It was found that there was inconsistency by the courts in accepting *fatwa* as a source of law in Malaysia as some of judges accepted the *fatwa* ruling but some refused. Thus, the authors recommend that there should be a codified *fatwa* system for all Malaysian states so as to make it binding upon courts to consider a *fatwa* in their decision making.

Keywords: Binding, cases, *fatwa*, *Fatwa* Committee, gazette, judges, juristic opinion, *Sharia* Court

INTRODUCTION

Fatwa is an Islamic religious ruling that can be referred to as a scholarly opinion on a matter of Islamic Law that is issued by a recognised religious authority of a country. It derived from the *ijtihad* of the *mufti* that began from the birth of Islam in the 7th century. According to the English/Arabic Dictionary (Almaany, n. d.), *fatwa* is defined as a legal opinion issued by Islamic scholars

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and in the Oxford Dictionary (Bjork, 2010), the word is said to have originated from the term “*iftā*”, which means to decide a point of law, and it can simply be defined as a ruling on a point of Islamic law that is to be issued by a recognised authority. Gilani (2011) stated that the term *fatwā* could be defined as a formal Islamic legal opinion issued by a jurist-consult (*mufti*) in response to questions submitted to him by private individuals or judges as justified by the Quran in *Surah Ali Imran* [3:159]:

So by mercy from Allah, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon Him]. (Saheeh International, 2004, p. 63)

and *Surah Ash-Shura'a* [42:38]:

And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend. (Saheeh International, 2004, p. 484)

These two *Surah* advocate for consultation when Muslims are faced with a problem. The practice to consult others has also

been further stated in the *Hadith* where ‘Ali bin Abi Talib said to the Prophet, “O, Prophet, [what if] there is a case among us, while neither revelation comes, nor the *Sunnah* (tradition of the prophet) exists?” The Prophet replied, “[You should] have meetings with the scholars,” and in another version these words are added, “...the pious servants and consult with them. Do not make a decision only by a single opinion.”

According to Bakar (1997), *fatwa* is a unique process in Islamic law as it always involves two parties, one who asks the question (*mustafti*) and a competent party who answers the question (*mufti*). The application to get an answer from the *mufti* is called *istifta'* or *su'al*. The *mustafti* may be more than one person as *istifta'* is also made by a judge in court when he asks for an explanation on Islamic matters in deciding the case before him. The post of *mufti* was created by Caliph Umar Abdul Aziz during the Abasyiah period. In Malaysia, it is the *mufti* who is responsible for issuing *fatwa*, as established by Syed (2007, p. 108) that the *mufti* and his deputy will be responsible to aid and give advice to the Yang di-Pertuan Agong on matters related to Islamic Law. Once a *fatwa* is adopted, it will be gazetted by the Federal or State Territories.

Institution of *Fatwa* in Malaysia

Shuaib, Ahmad and Mohd (2010) stated that in Malaysia, *fatwa* in all states, except Perlis, must be based on prevailing views (*qaul mu'tamad*) of the Shafie school of law. However, if such a view is against public interest, the *mufti* may follow the

qaul mu'tamad of other *Sunni* schools. If all the views are against public policy, the *mufti* may exercise his own *ijtihad* and the *fatwa* should be gazetted in advance by the Sultan before it is enforced. It also may change from time to time in accordance to the requirements of the current situation in each particular case.

They also said that even though the *mazhab* referred to in the issuance of a *fatwa* in Malaysia is *Mazhab Syafei*, the practice of the *Fatwa* Committee shows that the opinion of other *mazhab* also has to be taken into consideration and adopted in special circumstances such as the use of local currency to replace rice in *zakat fitrah* payment as prescribed by *Mazhab Hanafi*. However, this differs from state to state. In Perlis, the most relevant opinions of any accepted *mazhab* are referred to in issuing a *fatwa*. This practice began with the 1920s reform (*islah*) movement that called Muslims to reject the practice of *taqlid* (blindly following others, blind follower) by making direct reference to the Quran and the *Sunnah*. Shuaib et al. (2010) stated that this was the beginning of the search for the best opinions of any *Sunni* school in Perlis.

The *Fatwa* Committee in every state in Malaysia is established under the respective state's administration. The *mufti* presides over the National *Fatwa* Committee for Islamic Religious Affairs, Malaysia. Section 34(3) of the Administration of Islamic Law (Federal Territories) Act 1993 states that upon publication of a *fatwa* in the Gazette, it becomes binding on every Muslim resident in the Federal Territories as a dictate of

his religion and it shall be his religious duty to abide by and uphold the *fatwa*. The section also mentions that all courts in the Federal Territories shall recognise the *fatwa* as authoritative of all matters laid down therein.

The institution of *fatwa* in Malaysia is established at the national level and state level. Article 74(2) of the Federal Constitution places any Islamic matter or affair under the State List (Ninth Schedule, List II of Malaysia Federal Constitution) at state level. Islamic affairs are organised and managed as detailed in the Administration of Muslim Law Enactments. These state-based enactments are generally similar in content but not identical to one another. A *fatwa* is issued by the respective *mufti* of each state and it becomes binding on every Muslim of the state. However, if the proposed *fatwa* affects national interests, a slight procedure is set in motion at the national level. The National *Fatwa* Committee, which comprises the *mufti* of each state as well as five Muslim scholars appointed by the Yang di-Pertuan Agong, will recommend that the proposed *fatwa* be made and when the Conference of Rulers agrees with the recommendation, the matter will be returned to the *Majlis Agama Islam Negeri*. However, the *fatwa* issued by them are not necessarily followed by other states as Islamic affairs are under a state's jurisdiction. The National *Fatwa* Committee only acts as an advisory body.

Shuaib (2003) highlighted that unlike in other states, in the Federal Territories, the *mufti* is given power to issue a *fatwa*

in his own personal capacity. The *mufti* is required to call for a meeting with the *Fatwa* Committee to discuss the matter for which the *fatwa* is to be issued. This power is vested by Section 37(5) of the Administration of Islamic Law (Federal Territories) Act 1993. The *mufti* may on his own initiative or by request, make and publish in the Gazette, a *fatwa* on any unsettled or controversial question of or relating to Islamic law.

In the case of *Ramah bte Taat v Laton bte Malim Sultan* (1927) 6 FMSLR 128, the court was of the view that Muslim law is not foreign law but local law; it is the law of the land and the local law is a matter of which the court must take judicial notice. The court must propound the law and it is not competent for the courts to allow evidence to be led as to what is local. This clearly highlights that any rulings in Islamic Law should be celebrated in the courts. As *fatwa* is one of the verdicts in Islamic Law, thus, the courts should follow its ruling when it is requested.

Effect of *Fatwa* in Malaysia

Any *fatwa* made by the National Committee can be enforced in the respective state if the state committee gazettes it via its State *Fatwa* Committee. Ishak (1981) highlighted several important issues regarding *fatwa*:

1) The only recognised *fatwa* in Malaysia is an official *fatwa* that is published by the state *mufti* or the State *Fatwa* Committee or the National *Fatwa* Committee with the consent of the Conference of Rulers;

- 2) Other personal opinion on *Hukum Shara'* is not conclusive and not legally enforceable. It is merely an explanation of a legal ruling to the public; and
- 3) An official *fatwa* is a conclusive legal ruling enforceable in this country and it should not be questioned because:
- It is based on the provisions in the Quran and the *Sunnah*;
 - It is sanctioned by a Ruler, in case of state, or by the Yang di Pertuan Agong and Conference of Rulers, in case of national *fatwa*; and
 - It is gazetted as law.

Thus, *fatwa* plays a very important role in Malaysia once it is gazetted. However, its position is still left optional to the courts when dealing with any issue relating to it. For example, the 37th *Muzakarah Jawatankuasa Fatwa, Majlis Kebangsaan Hal Ehwal Islam Malaysia* (JAKIM, 2015, p. 200) declared that smoking is *haram* (forbidden) in Islam. However, only a few states have gazetted this as a *fatwa*, i.e. Penang and Selangor (Ahmad, Sivanandam, & Rahim, 2015), while Kedah accepted that *fatwa* but has made no step to gazette it. The same attitude is practised in Perlis and Sarawak. Meanwhile, in Pahang, the restriction only covers mosque areas in the state.

When a *fatwa* is gazetted, it becomes binding on those who reside in a particular state. However, the punishment for those who act in contravention of the *fatwa* is different. In the Federal Territories, for

instance, the punishment for those who act in contempt of religious authority or defy, disobey or dispute the orders or directions of the Yang di-Pertuan Agong as the Head of the religion of Islam, the *Majlis* or the *mufti*, expressed or given by way of fatwa, is a fine not exceeding RM3,000 or imprisonment for a term not exceeding two years or both as prescribed in Section 9 of the *Sharia Criminal Offences (Federal Territories) Act 1997*. Meanwhile, in Section 4 of the *Sharia Criminal Offences Sarawak Ordinance 2001*, those who teach or expound in any place, whether private or public, any doctrine or perform any ceremony or act relating to the religion of Islam shall, if such doctrine or ceremony or act is contrary to Islamic Law or any *fatwa* for the time being in force in the State, be guilty of an offence and shall on conviction be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding 3 years or to whipping not exceeding six strokes or to any combination thereof.

Thus, an individual who resides in a particular state will be held liable if performs any actions or words contrary to a *fatwa* gazetted by that state and he will also be subject to punishment prescribed in the state law. However, the question arises if the courts are also bound to follow the *fatwa* given by the *mufti*.

Position of Fatwa in Courts of Malaysia

Hallaq (1994) pointed out that:

the juridical genre of the *fatwa* was primarily responsible for

the growth and change of legal doctrine in the schools, and that our current perception of Islamic law as a jurists' law must now be further defined as a *Muftis' law*. Any enquiry into the historical evolution and later development of substantive legal doctrine must take account of the *Mufti* and his *fatwa*."

This means that a *fatwa* should be taken into consideration when making any decision in a court of law and it should also become binding law in the country. However, it is still ambiguous as to how far Malaysian courts, either the Civil or *Sharia* Court, will take *fatwa* into consideration in making the decision, or whether the *fatwa* can be used as grounds for a claim or for prosecuting a person in the courts. The acceptance of *fatwa* in the Civil Court and the *Sharia* Court in Malaysia are different, as discussed below.

***Sharia* Court.** Shuaib (2003) stated that the *Sharia* Court has the jurisdiction to deal exclusively with matters of Islamic law regarding Muslims in the country. Article 74 (2) of the Federal Constitution clearly states that the Legislature of a state may make laws with respect to any of the matters enumerated in the State Legislative List and Article 145 (3) further elaborates that the Attorney General of Malaysia has no power over matters related to *Sharia* Courts. Thus, *fatwa* are also included under the jurisdiction of *Sharia* Court and once it is published in the Gazette, it becomes binding

and enforceable. This is evidenced by Section 34 (3) and (4) of the Administration of Islamic Law (Federal Territories) Act 1993, which denotes that

upon publication in the Gazette, a *fatwa* shall be binding on every Muslim resident in the Federal Territories as a dictate of his religion and it shall be his religious duty to abide by and uphold the *fatwa*, unless he is permitted by Islamic Law to depart from the *fatwa* in matters of personal observance, belief, or opinion. A *fatwa* shall be recognized by all Courts in the Federal Territories as authoritative of all matters laid down therein.

Thus, it is clear that the *Sharia* Court should take into account the *fatwa* which have been statutorily regulated and gazetted when making any judgement because according to the Interpretation Act 1948/1967 (Section 61) all gazetted *fatwa* may be given statutory recognition by the *Sharia* Court in Malaysia. However, if the *fatwa* are not statutorily regulated, the *Sharia* Court still has the option of either following it or not. This is illustrated in the case of *Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan & Anor* [2013] 9 CLJ 444, where the issue arose with regards to the *fatwa of the Muzakarah Jawatankuasa Fatwa Kebangsaan bagi Hal Ehwal Agama Islam Malaysia Ke-92*, which does not allow a non-Muslim to become a *sharia* lawyer, was not gazetted and has no binding effect on the courts. The judge, nevertheless,

referred to the *fatwa* and decided that non-Muslims are not eligible to become *sharia* lawyers.

With regards to the obligation of judges to follow *fatwa* issued by the Council, judges, in practice, are not bound to follow all issued *fatwa*. There are cases where the judge, while making a decision, referred to *fatwa* such as in the case of *Perisytiharan Pembubaran Perkahwinan Kerana Pemelukan Islam Norhairy Cheong Abdullah @ Cheong Foo Siong* [2010] JH 20/1, the petitioner submitted an application in the Seremban *Sharia* High Court on 11 November, 2008 in order to verify the operation of this court regarding the annulment of the petitioner and his wife's marriage. The wife was brought to the court as a witness and was advised about the continuity of marriage if she reverted to Islam. The wife, however, affirmed that she wanted a divorce and refused to revert to Islam to follow her husband's religion. The procedure was in conformity with the decision given by the National *Fatwa* Council in their 11th Dialogue of the *Fatwa* Committee of the National Council for Islamic Affairs on 16 March, 1976, which provided that the marriage of the couple who does not revert to Islam when one of them is Muslim, will be dissolved and they should be informed on the impacts of non-reversion. Thus, in this case the judge, Mohd Nadzri Abdul Rahman, held that the marriage was dissolved following the *fatwa*.

There were also cases where the judge sentenced the defendants guilty for violating a *fatwa* issued by the council as in the

case of *Pendakwa Syar'ie v Fahyu Hanim Ahmad dan lain-lain* [2000] Jurnal Syariah 8 (1) 137, where the accused persons were found guilty under section 12 (c) Selangor Syariah Criminal Enactment 1995, which provides, *inter alia*, that any person who acts in contempt of lawful authority, or denies, violates or disputes the orders or instructions of the *mufti*, disclosed or provided through *fatwa*, commits an offence and is liable on conviction to a fine not exceeding RM3,000 or to imprisonment for a term not exceeding 2 years or to both. In this case, the accused persons were charged under the said provision for participating in a pageant contest, in contravention of a *fatwa* issued by the Council.

However, there were also cases where the judge did not follow the *fatwa* given on certain issues. For instance, in *Halijah Abdul Rahman v Zambree Baharom* [2009] 1 CLJ (SYA) 402, the judge at the Sharia High Court of Seremban, Mohd Nadzri Abdul Rahman, held that the *talaq* written by the husband using Short Message Service (SMS) was *sorih talaq* and intention was not necessary in this case. However, the National *Fatwa* Council agreed that a clearly written *talaq* by a husband specifically to his wife either through facsimile, SMS or e-mail is considered *kinayah at-talaq* and it is valid when accompanied with intention. Thus, in this case the court's decision was seen to be contrary to the *fatwa* issued by the Council.

Civil Court. The civil courts of Malaysia consist of the Federal Court, the Court of Appeal, the High Court, the Sessions Court

and the Magistrate's Court. The standing of *fatwa* in civil courts differs from that in the *Sharia* Court because *fatwa* are not binding on any of the civil courts but the courts may in their discretion refer to the opinion of the *mufti* for cases involving Muslims and matters of Islamic Law. The court may request the opinion of the *mufti* on a particular issue, and the *mufti* may certify his opinion and appear before the court as a witness.

The civil court judge in the case of *Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110 held that the judge had the option of accepting or declining to be bound by the *fatwa* in question even though the *mufti* was called by the judge to give his *fatwa* on the issues related. On the other hand, in the case of *Re Dato' Bentara Luar (decd) Haji Yahya bin Yusof & Anor v Hassan bin Othman & Anor* [1982] 2 MLJ 264, the court was of the view that as the opinion was expressed by the highest Islamic authority in the state, who had spent his lifetime in the study and interpretation of Islamic Law, the court had no reason to justify the rejection of the opinion, especially when the civil court judges themselves were not trained in the system of Islamic jurisprudence.

In *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, the judicial commissioner in the case referred the question at hand to the *Fatwa* Committee and after receiving a *fatwa*, confirmed his earlier findings and decision at the High Court in accordance

with the *fatwa* given. Similarly, in *Hajjah Halimatussaadiyah binti Haji Kamaruddin v Public Services Commission, Malaysia & Anor* [1992] 1 MLJ 513, the Supreme Court judge, in giving his judgement, took into consideration the opinion given by the *mufti* of Wilayah Persekutuan, who said that Islam as a religion does not prohibit a Muslim woman from wearing, nor requires her to wear, a *pardah*. Thus, the wearing of *pardah* is not an obligation for every Muslim as it is not stated in the Quran and *Sunnah*. In this case, the court did not only refer to the *fatwa* given by the *mufti* but also followed the *mufti's* opinion in delivering their judgement.

However, in *Isa Abdul Rahman & 1 Lagi v Majlis Agama Islam, Pulau Pinang* [1996] 1 CLJ 283, the Penang High Court judge held that the *fatwa* given by the *mufti* individually or the *Sharia* Committee would not bind the civil court in this country since the state law cannot decrease the jurisdiction of the civil courts as authorised by the Federal Constitution and Federal law. Besides that, Section 37 (2) of the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993 used the term '*fatwa* will only bind Muslims who reside in this particular state' to not refer to the court since the court could not be defined as 'Muslim' under the enactment. In this case, the court decided that the fact that the donated land was vested in the Council did not mean that the Council could make anything they wanted as landlords, but the Council was still subject to legal provisions and conditions of the *waqf* land

concerned. This is contrary to the second *fatwa* delivered by the *Sharia* Council in 1989, which allowed the construction of mosques and banks on the *waqf* land in concerned.

There was also a civil court judge who said that even though the judgement delivered was in line with the *fatwa* given by the *mufti*, the civil court need not consider any submission of jurisdiction to the *Fatwa* Committee. This was firmly held in the case of *Tegas Sepakat Sdn. Bhd. V Mohd. Faizal Tan Abdullah* [1992] 2 CLJ 2297, whereby the judge also said that there was no question of whether a civil court was surrendering itself to the jurisdiction of the *Fatwa* Committee since the latter body was merely a *sharia* committee as defined under Section 15 of the Johore Administration of the Islamic Law Enactment 12978 and thus could not come under the term 'a Court of law'.

In the case of *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354, the Supreme Court of Malaysia had decided that the *Fatwa* Committee of the State of Terengganu could make any *fatwa* on the *Sharia* Law, but the only *fatwa* which may bind the Court was the *fatwa* that had gone through the process as provided under Section 50 of the Administration of Muslims Affairs Terengganu Enactment (2001). Section 50 of the Administration of Muslims Affairs Terengganu Enactment requires a *fatwa* issued by the *Majlis Fatwa* to be gazetted for it to take effect.

This was also supported by Abdul Malik Ishak in his dissenting opinion for the decision of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488, when he stated that “the views of the ‘ulamas’ or Muslim scholars on wakaf would greatly assist the civil High Court to arrive at a just decision in the judicial review proceedings and this could only be achieved if State Religious Council was allowed to intervene ...”

Criticism against Position of Fatwa

The previous quoted cases show that there was no uniformity among the judges; either a civil court judge or a *Sharia* court judge could apply a *fatwa* ruling given by the *mufti* either in court or out of court. There were no standardised factors and consideration that had to be taken into account when considering whether a *fatwa* would bind the decision of the judge in the court. However, it should be noted why *fatwa* made by the *mufti* has no binding effects to all judges.

Sharia courts in Malaysia do not hold higher authority on its rules and regulations compared to the civil courts. The Federal Court is the highest authority in dealing with any issue on civil and also criminal cases in Malaysia while the *Sharia* courts have been divided into states and none of the courts reach the level of the Federal Court. The National *Fatwa* Committee acts as the head of *fatwa* resolution and also holds position as a high institution in *fatwa* matters in Malaysia; unfortunately, it only acts as an adviser to all *mufti* in Malaysia and is the

main reference for all *fatwa* cases with no binding effect on the courts in Malaysia.

The difference between administration of civil law and *Sharia* law is that the former is guided by the supreme law of the land, which is the Federal Constitution whereas the latter is conducted by the relevant laws of each state individually.

With regard to the issuance of *fatwa*, the *Fatwa* Committee does not hold any authority over any rulings in the courts especially in the *Sharia* Court because, normally, the *fatwa* is discussed by the Committee at national or state level but it is not binding on the whole country. It depends on a particular state either to gazette or not gazette a *fatwa*. If it is gazetted, only then may it bind the court but this is limited to the residents of the particular state that gazetted the *fatwa*. This gives rise to non-uniformity of rulings as everything depends on the state. The limited jurisdiction of the *Sharia* court also gives rise to the limited application of the *Sharia* Law in this country. The jurisdiction of the *Sharia* Court in Malaysia is only limited to Muslim family law and personal matters. Section 2 of the *Sharia* Courts (Criminal Jurisdiction) Act 1965 limited the jurisdiction of criminal matters in the *Sharia* Court to offences carrying a punishment of not more than 3 years’ imprisonment or RM5,000 in fine or six strokes of the cane or a combination these punishments.

According to Chiba (1989), there is another law that has not been given legal recognition. He referred to a hidden law that is considered important in the legal

field. Hosen and Black (2009) said that the 'law' introduced by Chiba did not depend on official recognition, but could be regarded as unofficial law among certain groups. Taking this view of Chiba's and that of Hosen and Black (2009), *fatwa* in Malaysia, even if not gazette, can be considered acceptable law that binds, and therefore, has legal credence in court.

CONCLUSION

The inconsistency of the courts in accepting *fatwa* as a source of law will cause chaos in the administration of justice in Malaysia. With regards to the acceptance of the *fatwa* in the civil courts, it can be said that it does not harm the juridical system of the civil courts, but with regard to the *Sharia* Court this is different. The problem with the inconsistency of the law in the different states, the reluctance of the states to codify and gazette the *fatwa* and the non-acceptance of the *Sharia* Court of a *fatwa* will result in chaos when it comes to making decisions.

We cannot neglect *fatwa* because it is a feature of Islamic Law. The *fatwa* is the result of the *ijtihad* of the *mufti* based on the current situation. It may be used at certain times but may not be suitable for other times (Hosen & Black, 2009). However, the *fatwa* is needed in the community because of its flexibility in adapting to social change, particularly when previous *fatwa* are no longer suitable for a situation. This means that *fatwa* will continue to be used.

So, there is an urgent need to combine and codify all *fatwa* into a single system that can regulate the issuance of *fatwa* by the individual states and bind all states in Malaysia as the Islamic Judicial Department of Malaysia (IJDM) does, through uniform administration of the *Sharia* Courts in Malaysia. This is because the different *fatwa* in each state in Malaysia contributes to the misunderstanding of people in the context of its application so as to lead to the difficulty of its enforcement. Therefore, there is a need for a uniform method that binds all states in Malaysia in terms of any *fatwa* made by the Committee at the national level. The best step is to centralise the administration of *fatwa* at the national level and create the post of 'National *Mufti*' who acts as a coordinator of all *fatwa* given by the *mufti* or the Committee whether at the national level or state level.

In addition, all the states' religious councils should also cooperate in this matter so that any direction given by the National *Mufti* will bind lower authorities. The decision of the National *Mufti* should also bind any civil courts in Malaysia without decreasing its position in the *Sharia* court.

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UniSZA's Staff Cash *Waqf*: The Impact to Social and Economic Development of Terengganu State

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ABSTRACT

Cash *waqf* is a viable form of Islamic endowment with the primary objective of providing relief to less privileged Muslims in society. *Waqf* has inherent potential to ensure redistributive justice in society given its numerous benefits as an instrument for human development. UniSZA as an education institution should explore the feasibility of *waqf* in its daily operations and consider adopting a cash *waqf* scheme. The research is based on the hypothesis that UniSZA's staff cash *waqf* can have a positive social and economic impact in Terengganu. The objective of this study is to examine how UniSZA's staff cash *waqf* can be utilised to develop Terengganu economically and socially for the interest of less privileged Muslims. The study applies the mixed methods of discussion and analysis. Human development in this study includes the creation of employment, micro-financing, transactions, farming, soft loans and other lawful lucrative businesses and investments. The paper concludes by offering suggestions to best utilise this cash *waqf* fund.

Keywords: Cash *waqf*, development, economic, influencing factors, social, Terengganu, UniSZA staff

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INTRODUCTION

Universiti Sultan Zainal Abidin (UniSZA), formerly known as Universiti Darul Iman Malaysia (UDM), was established in 2006. It is among the youngest public universities in Malaysia. However, its origin can be traced to Kolej Ugama Sultan Zainal Abidin (KUSZA). Kolej Ugama Sultan Zainal Abidin (Sultan Zainal Abidin Islamic College), better known as KUSZA, was a state-funded college that

commenced operations as Sultan Zainal Abidin Upper Islamic Secondary School, Batu Burok with the admission of its first batch of 35 students in January 1980. KUSZA was formally established in 1981 when the Terengganu State Legislative Assembly passed the Kolej Ugama Sultan Zainal Abidin Enactment 1981. In the same year, the late Sultan Mahmud Al-Muktafi Billah Shah ibni Al-Marhum Sultan Ismail Nasiruddin Shah graced the ground-breaking ceremony for KUSZA's own campus in Gong Badak. While its new campus was under construction, KUSZA leased premises in Pulau Kambing, Kuala Terengganu from 1981 to 1982. Later, KUSZA moved into its newly built campus in Gong Badak and operated as a public institution of higher learning in Terengganu. KUSZA offered many diploma courses in Islamic studies and other sciences. The courses offered during that period were Sharia, *Usuluddin*, *Al-Quran* and *Sunnah*, Arabic Language and Literature, Law, Accountancy, Business Administration, Banking, Insurance, Human Resource, Information Technology, Industrial Design, Manufacturing Technology, Arabic Language with Education, English Language and Nursing, among others. Since its inception, KUSZA had become one of the most sought-after public institutions of higher learning in Malaysia as well as Terengganu for SPM leavers because of its academic programmes.

After more than 25 years of service to the nation and state, KUSZA charted another development by becoming a part

of Universiti Darul Iman Malaysia (UDM), which was established in 2006. KUSZA officially became a part of UDM from 1 January, 2007. To facilitate KUSZA incorporation into UDM, the 1981 KUSZA Enactment was repealed by the Terengganu State Legislative Assembly in 2006. KUSZA was named after Sultan Zainal Abidin III, who was crowned the 11th Sultan (Ruler) of Terengganu on 19 December, 1881. Sultan Zainal Abidin was renowned for his excellent leadership, piety, and charisma. The Sultan was serious in the administration of Islamic religious affairs, including the enforcement of Islamic law. He was concerned with the intellectual development and education of his subjects. He raised the position of *'ulama* (Islamic scholars) in his administration and provided financial assistance to their families. He himself was very keen to learn Islamic theological knowledge, mathematics, science and geography. As proof of his passion for knowledge, he established the first Malay School in Terengganu in 1912. Apart from KUSZA, other learning institutions named after Sultan Zainal Abidin include Sultan Zainal Abidin Islamic Secondary School in Ladang, Kuala Terengganu and Sultan Zainal Abidin Upper Islamic Secondary School in Batu Burok, Kuala Terengganu.

Due to the above factors, UDM was renamed Universiti Sultan Zainal Abidin in 2010, using the acronym of UniSZA. The present UniSZA looks to soar high in the academic world to continue the legacy of KUSZA, with the motto of "Knowledge for the Benefit of Humanity".

Currently UniSZA has 10 faculties that offer diplomas, bachelor degrees, Master's degrees and doctorates. In addition, UniSZA has four centres of excellence that offer postgraduate programmes. The total number of students is 7,625 (undergraduates) and 730 (postgraduates). Among them, 205 are international students. The total number of staff is 729 (academic) and 1,000 (non-academic). Since the days of KUSZA, UniSZA has focussed on promoting tertiary education for Muslims and non-Muslims.

With respect to the application of *waqf* instruments and institutions in its operations, UniSZA has yet to pursue such initiatives. As such, UniSZA including all of its centres should explore the feasibility of *waqf* in its daily operations in order that it may one day operate based on *waqf* principles. Previous UniSZA contributions have focussed on education; however, with the implementation of *waqf* initiatives this can be extended to the state.

Waqf endowment is another way of contributing to the community by positively transforming the lives of the needy. *Waqf* is an established charitable endowment institution in Islam. The primary aims of *waqf* endowment are to cater for less privileged Muslims in society. It seeks to establish a charitable institution or endowment for the improvement of the welfare of the less privileged such as the poor, insolvent, needy, orphan, widows and victims of natural disasters, among others. Similarly, *waqf* was primarily meant for mosques, *madrrasah*, education, hospitals and social needs. A successful *waqf* endowment depends on the

effectiveness and efficiencies of managing and utilising *waqf*-donated property such as movable and immovable assets in the interest of the needy.

The causes of poverty differ from one nation and society to another, and financial constraints and difficulties cause poverty globally. Poverty has become a common global challenge for many households; it is not limited to any one community, society, state or nation. The cause of poverty could be a result of several challenges including, in recent times, the global financial melt-down. It could be positively argued that the public and private sectors of most nations have not been working towards alleviating poverty among the poor especially in the rural areas. In view of the high incidence of global poverty, there is urgent need for Islamic non-governmental organisations such as *waqf* to either supplement or complement the efforts of the aforementioned sectors. This could be argued on the basis of the track record of *waqf* institutions in Islamic history. It has been said that Malaysian Muslims have contributed more than 11,091.82 hectares of total *waqf* land but 99.8% of the land remains un-used and abandoned. Yet, there is need for cemented efforts from all quarters to help improve the lives of the less privileged across the nation and in Terengganu in particular through UniSZA's staff cash *waqf* monthly contribution.

The study applied qualitative and quantitative methods that included library and field work and data collection through the use of a questionnaire and interview. The respondents were UniSZA staff and

students. Materials and data from books, statutes, articles from refereed journals, gazettes, decided cases, seminar papers and proceedings, newspapers and relevant websites were consulted for the critical analysis of factors influencing UniSZA's staff cash *waqf* and its impact on social and economic development in Terengganu state.

The study examined how UniSZA's staff cash *waqf* can be utilised to develop Terengganu economically and socially for the interests of less privileged Muslims. Fifty sets of questionnaire were distributed between 13 and 30 April, 2015 to UniSZA teaching and non-teaching staff to discover their perceptions towards monthly contribution to a cash *waqf* fund. The population and sampling of this study were selected from different faculties and offices within UniSZA. The study focussed on students and teaching and non-teaching staff of the university.

The responses from the questionnaire were keyed into the Statistical Package for the Social Sciences (SPSS) for analysis. Mean, standard deviation and percentile were used for data analysis to identify the factors influencing UniSZA's staff cash *waqf* and its impact on social and economic development in Terengganu.

Factors Influencing UNISZA's Staff Cash *Waqf*

Financial Challenges/Constraint. The prime motivation for creating a UniSZA staff monthly cash *waqf* contribution would be the economic or financial challenges faced by the needy across the state. Some students

are in need of financial support throughout their diploma and degree programmes. We believed that UniSZA's staff monthly cash *waqf* contribution would reduce the financial burden of the beneficiaries within and outside the university. The *waqf* endowment should manage the donated cash *waqf* judiciously. If the donated and collected cash *waqf* is managed properly with transparency in its management and distribution, it will attract support from within and outside the state to donate to the *waqf* endowment due to its proper management and transparency (Amuda, 2013). Therefore, dynamic and competent people should be appointed to run the *waqf* endowment.

Appointment of Qualified Management.

The establishment of a UniSZA staff cash *waqf* endowment requires competent, qualified, pious, dynamic, industrious and knowledgeable scholars to manage the collection and distribution of the collected donations. The appointment should be strictly based on competency, merit and credibility. When qualified and competent management is in charge, it will educate teaching and non-teaching staff of the university and society on the values and importance of *waqf*. Subsequently, public awareness about UniSZA's staff cash *waqf* will attract donors to channel property to the *waqf* endowment. If UniSZA staff, the public and the wealthy are fully convinced of the capability of the *waqf* management team to manage their donations, they would be encouraged to donate more and even to invite others to join them in donating to the endowment.

If incompetent and non-dynamic persons are in charge or are managing the university cash *waqf* monthly contribution, the funds and property are likely to be mismanaged, resulting in the closure of the institution and the tarnishing of the university's image and the sanctity of the *waqf* endowment. Therefore, persons knowledgeable in *waqf* and *waqf*-related issues must participate in the management and administration of the *waqf* endowment. There must be annual audits and overall transparency to ensure the smooth running and proper management of the endowment, so that the reputation and integrity of the university and the *waqf* fund are upheld. The management and the university must put in a concerted effort to preserve and protect the smooth running of the *waqf* endowment. To this end, there must be proper education and awareness created among all involved through seminars, workshops and academic discussions for better understanding of *waqf* and how it operates in serving the interests of the community (Aliyu, 2013; Amuda, 2013).

Readiness of UniSZA Staff. The readiness of UniSZA staff for a *waqf* endowment operated by UniSZA to which they could make donations can be examined from the perspective of the readiness of the *waqif* (donor) and the *mutawalli* (management), the efforts to develop *waqf* funds and property to generate more income and the rules and regulations of the contract. If UniSZA staff are prepared well for accepting the existence of such an endowment and they are committed and dedicated in their

attitude towards donating part of their monthly salary for *waqf* and if management is ready to work around the clock for the best interests of the *waqf*, then the aims and initial objectives of the establishment of *waqf* to reduce poverty will be achieved and many beneficiaries would be empowered. Financial support to the needy will enhance their income and provide adequate provision for their immediate family so that one day, they too can contribute to the *waqf* endowment (Amuda & Nor, 2013).

University Authority. Universiti Sultan Zainal Abidin and its top management would be strong pillars for the establishment of the university's cash *waqf* endowment. The university is in the position to facilitate the rules and regulations that will accelerate the establishment of the cash *waqf* endowment. The management of the endowment would be answerable to the university authorities in case of the violation of rules and regulations such as mismanagement, misconduct, embezzlement, bias and unjust distribution. The university authorities should make it compulsory for the management to open a *waqf* account in Islamic banks and all their lucrative transactions, business, and investments must be in line with Islamic principles. Similarly, the university should give financial support to *waqf* institutions where and when it is necessary for the smooth running and proper management of the institution (Amuda & Nor, 2013).

Culture and Society. Society may experience the positive impact of UniSZA

through its support for the economy and society that will be made possible through the proposed *waqf* endowment. *Waqf* endowment is not a new concept to the people of Terengganu. As an Islamic state, Terengganu applies *waqf*, especially with regards to immovable property, and Terengganu Muslims understand the concept and application of *waqf*. Nevertheless, the creation of a monthly contribution of cash *waqf* by UniSZA staff would be a new system as cash *waqf* would be a new application of *waqf* to many Muslims. In management of the monthly contribution, the university can learn from the experiences of the International Islamic University, Malaysia or Albukhary International University, Kedah, Malaysia or Al-Azhar University, Cairo, Egypt and some Western universities.

Islamic culture extends financial support to the needy regardless of tribe, gender, colour, status, nationality, race and faith. Donors also seek rewards from Allah Almighty in this life and the next. Voluntary donations (*sadaqat*) are part of Islamic culture and practice. Nevertheless, there is a need to promote monthly contribution among UniSZA staff. Greater public awareness could also be pursued given that it is permissible to foster greater public support for good causes (Aliyu, 2013).

Impact of *Waqf* Endowment on Social and Economic Development of Terengganu. Historically, the establishment of *waqf* endowment primarily addressed the community's needs such as water, education,

health, burial requirements, newly-wed couples, the aged and the disabled. This can be traced to the well of Rumah, the gardens of Bairuha, the garden of Khaibar, Dar al-Arqam, Masjid Nabawi, Masjid Quba and other endowed property made available for the people during the period of the Prophet (S.A.W) and the Islamic caliphate (Zeinoul, 2013). Analogically, the primary objective was to address the present needs of the community, keeping in mind that each community differs from the other. It is the duty of the *waqf* management team to study the needs of the community in order to extend the necessary support. In Terengganu, the state government is effectively taking care of its citizens by providing adequate provision to the people. Nevertheless, *waqf* intervention could help reduce the burden on the government. *Waqf* as a tool for community development and empowerment is a sustainable development measure in terms of growth, progress, human development, material quality, capacity, wealth creation, property construction and cognitive, spiritual, social and personal development. Community empowerment through *waqf* refers to the capability of community members to organise, mobilise, own, control, invest and empower themselves with the aid provided (Zeinoul, 2013). Therefore, the *waqf* management team should utilise the donated cash *waqf* to empower and develop the community in order to enable the beneficiaries to organise and mobilise themselves financially and resourcefully.

Financial Support for UniSZA's Less Privileged Students. One of the primary aims and objectives for the establishment of *waqf* endowment is to provide financial support for educating society. Generosity, goodwill, sharing, caring and financial support to others are encouraged in Islam. In the context of less privileged students, the UniSZA staff cash *waqf* would be a great boon. Receiving financial support would help these students to focus more intensely on their studies (Amuda & Nor, 2013).

Financial Support for the Aged in Terengganu. The endowment would also benefit Terengganu's ageing citizens and homeless. The financial support can be in any form as decided by the management team: cash, food, shelter, clothing, education, health and others.

Waqf-Based Islamic Financial Instrument. The divine duties and responsibilities of an Islamic leader are to provide adequate provision for their citizens without any bias and unjust distribution. *Waqf* management plays a pivotal role in carrying out this duty. In order to have sufficient and surplus income to cater or provide for the less privileged, a *waqf* management team should engage in profitable business, transaction or investment in line with Islamic principles. The major forms of business contracts in Islamic finance consist of profit-sharing contracts such as *mudharabah*, *musharakah*, *murabahah*, *ijarah*, *bay as-salam*, *istisna'a*, *qard hasanah*, *bai bithaman ajil*, *bay as-sarf*, *ju'alah*. Contracts of deposit include

Al-wadiah, contract of *wakalah* (agency), contract of *hibah* and contract of *al-rahn* (security). The UniSZA staff cash *waqf* has to engage in the above-mentioned forms of Islamic business to generate more income and for human development and empowerment. If the business and transactions are properly managed, there will be sufficient income to assist the needy in the state. In order to achieve a profit, the management should employ skilful and qualified persons to manage the fund. Using its cash *waqf* as a micro-financial instrument, the university could support needy and skilful less-privileged citizens across the state. Creation of micro-finance will provide the less privileged with access to capital for small businesses through profit and loss sharing (PLS) instruments such as *mudarabah* and *musharakah*. *Mudarabah* financing can be used by the less privileged to start a business venture to support themselves. *Mudarabah* financing using the university's cash *waqf* fund will generally involve the contribution of capital by the *waqf* endowment acting as *rabbul mal* (owner) to the needy (*mudarib*) to set up and run a small business, with the intention of establishing financial security and independence. The profit will be shared on a pre-agreed ratio between the cash *waqf* management and the beneficiary (Yusuff, Azizan, & Oladapo, 2014).

METHODS

Analysis of Interview

The respondents were UniSZA administrators and lecturers with education levels that

varied from SPM to postgraduate degrees. Most of them stated that they understood the basic concept of *waqf* endowment and cash *waqf* but not completely. Only one respondent replied that he did not understand the concept of cash *waqf* and its application. The majority of the interviewees agreed on the establishment of a UniSZA staff cash *waqf*. Some believed that it would be better not to limit it to a monthly contribution but to include other options such as annual or quarterly contributions according to the means of individuals. Only one respondent disagreed with its establishment. In addition, all of them believed that such a contribution would be helpful for the economic and social development of Terengganu. Although the contribution might take a long time because the management would need to utilise and generate more income from the endowed cash, they stated that cash *waqf* can be used to help the needy in many ways, the main one being to reduce their financial constraints.

Some of the respondents highlighted that the extent of the effort depended on the efficiency of the management itself. The management, in their opinion, must comprise competent experts who can manage and generate more cash from the contributions. Some stated that the management must be responsible and trustworthy. They also agreed that the establishment of a UniSZA staff cash *waqf* may increase job opportunities. Although some of the respondents were unsure how UniSZA management can help with the creation of a *waqf* endowment, the majority

said the management could support the endowment morally and financially and by helping with planning. Some stated that the management should play an important role in the creation of the endowment by endorsing it.

Punishment for *waqf* management misconduct was supported by all the respondents because that would be a breach of trust, which is unlawful in both civil law and *Sharia* although types of punishment differ, from warnings and disciplinary action to legal action and imprisonment. One respondent even suggested forfeiture of the personal assets of the person who committed the misconduct to indemnify the damage incurred.

The involvement of the endowment fund in profitable and lucrative transactions in order to have sufficient income to support less-privileged applicants across the state was greatly welcomed. The type of transaction that UniSZA's cash *waqf* management should undertake in the view of the respondents varied. Some suggested investments or commercial businesses, small businesses or businesses related to tourism. Most of them agreed that *waqf* commercial transportation, *waqf* farming and *waqf* poultry businesses were good ideas. Some said *waqf* farming and poultry may not be able to be executed on a large scale as they are costly. Some agreed to involvement in those businesses because they can generate more profit and jobs and the produce can be sold to generate additional funds for the needy.

RESULTS

Analysis of Factors Influencing UniSZA's Staff Cash *Waqf*

Table 1
Critical analysis of factors influencing UniSZA's staff cash *waqf*

Items	Strongly Agreed	Agreed	Disagreed	None
Financial constraints in Terengganu call for creation of UniSZA cash <i>waqf</i> endowment.	(n=9) 18%	(n=33) 66%	(n=3) 6%	(n=5) 10%
Creation of UniSZA cash <i>waqf</i> endowment will help Muslims and non-Muslims within the state.	(n=10) 20%	(n=36) 72%	(n=3) 6%	(n=1) 2%
Competent and qualified people should be appointed as UniSZA <i>waqf</i> management.	(n=19) 38%	(n=27) 54%	(n=2) 4%	(n=2) 4%
UniSZA's staff cash <i>waqf</i> should be controlled by the university authorities.	(n=8) 16%	(n=20) 40%	(n=18) 36%	(n=4) 8%
UniSZA's staff cash <i>waqf</i> should not be controlled by the university authorities	(n=8) 16%	(n=19) 38%	(n=20) 40%	(n=3) 6%
UniSZA's staff cash <i>waqf</i> should be under the religious affairs department of the university.	(n=12) 24%	(n=28) 56%	(n=7) 14%	(n=3) 6%
<i>Waqf</i> needs university intervention for security purposes.	(n=8) 16%	(n=34) 68%	(n=7) 14%	(n=1) 2%
UniSZA's staff cash <i>waqf</i> rules and regulations should be drafted by Sharia experts and endorsed by the University authorities.	(n=22) 44%	(n=27) 54%	(n=1) 2%	(n=0) 0%
Appointment of <i>waqf</i> management should be based on merit.	(n=10) 20%	(n=26) 52%	(n=11) 22%	(n=3) 6%
Financial constraint rate among Muslims in Terengganu needs creation of a UniSZA staff cash <i>waqf</i> .	(n=10) 20%	(n=33) 66%	(n=4) 8%	(n=3) 6%
<i>Waqf</i> management must protect <i>waqf</i> reputation.	(n=16) 32%	(n=32) 64%	(n=2) 4%	(n=0) 0%
<i>Waqf</i> financial aid should be distributed judiciously.	(n=18) 36%	(n=31) 62%	(n=1) 2%	(n=0) 0%
Bias must be avoided during UniSZA staff cash <i>waqf</i> distribution to the less privileged.	(n=18) 36%	(n=28) 56%	(n=4) 8%	(n=0) 0%
Non-Muslim applicants should be considered for financial support.	(n=6) 12%	(n=37) 74%	(n=7) 14%	(n=0) 0%

Table 1 (continue)

UniSZA <i>waqf</i> management should engage in profitable transactions to increase <i>waqf</i> income.	(n=12) 24%	(n=30) 60%	(n=5) 10%	(n=3) 6%
UniSZA <i>waqf</i> management should engage in lawful transactions.	(n=25) 50%	(n=21) 42%	(n=2) 4%	(n=2) 4%
Many Muslim women can be empowered through UniSZA's cash <i>waqf</i> .	(n=13) 26%	(n=32) 64%	(n=4) 8%	(n=1) 2%
<i>Waqf</i> management is capable of generating more income from donated cash <i>waqf</i> .	(n=18) 36%	(n=22) 44%	(n=7) 14%	(n=3) 6%
It will encourage donors to be involved in devotional acts.	(n=11) 22%	(n=35) 70%	(n=3) 6%	(n=1) 2%
It will improve the standard of living of needy citizens in society.	(n=17) 34%	(n=30) 60%	(n=2) 4%	(n=1) 2%
UniSZA cash <i>waqf</i> contribution to society will enhance the university's reputation across the nation.	(n=14) 28%	(n=34) 68%	(n=1) 2%	(n=1) 2%
<i>Waqf</i> can be involved in <i>Mudarabah</i> transactions in order to have sufficient capital to assist the needy in Terengganu.	(n=15) 30%	(n=31) 62%	(n=3) 6%	(n=1) 2%
UniSZA cash <i>waqf</i> management can be involved in farming as a contribution to society at large.	(n=7) 14%	(n=36) 72%	(n=5) 10%	(n=2) 4%
Business centres can be established by UniSZA <i>waqf</i> management for various transactions.	(n=9) 18%	(n=35) 70%	(n=6) 12%	(n=0) 0%
Many farmers can be employed for <i>waqf</i> farming.	(n=9) 18%	(n=36) 72%	(n=3) 6%	(n=2) 4%
The <i>waqf</i> endowment fund can engage in commercial transportation business where some eligible Muslims can be employed as drivers.	(n=8) 16%	(n=36) 72%	(n=5) 10%	(n=1) 2%
Interest-free loans can be created from UniSZA's cash <i>waqf</i> to support needy Muslims and non-Muslims.	(n=15) 30%	(n=33) 66%	(n=1) 2%	(n=1) 2%
It can be used to assist UniSZA staff who are needy.	(n=17) 34%	(n=30) 60%	(n=2) 4%	(n=1) 2%
UniSZA's cash <i>waqf</i> can be used to reduce the financial constraints of students.	(n=22) 44%	(n=24) 48%	(n=1) 2%	(n=3) 6%
UniSZA's cash <i>waqf</i> can be channelled to orphanage centres across the state.	(n=18) 36%	(n=29) 58%	(n=1) 2%	(n=2) 4%
UniSZA's cash <i>waqf</i> can attract non- UniSZA donors.	(n=11) 22%	(n=37) 74%	(n=0) 0%	(n=2) 4%
Financial support can be extended to ageing indigenes.	(n=11) 22%	(n=34) 68%	(n=1) 2%	(n=4) 8%

Table 1 (continue)

Micro-finance can be introduced from UniSZA's cash <i>waqf</i> to support needy skilful indigenes.	(n=10) 20%	(n=35) 70%	(n=3) 6%	(n=2) 4%
<i>Al-Rahn</i> should be created from a UniSZA cash <i>waqf</i> contribution as a financial instrument for needy indigenes across the state.	(n=10) 20%	(n=36) 72%	(n=1) 2%	(n=3) 6%
UniSZA cash <i>waqf</i> can be used to support natural disaster victims.	(n=20) 40%	(n=24) 48%	(n=3) 6%	(n=3) 6%

The data contained in Table 1 reveals that an overwhelming 66% (n=33) of respondents agreed that financial constraints in Terengganu call for creation of a UniSZA cash *waqf* endowment, with 18% (n=9) strongly agreed and 6% (n=3) disagreed, while 10% (n=5) ticked 'none'. About 72% (n=36) strongly agreed that creation of a UniSZA cash *waqf* endowment would help Muslims and non-Muslims residing in the state and 20% (n=10) agreed. On the other hand, 6% (n=3) disagreed with the creation of a UniSZA cash *waqf* endowment, while 2% (n=1) ticked 'none'. A majority of 54% (n=26) of the participants agreed that competent and qualified people should be appointed as UniSZA *waqf* management, while 38% (n=19) strongly agreed. A total percentage of 4% (n=2) disagreed and another 4% (n=2) of the respondents answered 'none' respectfully. In addition, 40% (n=20) agreed that a UniSZA staff cash *waqf* should be controlled by the university authorities, with 16% (n=8) strongly agreed and 36% (n=18) disagreed, while 8% (n=4) ticked 'none'. However, 38% (n=19) agreed that UniSZA's staff cash *waqf* should not be controlled by the university authorities and

16% (n=8) strongly agreed it should not be controlled by the university, while 40% of (n=20) disagreed and 6% (n=3) ticked 'none'. Similarly, 56% (n=28) agreed that UniSZA's staff cash *waqf* should be placed under the religious affairs department of the university, while 24% (n=12) strongly agreed, 14% (n=7) disagreed and 6% (n=3) ticked 'none'. On the question of security, the majority 68% (n=34) agreed that *waqf* needs university intervention, 16% (n=8) strongly agreed, 14% (n=7) disagreed and 2% (n=1) ticked 'none'. Concerning the rules and regulations, a majority of 54% (n=26) agreed that rules and regulations should be drafted by Sharikh experts, 44% (n=22) strongly agreed, 2% (n=1) disagreed and 0% of (n=0) ticked 'none'. Regarding to the appointment of the university *waqf* management, a majority of 52% (n=26) agreed that the appointment should be based on merit, 20% (n=10) strongly agreed, 22% (n=11) disagreed and 6% (n=3) ticked 'none'. On the primary cause of creation of a university cash *waqf*, a majority of 66% (n=33) agreed that financial constraints among Muslims in the state called for the creation of the university cash *waqf*, 20%

(n=10) strongly agreed, 8% (n=4) disagreed and 6% (n=3) ticked 'none'.

On the issue of university *waqf* management, a total of 64% respondents (n=32) agreed that management must protect *waqf*'s reputation, 32% (n=16) strongly agreed and 4% (n=2) disagreed respectfully. On distribution of financial support to the needy, a majority of 62% (n=31) agreed that financial aid should be distributed judiciously, 36% (n=18) agreed, while 2% (n=1) disagreed. Similarly, a majority of 56% (n=23) agreed that management should desist from bias during the distribution of university endowed cash *waqf*, 36% (n=33) strongly agreed and 8% (n=4) disagreed. A majority of 74% (n=37) agreed that non-Muslims should be considered for financial support, 12% (n=6) strongly agreed and 14% (n=7) disagreed respectfully. A majority of 60% (n=30) agreed that university *waqf* management should engage in profitable transactions, 24% (n=12) strongly agreed with *waqf* management involvement in lucrative businesses while 10% (n=5) disagreed and 6% (n=3) ticked 'none'. A majority of 50% (n=25) strongly agreed that *waqf* management should engage in lawful business, 42% (n=21) agreed, 4% (n=2) disagreed and 4% (n=2) ticked 'none'.

Concerning the empowerment of needy women, 64% (n=32) agreed that women can be empowered through UniSZA's cash *waqf*, 26% (n=13) strongly agreed, 8% (n=4) disagreed and 2% (n=1) ticked 'none'. In order to have sufficient income to cater for the needy across the state, a majority of 44% (n=22) agreed that *waqf* management be

used to generate more income from donated cash *waqf*, with 36% (n=18) strongly agreeing and 14% (n=7) disagreeing, while 6% (n=3) ticked 'none'. A majority of 70% (n=35) agreed that proper and efficient management of endowed cash *waqf* would encourage more donors to get involved in devotional acts, 22% (n=11) strongly agreed and 6% (n=3) disagreed while 2% (n=1) ticked 'none'. A majority of 60% (n=30) agreed that UniSZA's cash *waqf* would improve the standard of living of needy citizens in society, 34% (n=17) strongly agreed, 4% (n=2) disagreed and 2% (n=1) ticked 'none'. A majority of 68% (n=34) agreed that *waqf* monthly contributions to society will enhance university reputation across the nation, 28% (n=14) strongly agreed, 6% (n=3) disagreed and 2% (n=1) ticked 'none'.

On *waqf* management in business and investment, 62% (n=31) agreed that university *waqf* management can be involved in *Mudarabah* transactions in order to have sufficient capital to assist the needy in Terengganu, 30% (n=15) strongly agreed and 6% (n=3) disagreed, while 2% (n=1) ticked 'none'. In order to generate more income to cater for needy applicants, a majority of 72% (n=36) agreed that *waqf* management can be involved in farming as a contribution to society at large, 14% (n=7) strongly agreed, 10% (n=5) disagreed and 2% (n=1) ticked 'none'. Similarly, a majority of 70% (n=35) agreed that business centres could be established by UniSZA *waqf* management for various transactions, 18% (n=9) strongly agreed and 12% (n=6)

disagreed. In addition, 72% (n=36) agreed that many farmers can be employed on their fertile land for *waqf* farming, 18% (n=9) strongly agreed and 6% (n=3) disagreed, while 4% (n=2) ticked 'none'. Concerning commercialisation of endowed cash *waqf*, 72% (n=36) strongly agreed that *waqf* institution could engage in commercial transportation business where some eligible Muslims can be employed as drivers, 16% (n=8) strongly agreed, 10% (n=5) disagreed and 2% (n=1) ticked 'none'. In the interest of the needy across the state, a majority of 66% (n=33) agreed that free interest loans could be created from the UniSZA cash *waqf* to support needy Muslims and non-Muslims, 30% (n=15) strongly agreed, 2% (n=1) disagreed and 2% (n=1) ticked 'none'. On the other hand, a majority of 60% (n=30) agreed that cash *waqf* can be used to assist UniSZA staff, 34% (n=17) strongly agreed, 4% (n=2) disagreed and 2% (n=1) ticked 'none'. Regarding needy students, 48% (n=24) agreed that endowed cash *waqf* can be used to reduce students financial constraints, 44% (n=22) strongly agreed, 2% (n=1) disagreed and 6% (n=3) ticked 'none'.

On the issue of orphanages, a majority of 58% (n=29) agreed that the UniSZA cash *waqf* could be channelled to orphanages across the state, 36% (n=18) strongly agreed, 2% (n=1) disagreed and 4% (n=2) ticked 'none'. The table also indicates that a majority of 74% of (n=37) agreed that the UniSZA cash *waqf* could attract non-UniSZA donors, 22% (n=11) strongly agreed and 4% (n=2) ticked 'none'. A total

of 68% (n=34) agreed that financial support could be extended to ageing indigenes, 22% (n=11) strongly agreed, 2% (n=1) disagreed and 8% (n=4) ticked 'none'.

On micro-financing, a majority of 70% (n=35) agreed that micro-financing can be introduced from UniSZA's cash *waqf* to support needy skilful indigenes, 20% (n=10) strongly agreed, 6% (n=3) disagreed and 4% (n=2) ticked 'none'. Similarly, 72% (n=36) agreed that *al-Rahn* should be created from UniSZA cash *waqf* contribution as a financial instrument for needy indigenes across the state, 20% (n=10) strongly agreed, 2% (n=1) disagreed and 6% (n=3) ticked 'none'. Finally, a total of 48% (n=24) strongly agreed that the UniSZA cash *waqf* could be used to support natural disaster victims, 40% (n=20) disagreed, 6% (n=3) disagreed and 6% (n=3) ticked 'none'.

Analysis of the Impact to Social and Economic Development of Terengganu State

According to the responses to the interview on the factors influencing UniSZA's staff cash *waqf* and its impact on the social and economic development of Terengganu, there is need for the establishment of a cash *waqf*. Some of the respondents argued that the contribution should not be limited to monthly payments but that it could be collected weekly, quarterly and annually for people to contribute according to their means. They unanimously agreed that UniSZA's cash *waqf* was able to contribute to the state economically and socially. Only one respondent disagreed

with the establishment of the cash *waqf*. The respondents argued that management should be dynamic, competent, qualified and able to manage the donated cash *waqf* properly and generate income in order to have sufficient funds to cater for the needy. Transparency and accountability will help the smooth running of the endowment and will achieve the primary aims and objectives of a *waqf* endowment. It is also inferred from the participants' responses that the management of the cash *waqf* should engage in lucrative and profitable businesses and transactions. They argued that the cash *waqf* is capable of reducing unemployment among the needy and supporting ageing citizens and victims of natural disasters.

Suggestions

From this study, we suggest that UniSZA should do everything possible to endorse the establishment of its cash *waqf*. University teaching and non-teaching staff should be well informed about and made aware of the importance of their contribution to the fund. Dynamic and qualified people should be appointed to manage the fund in order to generate sufficient income to support the community. In order to have more income, philanthropists across the nation should contribute to the cash *waqf* endowment. Therefore, the management should attract others to contribute to the endowment as well. The management should prioritise their programme and distribution of collected cash *waqf* should match the needs of the beneficiaries.

CONCLUSION

It can be concluded that UniSZA's staff cash *waqf* is able to benefit many people within the state and beyond provided that the collected cash *waqf* is well managed and commercialised. In addition, it can be utilised to support needy students, empower the less privileged and contribute to human development. The collected donations can be used to assist less-privileged applicants in securing working capital to run their business and conduct their transactions successfully and financial aid can be in the form of interest-free loans. Since the primary objective for collection and donation of cash *waqf* is to relieve the financial difficulties of the less-privileged in Terengganu, the collected cash *waqf* should be channelled to them to reduce their financial constraints. The management of UniSZA's staff cash *waqf* will help by financing needy applicants to run their business by allocating running capital. The recipients should also respect any related agreements and manage the money judiciously for the benefit of the endowment.

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Zakat Distribution In The East Coast: Recipients' View

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ABSTRACT

Zakat institutions are responsible for managing *zakat* from collection to distribution. An in-depth understanding of the management of *zakat* institutions is vital in order to understand the process of managing *zakat* funds. To date, there has been rising concern from the public on how *zakat* funds are distributed to the eligible recipients. The public are curious why, notwithstanding the rising amount of *zakat* collections, poverty rates among Muslims are still high. Thus, this paper aims to explore the problem by gathering the views of *zakat* recipients on the *zakat* distribution system. For data collection, questionnaires were distributed to selected participants in the East Coast. The results showed that most of the recipients were not fully satisfied with the management of *zakat* distribution, specifically with regards to the amount of *zakat* received and customer service. Thus, it is crucial for *zakat* institutions to improve their management system to earn positive reviews from the public. It is hoped that this study can assist *zakat* institutions in improving their management system and dispelling the negative view of them held by the public.

Keywords: Perceptions, *zakat* institutions, *zakat* management

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INTRODUCTION

Zakat is the third pillar in Islam and it is fundamental to Islamic economy. Theoretically, it has a wide and deep impact on the socio-economic development of a nation (Shariff et al., 2011). There are abundant amounts of literature that focus on the importance of *zakat*. For instance, *zakat*

is an important mechanism for social justice as it leads to the increase of prosperity in this world as well as religious merit (*thawab*) in the hereafter, since its payment purifies individuals from sins (Abdul, 1987). From the *fiqh*'s perspective, *zakat* is a payment of wealth for qualified groups as stated in the Holy Quran (Abdul, 1992). In addition, Al-Qardawi (1999) described *zakat* as an act of worship to Allah, since the payers are giving a portion of their wealth to others without question.

Countries can gradually solve their economic problems through the *zakat* system, since history has proven that *zakat* is a good and practical way to reduce the gap between the rich and the poor, if managed fairly according to the Sharia. The rich will continue to enjoy their wealth, provided that a part of the wealth is distributed to the poor (Din, Yasin, Salleh, & Ghazalba, 1985). In other words, the poor should not be treated as beggars who beg for the mercy of the rich. Muslims who meet the conditions of *zakat* payments need to pay *zakat* as it is compulsory for all Muslims, either as individual *zakat* (*zakat fitrah*) or *zakat* on wealth.

In Malaysia, *zakat* collection has been increased from year to year (Salleh, 2002). For instance, the collection of *zakat* in Malaysia in 2007 was RM806,284,072. However, in 2012, the collection of *zakat* increased to RM1,797,604,876 (Laporan *Zakat*, 2007-2012). The increase in collection shows that the public are more aware of the obligation of paying *zakat*. Furthermore, there are some factors that

contribute to the increase in the awareness of paying *zakat*. Hairunnizam, Sanep and Mohd (2005) and Abu, Nur and Abdul (2010) argued that personal values are not the sole factor that influenced the individuals' motivation to pay *zakat* on income. Personal satisfaction also plays a pivotal role as payers believed that by paying *zakat*, they were indirectly helping the less fortunate. Most of the previous studies on *zakat* (Arif, Alwi & Tahir, 2011; Bakar & Ghani, 2011; Siska & Siswantoro, 2012; Sapongi, Obid, & Nelson, 2013) proved that the personality value of the *zakat* payer is among the important factors that influenced the decision to pay *zakat*. Other factors that were also significant were altruism, faith, self-satisfaction, organisation and reward. In addition, the government's decision to grant a tax rebate on *zakat* paid may also be a contributing factor to the increase in *zakat* collection.

It cannot be denied that *zakat*, in terms of collection, has been showing an increase from year to year. However, the question here is how efficiently this collection is being distributed to the qualified *asnaf*. As mentioned in the Holy Quran, *zakat* collected should be distributed to eight qualified recipients, who are *al-fuqara*, *al-masakin*, *amil*, a convert to tame him, *al-Riqab*, *al-Gharimin*, *fee-sabilillah* and finally, *ibn sabeel*. Al-Qardawi (2005) discussed in depth about the statement that *zakat* should be distributed to eight *asnaf* if the funds are in abundance and the degree of their needs is similar. In order to show their effectiveness and efficiency, *zakat*

institutions should improve the quality of the collection process and be able to disburse the collected amount in the same year (Hassan, 2007). Any undistributed amount should be reported in order to show where the money went. However, it was found that there was an excess in *zakat* collection based on the observation of the report from the *zakat* institution. For example, in 2011 and 2012, the excess in *zakat* collection was RM252,929,462 and RM335,839,892, respectively. These figures were not reported in the financial report of the *zakat* institutions.

This shows that the *zakat* collected was fully distributed. Embong, Taha and Mohd (2013) stated that excess *zakat* from any group of the *asnaf* for the current year shall be transferred to other groups of *asnaf* who are also the recipients in the current year. Any excess then shall be added in the collection of *zakat* from the following year or stored in a surplus *zakat* fund. Furthermore, in the observation of the report, there was no clear information regarding this matter on whether the excess was carried forward to the next year or stored as surplus in the *zakat* institution. This information is critical because it may affect the credibility of the *zakat* institution, which is responsible for providing such information to the public and to stakeholders. The public and the stakeholders are left unsure as to whether their contributions are being distributed to the qualified *asnaf*. This leads to negative perception by the recipients and others on the management of the *zakat* institution.

Zakat is also important for eradicating poverty. As mentioned earlier, Islam introduced *zakat* to bridge the imbalance between the rich and the poor. Theoretically, the trend of increasing *zakat* collections in Malaysia means that poverty can be reduced gradually (Siska & Siswantoro, 2012). Unfortunately, the incidence of poverty, specifically among Muslims in Malaysia, is still very high. Thus, to overcome the problem of poverty, the distribution and allocation of *zakat* should be done effectively and efficiently. This problem should be solved by the management of *zakat* institutions. The effectiveness of *zakat* collection and the distribution of *zakat* are highly dependent on the management of *zakat* institutions. In addition, the distribution of *zakat* is very important because it shows how *zakat* funds can impact society and the country in terms of poverty alleviation and economic development (Wess, 2002; Mannan, 2003; Hassan & Khan, 2007).

Therefore, the objective of this study is to measure the level of satisfaction of *zakat* recipients in the ability of *zakat* institutions to distribute *zakat* funds. To realise this, we conducted a survey that covered eligible *asnaf* in the East Coast. A few factors such as the amount and service provided were the main focus of this study. In brief, the recipients were not fully satisfied with the management of *Zakat*. The rest of this paper is organised as follows: the next section will review the relevant literature and Islamic principles, followed by the section discussing methodology used and the

section featuring a discussion of the results. The final section concludes the paper.

LITERATURE REVIEW

Zakat Distribution

The distribution of *zakat* to eight eligible recipients (Hairunnizam, Sanep, & Abdul, 2009) is clearly stated in Surah al-Tawbah, verse 60:

Indeed, charity, alms are only for the poor, the needy, charity managers, the mu'allaf who persuaded him, for (freed slaves), those who owe, for the cause of Allah and of those who by the way, an ordinance that required Allah. (Al-Taubah 9:60)

Based on the interpretation, there are eight groups of people who are eligible to receive *zakat*. According to Abdul (2003), this verse gives a clear explanation of the distribution of *zakat*, compared with the problem of determining the source of charity based on the verse detailing the instructions. The eight groups are the *al-fuqara'* (the poor), *al-masakin* (the poor), *amil*, a convert to tame

him, *al-Riqab* (slave), *al-Gharimin* (the person who owes a debt), *fee-sabilillah* (the person who fought for the cause of God) and finally, *ibn sabeel* (traveller) (Hairunnizam et al., 2009). This definition is also spelt out in studies by Bakar and Ghani (2011), Marhaini, Ahmad and Mohamad (2012), Firdaus, Beik and Irawan (2012) and in the most recent study by Embong et al. (2013).

The distribution of *zakat* can be classified into three categories. The first distribution is based on needs and this category includes the needy, the poor, slaves, debtors and the Ibnu Sabil. Second, the distribution is based on the cultivation and encouragement of religious life and morality. Recipients who fall in this category are converts (*Muallaf*) and *fisabilillah*. The third category is that of distribution of incentives to motivate managers, and the recipients under this category are the *Amil* (Tarimin, 2005).

It is not clearly discussed how *zakat* is to be distributed among these eight groups of *asnaf* in the Qur'an or in the *Hadith* of the Prophet (Al-Abdin, 2002). Table 1 summarises the discussion on how *zakat* should be distributed. It can be seen that

Table 1
Summary of discussion on how *zakat* should be distributed

Author	Discussion
Al-Shafi'i and Hambalites	Distribute to all the eight categories if they exist, otherwise to those who are available.
Malik and Abu Hanifah Shahatah (2000)	It is not necessary to cover all the groups. To be collected from the rich and given to the poor. If in excess, it is to be paid to those whose hearts are to be reconciled. If there is more excess, it is to be paid to those who are in debt.
Al-Qardawi (2005)	Distribute to all eight <i>asnaf</i> if the funds are in abundance and the degree of their needs is similar.

there are several contradictions regarding the distribution of *zakat* based on the categories of recipients. Al-Shafi'i was of the opinion that *zakat* should be distributed to all the eight categories if they exist, otherwise to those who are available and being supported by some of the Hambalites. However, Malik and Abu Hanifah argued that it is not necessary to cover all the groups.

Shahatah (2000) quoted Abu Ubaid (in al-Amwal), who emphasised that the Prophet (peace be upon him) initially mentioned that only one category was to receive *zakat* in his *Hadith*: "The *Zakat* is to be collected from the rich and paid back to the poor." However, when the Prophet received more money/wealth, he mentioned another category, which was 'those whose hearts are to be reconciled'. Further, when more and more money was received, he added another category, which was 'those who are in debt'. Following this, Abu Ubaid stressed that the distribution of the *zakat* fund is to be left to the discretion of the ruler to manage.

As most scholars are of the opinion that preference should be given to the poor in distributing *zakat* funds rather than to distribute to all the deserving categories, it became the practice for most countries to give a greater percentage of *zakat* funds to the genuinely poor (Al-Abdin, 2002). Al-Qardawi (2005) was of the opinion that *zakat* funds should be distributed to all eight *asnaf* if the funds are in abundance and the degree of their needs is similar. The share of each one does not necessarily have to be equal but it should be according to their

number in society and the conditions of need.

Measurement Performance of Non-Profit Organisations

The *zakat* institution is a body that is being trusted to manage the *zakat* collection and distribution funds. The *zakat* institution is a non-profit organisation that is entitled to ensure the effectiveness and discipline of *zakat* payments. Besides that, *zakat* institutions are also obligated to comply with Sharia law and be responsible towards the administration and management of the Islamic fund. Thus, there is a need to know how well *zakat* institutions fulfil the role entrusted to them on the collection and distribution of *zakat*. To achieve this objective, this paper examines how non-profit organisations should be measured based on their performance. To accomplish this, this paper reviewed previous studies on performance measurement of non-profit organisations.

Performance measurement for nonprofit organisations, such as *zakat* institutions, should include multiple types of measure such as input, processes, output and outcomes (Keehley & Abercrombie, 2008). This is due to the varying levels of service and monetary aid provided by the institutions. The existence of multiple stakeholders also makes it necessary to include multiple measures to capture the organisation's performance adequately.

Previous studies have discussed the importance of measurement of the performance of non-profit organisations.

Among them are Schuster (1997) and Berman and West (1998), who stated that it is important for the managers of nonprofit organisations to measure their performance. A previous study by Zahra (1991), which was supported by Lu (2006), reported that the performance of nonprofit organisations should be measured both in terms of their financial and non-financial performance.

Financial Aspect. In view of the *zakat* institution, this aspect is less important among others. This is because *zakat* institutions are not obliged to measure their operating income, return-on-capital employed and economic value. However, the level of customers' satisfaction is still based on the institution's financial performance (Chi & Gursoy, 2009; Shafiee et al., 2014). In this case, the performance of *zakat* institutions is observed through the ability of such institutions to manage the *zakat* money. Thus, the *zakat* institution's financial performance is not only measured on how high the collection is but also on whether the money reaches the eligible *asnaf*. The higher the level of financial performance of the *zakat* institution, the higher the level of satisfaction of the customers.

Customer Aspect. The customer's perception of *zakat* institutions has become a main aspect of the performance measurement of *zakat* institutions. Currently, customer satisfaction is the most crucial element that needs to be taken care of by *zakat* institutions. The ease of spreading information through social media

has become a main challenge of *zakat* institutions. For example, if the customers are not satisfied with the organisation, they can easily spread the information, and this would tarnish the *zakat* institution's image. In other words, the key to tackling customer loyalty is by having an efficient internal business process so that a good relationship with customers can be created. However, if the organisation's work ethic is poor, the customer will be not satisfied with the organisation.

Organisational aspect. The organisation should also know what it should excel at both in the long-term and the short-term. The organisation aspect measures employee satisfaction, productivity and retention and defines how the people, technology and organisational environment merge to support organisational strategy (Laske, 2001). Kaplan and David (2001) pointed out that managers recognise the importance of the internal processes at which their organisation must excel in order to achieve financial and customer objectives in this aspect.

METHODS

This research is concerned with the *zakat* institutions' management and also the recipients of the *zakat* funds. This research aimed to evaluate the level of *zakat* institutions' management efficiency and also to evaluate the satisfaction of recipients towards *zakat* distribution. Therefore, the focus group of participants in this study was a sample of *zakat* recipients.

Questionnaire

As this was a preliminary study, questionnaires were directly distributed only to a total of 30 respondents. The questionnaires were circulated and distributed to the Muslim community around Kuala Terengganu. The questionnaires were a modification of that used by Mohd (2011). The respondents came from different groups of *asnaf*.

The Cronbach's Alpha for the questionnaire was 0.904, as shown in Table 2, suggesting that the items had a relatively high internal consistency. The Cronbach's Alpha, which was a measure of internal consistency, was tested for the whole aspect of the questionnaire. This test showed how closely related items in a set were as a group and was also considered a measure of reliability. Gliem and Gliem (2003) stated that the Cronbach's Alpha reliability coefficient normally ranges between 0 and 1. However, there is no lower limit to the coefficient. The closer the Cronbach's Alpha coefficient is to 1.0, the greater the internal consistency of the items on the scale. It was noted that a reliability coefficient of 0.70 or higher is considered "acceptable" in most social science research.

Table 2
Reliability statistics

Cronbach's Alpha	No of Items
0.904	21

RESULTS AND DISCUSSION

The measures developed were able to measure the *zakat* institution's performance because the measure consisted of various aspects that could be divided into financial and non-financial measures. Every aspect had its own process measured to determine the *zakat* institution's overall performance. The process measured for each aspect is shown in Figure 1.

Financial Aspect

Table 3 shows the descriptive statistics for the financial aspect analysed from the questionnaire. The variables and mean were arranged in ascending order based on the financial aspect. As we can see, the question with the highest mean, 5.33, was for the statement, "Zakat assistance can reduce the poverty level of my family." This indicated that most of the respondents agreed that *zakat* received helped them to overcome problems in their family triggered by poverty.

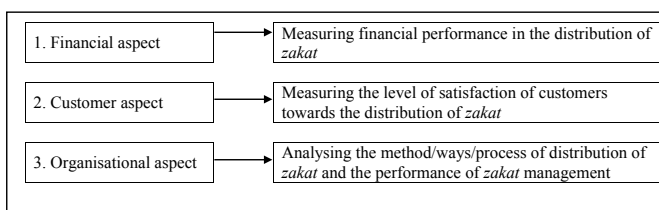


Figure 1. The processes taken to measure the zakat institution's performance

Table 3
Financial aspect

	N	Min	Max	Mean	Std. Deviation
<i>Zakat</i> assistance received can increase my monthly income.	30	3	5	3.77	0.626
There is an obvious improvement in income after receiving <i>zakat</i> assistance.	30	2	5	3.90	0.803
<i>Zakat</i> assistance can fulfil my family's basic needs.	30	2	9	3.90	1.269
<i>Zakat</i> distribution is increasing from year to year.	30	2	9	4.00	1.203
<i>Zakat</i> assistance has made me a successful businessman.	30	2	9	4.03	1.129
<i>Zakat</i> collected is being fairly distributed to recipients.	30	2	9	4.17	1.315
<i>Zakat</i> assistance can reduce the poverty level of my family.	30	3	43	5.33	7.126
Valid N (listwise)	30				

Two statements had the same mean, 3.90. The statements were, "There is an obvious improvement in income after receiving *zakat* assistance," and "*Zakat* assistance can fulfil my family's basic needs." The lowest mean, which was 3.77, was for the statement, "*Zakat* assistance received can increase my monthly income." This showed that the recipients believed that the *zakat*

funds received did not contribute to the increase in their income.

Customer Aspect

Table 4 below shows the descriptive statistics for the customer aspect. As we can see, the question with the highest mean was 4.13, with the statement, "*Zakat* assistance has already contributed much

Table 4
Customer satisfaction aspect

	N	Min	Max	Mean	Std. Deviation
<i>Zakat</i> assistance increased my ability to manage the <i>zakat</i> funds being given.	30	2	9	3.80	1.349
<i>Zakat</i> contribution increased my business potential.	30	2	9	3.93	1.230
<i>Zakat</i> assistance has already contributed much towards improving my family's/children's education.	30	3	9	4.03	1.098
<i>Zakat</i> assistance has increased my ability to manage the <i>zakat</i> funds being given.	30	2	9	4.13	1.196
Valid N (listwise)	30				

towards improving my family's/children's education." This indicated that most of the respondents agreed with this statement. The lowest mean was 3.80, and it was for the statement, "Zakat assistance increased my ability to manage the zakat funds being given." This indicated that only a few agreed and were satisfied with this question.

Organisational Aspect

Table 5 shows the descriptive statistics for the internal business perspective and the learning and growth perspectives. As we can see, the question with the highest mean was 4.37, with the statement, "Zakat information can be obtained easily." This indicated that

most of the respondents agreed with this statement. The respondents also agreed that the zakat institution's staff were being provided with sufficient training and that the zakat institution did provide good service, as both statements recorded a mean of 4.27. The lowest mean was 3.83, which was for the statement, "The process of applying for zakat is easy." This indicated that only a few agreed and were satisfied with the process as they felt that applying for the zakat fund was complicated. There were a lot of procedures to consider in processing zakat applications. These results reflected a contrast in perception among zakat recipients of the management of zakat by the zakat institution.

Table 5
Organisational aspect

	N	Min	Max	Mean	Std. Deviation
The process of applying for zakat is easy.	30	3	9	3.83	1.085
The zakat institution uses a good system.	30	2	9	4.00	1.203
The zakat institution has a good distribution system.	30	3	9	4.03	1.098
The management of the zakat institution is effective and efficient.	30	2	9	4.10	1.155
Overall, the zakat institution's performance is effective and efficient.	30	2	9	4.13	1.167
The zakat institution is doing a good job of zakat distribution.	30	2	9	4.17	1.262
There is training for the employees and the employers.	30	3	9	4.27	1.112
The zakat institution offers good services.	30	3	9	4.27	1.461
Zakat information can be obtained easily.	30	2	9	4.37	1.129
Valid N (listwise)	30				

CONCLUSION

Salleh (2002) emphasised that Malaysia can be considered one of the outstanding and excellent countries in *zakat* management compared to other Islamic countries. However, the findings of this study showed that the administration of *zakat* in Malaysia was inefficient based on the recipients' perception. Although this institution is managed by workers trained in Islamic education, they are not professionals. This causes the distribution of *zakat* to not be managed properly, effectively and efficiently.

Based on the analysis of the descriptive statistics, it was found that the public and the recipients were not satisfied with the existing *zakat* distribution system. In addition, it was found that a lot of excess in the collection of *zakat* was not disclosed or mentioned in the annual reports. This created a negative perception of the *zakat* institution. The *zakat* institution should have a proper documentation system that provides an avenue for the recording of excesses in the *zakat* collected. This should be made a priority in order to fulfil the institution's responsibility towards the public. By doing so, all stakeholders can be aware of all relevant information regarding their *zakat* contributions.

Future research and studies should focus on the advantages related to maintenance and management cost, integration and upgrading as well as scalability issues in the planning phase of *zakat* collection and distribution to avoid wasting of money.

Another area of research for the future is the obstacles faced by the *zakat* institution that can hinder it from providing effective and efficient service in handling *zakat* funds.

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The Effort of Selected Public and Private Universities to Develop *Awqaf* Property in Malaysia

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ABSTRACT

Waqf has been practised by Muslims since the time of the Holy Prophet Muhammad ﷺ time. The practice continues today, covering various sectors and fields. One of the sectors in which *waqf* is practised is education. Education is one of the basic needs of people, but not all can afford to pursue their studies to tertiary level. In Malaysia, some public and private universities have initiated efforts to develop *awqaf* properties with the intention of helping poor and needy students, among others. In addition, *waqf* can also be used to finance other beneficial projects, the returns being channelled to other beneficial purposes that are allowed by Sharia. This paper is a conceptual paper, with data gathered from interviews and articles published in journals, conference proceedings, books and universities' official website. The data show that among higher education institutions, five public and four private institutions had established a *waqf* fund. They established the *waqf* fund with the aim of helping poor and needy students. Usufructs or returns from *awqaf* funds have been channelled into scholarships and research grants, to build facilities and to fund academic projects to benefit the universities.

Keywords: Higher education, public university, private university, *waqf*

INTRODUCTION

Waqf has been practised since the time of the Prophet Muhammad ﷺ. For example, Caliph Umar dedicated the land he received in Khaibar for *waqf* (Ibrahim, Amir & Masron, 2013). *Waqf* is a sincere gift of private possessions made for the provision of Muslims (Rosnia & Zurina, 2013). The

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Quran clearly encourages people to use money and property in the way of Allah as this will bring a good reward. Allah says in the Quran:

ءَامِنُوا بِاللَّهِ وَرَسُولِهِ وَأَنْفِقُوا مِمَّا جَعَلَكُمْ مُسْتَحْلِفِينَ فِيهِ فَالَّذِينَ
ءَامِنُوا مِنْكُمْ وَأَنْفَقُوا لَهُمْ أَجْرٌ كَبِيرٌ ﴿٧﴾

Believe in Allah and His Messenger and spend out of that in which He has made you successors. For those who have believed among you and spent, there will be a great reward. (*Al Hadid: 7*)

مَثَلُ الَّذِينَ يُنْفِقُونَ أَمْوَالَهُمْ فِي سَبِيلِ اللَّهِ كَمَثَلِ حَبَّةٍ أَنْبَتَتْ
سَبْعَ سَنَابِلَ فِي كُلِّ سُنْبُلَةٍ مِائَةٌ حَبَّةٌ وَاللَّهُ يُضْعِفُ لِمَنْ يَشَاءُ وَاللَّهُ
وَاسِعٌ عَلِيمٌ ﴿٣٦١﴾

The example of those who spend their wealth in the way of Allah is like a seed [of grain] which grows seven spikes; in each spike is a hundred grains. And Allah multiplies [His reward] for whom He wills. And Allah is all-Encompassing and Knowing. (*Al Baqarah: 261*)

There are many rewards from Allah SWT that await the *waqif*¹. This has encouraged many to dedicate their wealth, and *waqf* property is growing, covering various sectors such as healthcare, medical, land, building, agriculture and education.

In Malaysia, many instances of *waqf* donation have been seen in the education

sector. A lot of property has been dedicated as *waqf* in various forms such as *waqf* scholarship, *waqf* hostel, *waqf* building, *waqf* equipment and others. *Waqf* property has a big potential to be developed and can bring a big impact on Muslim economies. *Waqf* property can create many educational and job opportunities as well as reduce/complement government spending. This potential can be achieved with efficient and professional management and good governance. However, there is still a lack of *waqf* in the higher education sector due to various problems. Hence, the potential of *waqf* in this area is not fully realised.

Waqf

Waqf comes from the Arabic verb *waqafa*. The root word means “to prevent” or “to

¹*Waqif* is an Arabic term for the endower of *waqf*.

stop” or “to restrain” or “to abstain from” (Ahmed & Khan, 1997; Bearman, 2003; Ibrahim et al., 2013). *Waqf* is continuous charity where the rewards continue to accrue even after the donor’s death (Hassan & Shahid, 2010). One Hadith of Prophet Muhammad ﷺ mentions continuous reward: “When the son of Adam (human being) dies, his deeds are stopped except for three things, namely, his good deeds, his knowledge, and his pious child who prays for him” (Muslim). There is no direct reference to *waqf* in the Quran. However, it is covered by the term *infaq*, which is highly enjoined by Islam.

The four Islamic schools of law² attach different meanings to *waqf*. The Hanafi school of law defines *waqf* as custody of a specific thing whose ownership rests with the founder and the usufruct of such things is dedicated to charity in terms of a loan, through lending or by accommodating a loan (Siti, 2006). The Maliki school states that *waqf* is sharing the usufruct of things that belong to the founder for the duration of its existence and the ownership remains with the founder although he does not use the property anymore (Powers, 1993). The two other schools of law, Shafie and Hambali, are of the opinion that *waqf* refers to “tying up of the substance of a property and the devoting of its usufruct for the benefit of

mankind, in such a manner that ownership of it belongs to God (Allah)” (Siti, 2006). The different interpretations of the four schools of law are acceptable as long as they do not go against the Quran and *Sunnah*³.

Despite the various definitions, *waqf* generally means religious charity in the way of Allah. *Waqf* property is non-transferable and received from private ownership. The usufruct of *waqf* property is dedicated to the Muslim society, specifically which goes beyond religious, cultural, racial and secretarial boundaries (Abu-Zahrah, 2007; Ibrahim et al., 2013; Mohammad, 2011; Mohsin, 2013; Siti, 2006).

Higher Education in Malaysia

In Malaysia, higher education institutions are divided into public Higher Education Institutions and private Higher Education Institutions.

Public higher education institution.

Public higher education institutions (HEIs) are categorised into three entities: research universities, focused universities and comprehensive universities. Twenty public Higher Education Institutions have been established under the Universities and University Colleges Act 1971 comprising five research universities, four comprehensive universities and eleven focused universities. The research universities focus on research

²In Islam, there are four different schools of law: Hanafi, Maliki, Hambali and Shafie. These schools of law are also known as *madhab*. These different schools of law exist due to having originated in different geographical areas that influenced the different interpretations.

³*Sunnah* is the saying and acts of the Prophet Muhammad ﷺ.

activities and teaching based on research and development (R&D). Among these universities are University of Malaya (UM), the National University of Malaysia (UKM), Putra University of Malaysia (UPM), the Science University of Malaysia (USM) and the Technology University of Malaysia (UTM). Comprehensive universities offer various courses covering various fields of study for all levels of education, including pre-undergraduate, undergraduate and postgraduate degrees. The four universities are MARA University of Technology (UiTM), International Islamic University Malaysia (IIUM), University of Malaysia Sabah (UMS) and University of Malaysia Sarawak (UNIMAS). Lastly, focused universities are universities that focus on specific fields such as technical subjects, science, management and defence.

There are 11 focused universities, which are the Northern University of Malaysia (UUM), Sultan Idris University of Education (UPSI), University of Malaysia Pahang (UMP), Tun Hussein Onn University of Malaysia (UTHM), University of Technical Malaysia Malacca (UTeM), University of Malaysia Perlis (UniMAP), Sultan Zainal Abidin University (UNISZA), Islamic Science University of Malaysia (USIM), University of Malaysia Terengganu (UMT), University of Malaysia Kelantan (UMK) and the National Defence University of Malaysia (UPNM).

Private higher education institutions. Another type of higher education institution in Malaysia is the private Higher Education

Institution (Private HEIs). Private HEIs contribute to the development of higher education in Malaysia as they provide the opportunity for higher education, save money for the nation in foreign exchange and contribute to establishing Malaysia as a centre of excellence in international higher education.

Since the 1980s, Private HEIs have developed rapidly, offering courses at certificate and diploma levels in collaboration with foreign universities and professional bodies from the United Kingdom (UK), the United States of America (USA), Canada, Australia and New Zealand. The development of Private HEIs has continued over the years as more countries have entered into collaboration with Malaysia, including France, Ireland, Egypt, Indonesia and India. The number of institutions in Malaysia up to 31 August, 2016 is 45 private universities, 29 private university colleges, nine foreign university branch campuses, 37 polytechnics, 94 community colleges and about 500 private colleges.

METHODS

This paper is conceptual in nature. The data were collected from primary and secondary sources. The primary sources were interviews conducted with higher education *waqf* administrators from November 2015 to February 2016. The interviews were held in the interviewees' office and tape recorded to ensure all important points were best captured. The secondary sources were reading materials such as articles published

in journals, conference proceedings, books and universities' official websites.

RESULTS AND DISCUSSION

This section discusses *waqf* efforts by public and private higher education institutions. Five public HEIs identified in this study, namely, USIM, UPM and UKM, have established *waqf* funds, while the other two, IIUM and UTM, have established endowment funds. Of the private HEIs, this study discovered that four have established *waqf* funds.

Waqf Efforts in Public Higher Education Institutions

In order to develop *waqf* property, some public HEIs have established a *waqf* fund. Some progress has been achieved. Four public HEIs have established their own *waqf* funds, namely, Universiti Sains Islam Malaysia (USIM), International Islamic University Malaysia (IIUM), Universiti Putra Malaysia (UPM) and Universiti Kebangsaan Malaysia (UKM). Table 1 lists the public HEIs that have established *waqf* funds.

Table 1
Summary of public higher education institutions that have established *waqf* funds

No.	University	Designation of <i>Waqf</i> Fund	Year Established
1	Universiti Sains Islam Malaysia	Al-Abrar <i>Waqf</i> Fund USIM	2013
2	Universiti Islam Antarabangsa	IIUM Islamic Endowment Fund	1999
3	Universiti Putra Malaysia	Knowledge <i>Waqf</i> Fund	2011
4	Universiti Kebangsaan Malaysia	UKM <i>Waqf</i> Endowment Fund	2010
5	Universiti Teknologi Malaysia	UTM Endowment Fund	2010

Source: (Fadhilah, Zurina, & Mohammad, 2014)

Universiti Sains Islam Malaysia (USIM) took the initiative to focus on the *waqf* concept in financing the development of Islamic higher education. A unit was set up in 2013 known as the Centre for *Awqaf* Financing Development. This Centre worked closely with the Majlis Agama Islam Negeri Sembilan (MAINS) and the Faculty of Medicine and Health Sciences to establish the USIM Specialist Clinic and also a hemodialysis center. The university established the USIM Medical Specialist

Clinic. USIM has received RM2 million (RM1 million as outright *waqf* grant and RM1 million as *Qardhul Hassan*) from MAINS. The latter has also committed another RM1.5 million for the establishment of a hemodialysis clinic. The hemodialysis clinic, when in operation, will provide free treatment for the *asnaf*⁴ group and lower

⁴*Asnaf* are the eight categories of people who have the right to receive zakat.

charges for other patients. MAINS had appointed USIM as a *mutawalli*⁵ to manage and develop the *waqf* fund. Not only that, USIM will also distribute the benefits to the targeted group as intended by the *waqif*⁶ (Mohammad, Fuadah, & Asma, 2014).

The IIUM Endowment Fund (IEF) was established in 1999 with the purpose of assisting poor and needy students in IIUM who have the potential to do well academically but lack financial resources. The IEF has initiated many fund-raising activities such as general donation drives among individuals, companies and organisations; the *Kafalah* Program; the RM1 Campaign; and a collection of zakat in collaboration with the Lembaga Zakat Selangor (LZS). Not only that, the IEF is also involved in business collaborations to add to the funds. The IIUM Endowment Fund had received RM7 million from the Ambank Group Chairman, Tan Sri Azman Hashim, and his foundation, Yayasan Azman Hashim. This money was used to build a complex, the Tan Sri Azman Hashim Complex, which houses branches of three banks, Bank Islam, Bank Muamalat and AmIslamic Bank, a bookstore, an exclusive café and a multipurpose hall. About RM500,000 of the annual rental income generated from this complex is used

to sponsor needy and deserving students through the IIUM Endowment Fund. In 2008, more than 1,300 students benefitted from RM2.5 million of the endowment funds. In 2009, the number increased to 1,800 students, who received RM3 million in aid (Siti & Asmak, 2014).

The UPM *Waqf Ilmu* Fund is an effort of the university's to collect funds in meeting the needs of academic activity in UPM. The fund is raised through various methods such as contribution from individuals, the corporate sector, cooperatives, non-government organisations, the returns of *waqf* investment, yield of agricultural, plantation and industrial activities and returns from the money market. The fund was established in February 2012 and a MoA was signed between UPM and the Selangor Islamic Religious Council (MAIS) to collect *waqf* fund for a period of three years until February 2015. After two years of the *waqf* establishment, the *Waqf Ilmu* UPM had collected about RM2.51 million from various sources, including corporate partners, the industrial community and the UPM community. The account is managed by the Bursar. The money collected is invested in Sharia-compliant financial institutions. Until March 2015, RM5.9 million was collected, including accumulated *mudharabah* returns. As of September 2013, *mudharabah* profit received was RM97,057. The funds received were used to aid in establishing infrastructure for facilities in universities and for academic activities and also research activities. Not only that, the fund also gives out scholarships to selected

⁵*Mutawalli* is the manager of waqf property. In Malaysia, the *mutawalli* is the Majlis Agama Islam Negeri (MAIN) and MAIN has the right to appoint other entities to act as *mutawalli* on its behalf.

⁶*Wakif* means *waqf* giver.

students in UPM. In 2013, eight students received scholarships from the the *waqf* fund and in 2014, another 12 scholarships were given. The donor and *waqf* giver is entitled to tax exemptions under section 44(6), Income Tax Act 1967 (Ahmad, 2015).

The *waqf* fund raised by UKM in 2010 is known as the Islamic Endowment Fund (*Tabung Pemberian Islam*) and is placed under the Chancellor's Holdings. The objective of the establishment is to be a platform for staff and alumni of UKM to donate money based on the concepts of *waqf* and *infaq*. The endowment fund is used to fund teaching and learning, research, publications, establishment of Chairs of Excellence, community service and industrial relations (Ahmad, 2015). The *waqf* fund offers two schemes to encourage staff to contribute to *waqf*. The schemes are the UKM Cash *Waqf* Scheme and UKM *Waqf*-Takaful Scheme. Under the UKM Cash *Waqf* Scheme, donors may contribute a certain amount of money, either as a lump sum or by instalment, while under the UKM *Waqf*-Takaful Scheme, UKM cooperates with licensed *takaful* institutions to provide a fund donation scheme through *waqf* practice. This scheme allows the contributor to gather funds in instalment basis for the preferred duration of at least five years. UKM acts as the *waqf* recipient institution while the licensed *takaful* institution acts as the scheme manager. At the maturity period, the dividend will be directly paid by the *takaful* institution to UKM as the *waqf* recipient. In the event of accidents or calamities, the *waqf* contributor has the

option to receive a portion of the *takaful* benefit. UKM signed a memorandum of agreement with the Selangor Islamic Religious Council for a period of two years (already lapsed) allowing the university to raise *waqf* funds. About RM280,000 was collected by the *waqf* fund though salary deductions or one-off *waqf* contributions from academic and administration staff of UKM. In the next phase, the Chancellor's Holdings plans to raise *waqf* funds from UKM's Alumni and students. UKM is also collaborating with Perbadanan Wakaf Selangor (PWS) to collect *waqf* funds that will be handed over to PWS to be invested, with the profits to be shared between UKM (70%) and PWS (30%). UKM will distribute the profits as specified by *Wakaf Ilmu* UKM (Mohammad et al., 2014).

Universiti Teknologi Malaysia (UTM) set up an endowment fund in 2010. UTM is planning to provide scholarships to all outstanding undergraduates through the endowment fund by the year 2020. Not only that, the endowment fund will also provide sponsorships for the establishment of a professorial chair and finance publication of scientific materials and the implementation of high impact programmes to inculcate knowledge culture in UTM. In order to raise funds, UTM will be carrying out book sponsorships with UTM Press as publisher. Other programmes that will benefit from the endowment fund is a professorial chair, the Abadi Endowment Tower, a golf tournament and investment in financial industries and trust funds. The university has two endowments viz. the Merdeka

Endowment and the Menara Endowment. The Merdeka Endowment Fund finances academic activities in UTM that impact the nation's growth and UTM's progress. The Menara Endowment Fund is collected through the sponsoring of selected premises in UTM by donors made up of individuals, organisations or companies, with the premises displaying the names, images or brands of the donors. In 2013, the fund collected about RM50 million, enabling

206 students to receive scholarships (Ismail, Aminah, & Julaida, 2015).

Waqf Efforts in Private Higher Education Institutions

In addition to efforts by public higher education institutions to develop *awqaf* property, private higher education institutions have also done their part. This study discusses five private HEIs as shown in Table 2 below.

Table 2
Summary of private higher education institutions that have developed *awqaf* property

No	Private Institutions	Year Established
1	Islamic University of Malaysia (UIM)	2013
2	International Islamic University College Selangor (KUIS)	1995
3	Bestari University College	1998
4	Sultan Azlan Shah Islamic University College (KUISAS)	1999

Source: (Mohd & Hasan, 2016)

The Islamic University of Malaysia, established in 1955, was formerly known as the Muslim College Malaya (KIM). *Waqf* contributions or endowments from Muslim communities in the Federation of Malaya, Singapore, Sabah, Sarawak and Brunei were used to establish KIM. There were also contributions from non-Muslim communities. The late HRH Sultan Hishamuddin Alam Shah Al-Haj generously donated one of his palaces to the college. The college operated its campus in the former Istana Jemaah located in the royal town of Klang, Selangor (Abd, 2015).

The International Islamic University College Selangor (KUIS) was established in 1995 and fully owned by the Selangor Islamic Religious Council (MAIS). KUIS has made an attempt to promote *waqf* by establishing a *waqf* fund. This *waqf* fund is aimed at helping the University College to develop educational facilities such as a library, an academic building and student facilities. Various parties have contributed to the *waqf* fund, including individuals, associations and corporate companies.

Bestari University College is the first University College that made an effort to elevate the poor, needy and orphaned

through education. Thus, the establishment of Bestari University College was not only as a non-profit making institution but also to provide orphans and the rural community the opportunity to pursue tertiary education. This University College is owned by Pertubuhan Kebajikan Anak-anak Yatim Malaysia [PEYATIM]. In developing Bestari University College, PEYATIM assigned two bodies to collect and manage the *waqf* fund, Yayasan Pendidikan Anak Yatim atau Miskin Malaysia (YAWATIM) and CIFP Consultants Sdn Bhd (CIFP). For every RM30.00 donated, the donor is entitled to 0.1 m² land on which Bestari University College sits. The donor's name is registered and the donor then dedicates the land as *waqf* to PEYATIM. This type of *waqf* is known as '*wakaf kaki*'. The money collected is used to build infrastructure and facilities in Bestari University College (Baharuddin, Mohd, Muhammad, & Azri, 2016).

Sultan Azlan Shah Islamic University College (KUISAS) was known at one time as Kolej Islam Darul Ridzuan. This University College is owned by the Perak state government and registered under the Ministry of Higher Education of Malaysia. KUISAS was the brainchild of His Royal Highness the Sultan of Perak, Sultan Azlan Muhibuddin Shah, in 1986. The institution was realised in 1999 with a temporary campus located at Ipoh, Perak. In 2006, Sultan Nazrin Shah, the present Sultan of Perak, endowed a piece of land in Kuala Kangsar to KUISAS that became its permanent campus.

Other Financing Instruments

Mohammad et al. (2014) identified seven instruments that have great potential in *waqf*. The first is cash *waqf*. This is a popular mode in countries such as Malaysia, Syria, Turkey, South Africa, Singapore, Pakistan and Egypt. According to the *Muzakarah* of the Fatwa Committee No 77 held on 10-12 April, 2007, cash *waqf* is allowed in Islam (JAWHAR, 2012). Through this instrument, the public can dedicate an amount of money to the Council as *waqf*. This money can be used for social and welfare activities. In order to encourage people to participate in charity, the government has provided tax incentive donations as given in section 44(6) of the Income Tax Act 1967 (Hasan & Abdullah, 2008).

The second instrument is *waqf* shares. *Waqf* shares are sold by the Islamic Religious Council at minimum value to individuals or organisations. The *waqf* shares purchased can be dedicated as charity and therefore, the purchaser will not be entitled for a dividend or profit (Mohammad et al., 2014). The third instrument is *waqf* in financing microfinance. This instrument is introduced as an alternative to conventional microfinancing institutions. *Waqf* in microfinancing acts as a support system for entrepreneurs for developing their business (Ahmed, 2007). The fourth instrument is *waqf* in social banks or trust funds. The current banking system has failed to deal with the poor. Thus, the *waqf* bank can be the bank for the poor and needy. According to Mohammad et al. (2014), it is permissible in Islam to have *waqf* banks based on the

validity of cash *waqf* and the need of *waqf* and its beneficiaries.

The fifth instrument is *waqf* and *Mudharabah* investment. Cash *waqf* can be invested through *Mudharabah* to generate returns. Cash *waqf* is raised from savings for charity. The money collected can be invested into partnership contracts between cash *waqf* corporations and Islamic banks (Cizacka, 2014). The sixth instrument is *waqf* and *sukuk* investment. *Sukuk* is the best practice for developing *awqaf* property (Mohammad et al., 2014). There are two projects that develop *waqf* property through *sukuk*. The Islamic Religious Council of Singapore issues *sukuk musyarakah* to develop *waqf* property for commercial use. Another project is the Zam Zam tower complex in Saudi Arabia that was built using *sukuk intifa'* financing (Shamsiah, 2010). The seventh and final instrument is *waqf* in business growth and economic development. *Waqf* can contribute a lot to business growth and development. Zakaria, Samad and Shafii (2013) proposed a model with characteristics of *waqf* practice that can be used in Malaysia. The characteristics are: (1) low price of essential goods and services, (2) creation of employment opportunities, (3) growth stimulation of Islamic financial institutions and (4) *waqf*-based financing.

The success of *waqf* development is due to awareness within the Muslim community of *waqf*, especially its role in *Ummah*, and proper implementation of *waqf* as well as an effective delivery system (Mohammad et al., 2014).

Critical Success Factors

Mohammad et al. (2014a) highlighted three critical success factors for *waqf* development based on the speech by HRH Dr. Raja Nazrin Shah (Khairulrijal, 2016). The factors are legislation, efficiency and professional management and capital, all of which highly impact *waqf* development.

Legislation

In Malaysia, the respective State Islamic Religious Councils (Majlis Agama Islam Negeri [MAIN]) are the sole trustee⁷ for the *awqaf* assets of each state. For example, the Negeri Sembilan Wakaf Enactment 2005 states that the Majlis Agama Islam Negeri Sembilan (MAINS) is the sole trustee for any *waqf* property in the state of Negeri Sembilan (Negeri Sembilan Wakaf Enactment, 2005). MAIN is responsible for managing *waqf* property and has the right to manage it according to Syariah and Islamic law. In the Canon of State Land 1965 (KTN), section 4(2)(e) highlighted that anything under KTN in relation to *waqf* property is to be managed according to Islamic law (Ahmad, 2012). Therefore, this clause gives MAIN a platform to systematically manage *awqaf* property for the benefit of the *Ummah*.

Efficient and Professional Management

Another factor that contributes to the success of *waqf* development is good governance coupled with efficient and professional

⁷Trustee in *waqf* is called as *Mutawalli*

management. This gives confidence to donors to continue making contributions. The establishment of *waqf* bodies such as the Malaysian Waqaf Foundation (Yayasan Wakaf Malaysia [YWM]) is expected to encourage the public to contribute towards *waqf* (Mohammad et al., 2014). The YWM focusses on the commercial aspects of *waqf* in collaboration with the State Islamic Religious Councils.

Capital

Capital contribution is an important factor in developing *waqf* property. The capital can be collected from diverse parties such as individuals, corporate bodies and the public sector. For example, the government allocated about RM256 million under the Ninth Malaysia Plan and RM20 million under the Tenth Malaysia Plan to the Department of Awqaf, Zakat and Hajj (Jabatan Wakaf, Zakat dan Haji [JAWHAR]) to develop *waqf* land. Many projects have been developed such as orphanages, shop lots, education complexes, hemodialysis centres, shelter houses for women, hotels in Malacca, Perak, Terengganu and Negeri Sembilan and many more that benefit society (Hassan & Shahid, 2010).

CONCLUSION

The relevant higher education institutions have done a good job of establishing a *waqf* fund. This effort needs to be emulated by other higher education institutions to promote the practice of *waqf*. *Waqf* funds will not only ease the burden of

the government, they will also provide a platform or opportunity for the public to contribute towards charity for the sake of Allah. In developing *awqaf* assets, capital is the main factor in ensuring the success of projects. In addition, legislation and efficient and professional management also contribute to the success of *awqaf* projects. It is agreed that this paper is limited by data availability. There is need for more research into the roles of higher education institutions in promoting *waqf*.

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Acquisition of *Waqf* Lands by The State Authority : A Case Study of Land Acquisition in Terengganu

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ABSTRACT

The Land Acquisition Act 1960 has listed out some categories of land that can be acquired for certain purposes by the Government or the State Authority (SA), namely registered alienated land. In this regard, the National Land Code 1965 has allocated the power to place any *waqf* land under a specific administrative body, the State Islamic Religious Affairs Council (SIRC). The objective of this article is to identify some issues connected with the acquisition of *waqf* land by the SA. It is also to recommend some improvements to the law in order to ensure that the acquisition of *waqf* land is in line with Sharia. As a case study, the State of Terengganu is chosen to highlight the issues connected with the acquisition of *waqf* land by the SA. The study adopts the qualitative approach, where data are collected through library research and the content analysis method. The research findings reveal that most of the remedies awarded in the *waqf* land were monetary compensation based on market value.

Keywords: Acquisition, case study, Terengganu, *waqf* land

INTRODUCTION

Buang (2010) defined acquisition as transfer of ownership of property that must indicate a person or body to whom the property is transferred. Land ownership in Peninsular Malaysia is governed by the Federal Constitution (FC), National Land Code 1965 (NLC) and the Land Acquisition Act 1960 (LAA). In Malaysia, land ownership is guaranteed under Article 13 of the Federal Constitution, which provides that private

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property cannot be compulsorily acquired or used, unless it is done in accordance with the law and the deprived owner is paid adequate compensation. In *Chiranjit Lal v Union of India* AIR (1951) SC 41, Mukherjee J defined acquisition as follows: "Acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former" (p. 54). In other words, although an individual has a right over his property, this right can be denied through legal procedures subject to adequate compensation being paid to the owner.

Section 3(1) of the LAA provides that any alienated land may be acquired by the State Authority (SA) if needed: (a) for any public purpose; (b) by any person or corporation for any purposes, which in the opinion of the SA is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; (c) or for the purpose of mining or for residential, agricultural, commercial, industrial or recreational purposes or any combination of such purposes. *Waqf* land may also be compulsorily acquired by the SA under the LAA. This is a result of not having precise laws dealing with acquisition of *waqf* land. According to Ibni al-Manzur (1994), *waqf* comes from the Arabic verb '*waqafa*', whose root means 'to prevent' or 'to stop' or 'to restrain' or 'to abstain'. Other jurists such as Muhammad (1971),

al-Syirbini (1994) and Ibn Qudamah (1999) deliberated the legal context of *waqf*, which referred to an irrevocable gift of a corporeal property ('*ayn*') for the benefit of the donor's family or someone else or something, in perpetuity, as charity promised and executed normally during the life-time of the donor, that is not capable of transfer, gift and transmission thereafter. As a whole, *waqf* is a perpetual dedication of movable or immovable property for religious, pious or charitable purposes. Therefore, the main characteristics of classical *waqf* are irrevocability, perpetuity and inalienability. In other words, *waqf* carries with it an element of eternity in benefits that become the goal of *waqf* (Salleh, Hamid, Harun, & Abd, 2015).

Section 2 of the LAA clearly stipulates that the government has the power to acquire land including that under the control of the SIRC because the status of land that has been endowed as *waqf* land is also classified as alienated land. Therefore, as with other alienated land, the SA can exercise their power to acquire *waqf* lands at any time without any legal restrictions (Mat, 2012a). Further, there is no legal provision indicating that any acquisition of *waqf* land must be replaced with another piece of land of similar nature and value (Mohamad, Syed, & Ali, 2012). Hence, *waqf* land could also be acquired by any party for the purpose of economic development such as housing projects or government projects. This provision is inconsistent with Islamic principles, which state that the acquisition of land must be in line with

public interest (*masalah 'ammah*) such as for the construction or expansion of a mosque, cemetery or roads (Ismail, Harun, & Omar, n. d).

Market Value

The principles of awarding compensation for land acquisition are found in the First Schedule to the LAA, wherein it is stated that the compensation must be in accordance with the market value of the land in question at the time the land is gazetted for acquisition. Section 2 of the First Schedule to the Act states that in determining the amount of compensation to be awarded for any scheduled land acquired under the Act, consideration must be made in respect of the following matters and no other: (a) the market value as determined in accordance with section 1 of the First Schedule; (b) any increase in the value of the property belonging to the interested person that is likely to accrue from the use to which the land acquired will be put; (c) the damage, if any, sustained or likely to be sustained by the person by reason of the acquisition injuriously affecting his other property or his actual earnings; (d) the damage, if any, sustained or likely to be sustained by the person by reason of the acquisition injuriously affecting his other property or his actual earnings; if, in consequence of the acquisition, he is compelled to change his residence or place of business, the reasonable expenses incidental to such charge; and (f) where only part of the land is being acquired, any under-taking by a competent authority to construct roads, drains, walls,

fences or other facilities benefitting any part of the land left unacquired, provided that the undertaking is clear and enforceable.

In determining what is the 'market value' of the acquired land, the Collector is required to take into consideration the principles contained above and, in addition, any express or implied conditions restricting the use of the said land (Buang, 2010, p. 317). The term 'market value' has not been defined in the LAA (Chin, 1999, p. 45). In the case of *Foh Chong & Sons Sdn Bhd v the District Land Administrator, Johor Bharu and Another* [2005] 3 MLJ 748, the High Court decided that:

The principles of awarding compensation for land acquisitions are found in the First Schedule to the Land Acquisition Act 1960 (Act 486) wherein it is stated that the compensation must be in accordance with the market value of the land in question at the time the land is gazetted for acquisition. (p. 751)

In *Nanyang Manufacturing Co v The Collector of Land Revenue Johore* [1954] MLJ 69, Buhagiar J stated the definition of market value as the price that an owner, willing to sell but not obliged to sell, might reasonably expect to obtain from a willing purchaser with whom he is bargaining the sale and purchase of the land. The judge further summarised the three recognised methods of valuation as follows: (i) the opinion of experts, (ii) the price paid, within a reasonable time, in *bona fide* transactions

of purchases of land acquired, or of the land adjacent to the acquired and possessing similar advantages; and (iii) a number of years' profit from the land. In *Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co* [1996] 1 MLJ 243, Suffian J stated that market value meant the price expected to be obtained by a seller from a willing purchaser.

Market value was clearly defined in *Ng Tiou Hong v Collector of Land Revenue Gombak* [1984] 2 MLJ 35, when Syed Agil Barakbah HMP stated the main principles in determining market value: Firstly, market value refers to compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. Secondly, market price can be measured by a consideration of the price of sale of similar land in the neighbourhood or locality that is of similar quality and position. Thirdly, its potentialities must be taken into account. Fourthly, in considering the nature of the land regard must be given as to: whether its locality is within or near a developed area; its distance to or from a town; availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be construed in the near future; and expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should not be given to an estimate unless it is supported by, or coincides with, other evidence.

In *Ong Yan & Anor v Collector of Revenue Lands, Alor Gajah, Malacca* [1986] 1 MLJ 405, Wan Yahya J highlighted the trend of recent cases reflecting that in assessing market value, the court does not only consider the present utility of the land but also the potential use of such land in the future. The judge further summarised the five known methods of valuation as follows: (i) the opinion of experts; (ii) the costing method, which is adding by the primordial value of the land and any costs of improvement and all elements of profits; (iii) comparing the sale price of land in the neighbourhood of the acquired land; (iv) a number of years' purchase of the profit from the land acquired; (v) the residual method, namely by retrocessive deduction of the cost of development and building from a built-up property so as to arrive at the residual value of the land. Out of the five methods, the judge in this case chose the comparative sale method as the best guide to a fair assessment and did not really depend on the valuation of the real estate expert (Buang, 2010, p.320). In other words, what is emphasised is not only the remedy for the loss of ownership but also compensation for any expenses incurred on the land, such as buildings, as well as loss of earnings consequential to any land cultivation and future development that is likely to be incurred.

Legal Position of Waqf

Islamic law matters in Malaysia are governed at state level through the Sharia Courts by virtue of the State List of the Ninth

Schedule to the Federal Constitution. A state's jurisdiction, including Terengganu's, over Islamic matters is definite. *Waqf* is one of the matters related to the religion of Islam as listed under Item 1, List II (State List) of the Ninth Schedule of the Federal Constitution. Item 1 reads as follows:

...Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue....

Based on the above provision, it is clear that matters related to *waqf* are under the jurisdiction of the state. Article 74 of the Federal Constitution further provides that the Legislature of a state may make laws on any matters specified in the State List (*Waqf* Land Vesting Management Manual, 2010). The state can create the laws on the above matters. In other words, the *waqf* institution has been provided by the Islamic

Religious Administrative Enactments of each state or other enactments relating to the state's *waqf* property (Ishak, 2013). Therefore, each state has the power to enact its own *waqf* laws without being subject to the federal law. This could be seen when the states of Selangor, Malacca and Negeri Sembilan Enactment specifically legislated *Waqf* Enactments for their respective states. For states with specific *waqf* legislation, the administration and management of *waqf* property was subject to such law (*Waqf* Land Vesting Management Manual, 2010). In states other than Selangor, Malacca and Negeri Sembilan that have yet to introduce specific *waqf* legislation, matters related to *waqf* form part of the state's jurisdiction and only the Sharia Court can hear and decide any matters related to the *waqf* (Dahlan, Yaa'kub, Abdul, & Palil, 2014).

Under the NLC, the position of the *waqf* was provided for in section 4(2)(e), which explicitly stipulates that no provision in the NLC is applicable to *waqf* land, except as otherwise provided. The provisions of the NLC expressly provide that *waqf* lands are not recognisable as being administrable under the NLC. This provision seems to generally recognise that only *waqf* laws are needed to govern and administer *waqf* land. Therefore, the general principles of the NLC that are not in line with Islamic law are not applicable to the extent that they are inconsistent in terms of the management and administration of *waqf* land (Md Omar, 2013).

The Department of Wakaf, Zakat and Haji (JAWHAR) published a manual for

waqf land i.e. 'Waqf Lands Administration Manual 2010' and proposed three methods to register *waqf* land according to the NLC. Firstly, the *waqf* land can be transferred using Form 14A, where the land will be transferred from the original registered proprietor (the donor) to the *mutawalli* (the State Religious Council). The *mutawalli* is the person or institution who is assigned as legal custodian over *waqf* assets or funds. Secondly, *waqf* land can also be transferred to the *mutawalli* using the surrender and re-alienation provision under section 197 of the NLC. The land can be dedicated for *waqf* by Muslims through the mechanisms of Part 12 of the NLC, which deals with the surrender of the ownership of alienated land to the SA (sections 195 to 204). The act of registering *waqf* land can be done under the provisions in Part 30 of the NLC that regulate registration by way of statutory vesting as stipulated in sections 414 to 416. Lastly, *waqf* land can be registered under the provisions of section 416C of the NLC in the name of the SIRC as transferee (Syed, & Mohamad, 2014). Section 416C of the NLC includes statutory vesting in favour of the transferee of alienated land derived by way of donation, gifts, bequest, permission, consent or any other means. Applications may be made by the transferee by presenting evidence of such donation, gift, bequest, permission, consent or in any other way to the Registrar of Titles or the Land Administrator for endorsement in order to affect the rights and entitlement of the transferee as well as to bind the land proprietor. The rights granted are to occupy,

utilise, control or manage the land, and not to act as the land proprietor. Therefore, the statutory vesting under this provision is restrictive, wherein the SIRC can only occupy, use, control or manage the *waqf* land but not own it.

Therefore, the SIRC is the body given the responsibility of administering and managing *waqf* lands as sole trustee in respect of all *waqf* lands and the trustee for all types of trust in the form of Charitable Trusts (*Amanah Khairat*), which look after the welfare of Muslims. The SIRC has been established in every state for the same purpose, namely, to be responsible for maintaining, developing and managing *waqf* property, but they differ in the implementation of control of management (Ab, Mohamad, Mohamed, & Abdul, 2011).

In Terengganu, *waqf* lands fall under the jurisdiction of the Islamic Religious Council and the Malay Customs of Terengganu (MAIDAM), a body that is responsible for looking into the affairs of *waqf* land administration. Section 63 of the Administration of Religious Affairs (Terengganu) Enactment (No. 2 of 2001) states:

Notwithstanding any provision to the contrary contained any instrument or declaration creating, governing or affecting it, the Majlis shall be the sole trustee of- (a) all wakaf, whether wakaf am or wakaf khas; (b) all nazar am; and (c) all trusts of every description creating any charitable trust for

the support and promotion of the religion of Islam or for the benefit of Muslims in accordance with Hukum Syarak, to the extent of any property affected by the wakaf, nazar am or trust and situated in the State of Terengganu.

Section 64 provides that, “All property subject to section 63 shall without any conveyance, assignment or transfer, and, in the case of immovable property, upon registration under the written law relating to land, vest in the Majlis, for the purpose of the wakaf, nazar am or trust affecting the property.”

Mahamood (2005) stated that the purpose of the appointment of the SIRC as sole trustee of *waqf* was to ensure that *waqf* is efficiently managed and administered, so that it can generate substantial revenue

that will benefit the beneficiary or be used for welfare purposes that are either or not determined by the *waqif*.

A Case Study of Acquisition of *Waqf* Land by the Terengganu State Authority from Year 2009 to 2014

In Malaysia, nearly all mosques, Muslim prayer houses (*surau*) and cemetery sites that are built on government land are yet to be transferred to the SIRC (Mat, 2012b). In Terengganu most of the *waqf* lands affected by the acquisition are those donated for use as mosques, Muslim prayer houses and cemeteries. Fortunately in Terengganu, these land titles are already registered under the SIRC and compensations has been paid by the government to the SIRC as *mutawalli*. The list of *waqf* land in Terengganu that was involved in the acquisition of land from the years 2009 to 2014 is shown in Table 1.

Table 1
List of types of waqf land involved the land acquisition with compensation

Year	Types of <i>Waqf</i>	Location	Compensation Sum (RM)	Purpose of Acquisition
2009	Welfare of Roh Hj Omar	Kg. Bukit Dungun/ Bukit Payung	21,560.00	MC
	Hiliran Mosque	Kg. Pak Bang/Chabang Tiga	55,090.00	MC
	Tok Ku Mosque	Kg Melintang/Kubang Parit	32,661.00	MC
	Tok Ku Mosque	Kg Melintang/Kubang Parit	33,687.00	MS
	Tok Ku Mosque	Kg Melintang/Kubang Parit	13, 908.00	MC
	Mosque site	Kg Amir/Mukim Kampung Raja	23,590.00	MC
	Religious Education	Kg Pak Pe/Gelugur Raja	294,645.00	MC
2010	Beneficiaries of Haji Abdullah bin A. Aziz (Tok Pelam)	Kg. Ladang Tok Pelam/Bandar Kuala Trg.	9,133,430.27	RP
	Pasir Akar mosque site	Kg Pasir Akar/Pasir Akar	25,920.00	MC
	Bukit Bayas Mosque site	Kg. Laut/Pengadang Buluh	13,205.00	RE
	Beneficiries of Sheikh Kadir	Kg. Laut/Pengadang Buluh	113,905.00	RE

Table 1 (continue)

	Mosque site	Binjai Rendah/Bukit Payung	No compensation	MS
	Mosque site	Binjai Rendah/Bukit Payung	No compensation	MS
2011	Religious education	Reli Kg Pak Pa/Gelugor Raja	170,289.00	MS
	General <i>waqf</i> (Mosque)	Baroh Kg. Panji /Gelugor	9,384.00	MS
2012	Late Royal Sultan	Kg. Padang Air/Kuala Nerus	457,120.00	MS
2014	General <i>waqf</i>	Kg Pantai Telok Tanjung/Bandar Kuala Terengganu	1,495,330.92	DP

Source: MAIDAM (2015)

Note: MC = Ministry Complex; MS = Mosque Site; RE = Road Expansion; RP = Residential Project; DP = Development Project

RESULTS AND RECOMMENDATIONS

Based on the above information, almost all of the *waqf* land acquired by the government in Terengganu was paid for with monetary compensation upon acquisition. Two methods of compensating the acquisition of lands were used, *ibdal* and *istibdal*. According to Badran (1986), *ibdal* is the selling of corporeal property to buy property/ other assets or in the form of money, while Ibn Qudamah (1999) highlighted *istibdal* as the buying of corporeal property ('*ayn*) that constitutes *waqf* replacement. Islam has set compensation value as being equal to or higher than the price of the land acquired. Land acquisition over *waqf* property, which is happening nowadays, refers mainly to the concept of the sale of '*ayn Waqf* or *Ibdal* to the Government that is subsequently replaced either in the form of land or with compensation money (Mat, 2008). *Waqf* land in Terengganu was acquired for the following purposes, namely, to erect a ministry complex, to expand roads and

build mosque sites, residential areas and development projects. The total amount of compensation paid was RM11,89,722.19; none was replaced by *istibdal*; this, in the opinion of the writers, is the best way to remedy the loss of *waqf* land upon acquisition by the SA.

At the same time, the acquisition of *waqf* land has adversely contributed towards the declining number of *waqf* land. This is in view of the difficulty of procuring strategic land that is almost not available to replace acquired *waqf* land as well as rising land price (Nazli Amirri Ngah, interview on 2015, March 25). Due to failure to replace, *waqf* land will inevitably disappear and will no longer exist. This definitely defeats the principles and concepts of *waqf*, which emphasise on the permanency of the donated property. For example, taking *waqf* land in Kg Pantai Telok Tanjung/Bandar Kuala Terengganu for a development project actually cannot be compensated with money because the compensation was too little compared to the profits generated by the

development that has since taken place in the area. Buang (2010) stated that the land owner is entitled not only to the land but also to any benefits derived from the land, and these become the determining factors that must be taken into account in deciding the amount of compensation.

With regard to *waqf* of mosques, Muhammad (1971) asserted that the Maliki and Shafi'i schools of law agreed that such *waqf* could not be sold or exchanged, except when the transaction could not be avoided due to public interest. As a result, all *waqf* property dedicated for use as mosques cannot be acquired by the government for any reason of development. This is due to the principle that *waqf* property cannot be sold, given or bequeathed. Thus, it becomes necessary for the LAA to be amended to forbid the acquisition of *waqf* land, mainly, that connected to *waqf* of mosques or Muslim prayer houses (*surau*) by the government for any reasons whatsoever. This amendment is consistent with the interpretation given by the Maliki and Shafi'i schools of law, which totally prohibit the exchange or sale of the *waqf* of mosques. Alternatively, we may refer to the less restricted and more liberal opinion of the Hanafi and Hanbali schools of law, which allow the implementation of *istibdal* under some circumstances. In Terengganu, *waqf* land comprising the Hiliran Mosque, Bukit Bayas Mosque and Tok Ku Mosque was acquired by the SA; this, in fact, was in violation of the above principles as it was used to build ministry and state unity complexes.

The rise in land price and inadequate compensation have made it difficult to sustain and replace *waqf* lands that were acquired by the SA. Should the acquired land be replaced with the purchase of any new land and endowed as *waqf*, it would go against the concept of *istibdal*, which requires the *waqf* land to be replaced with a land of equal or higher value. With regards to proper practice, Mat (2012) laid down certain guidelines. If the acquisition of *waqf* land is specifically for mosque and cemetery sites, there are two types of usage: firstly, when the donor/*waqif* endows his land specifically for mosque or cemetery sites, the land must be utilised in accordance with the wish of the donor/*waqif*. Secondly, if the land is endowed for the benefit or usufruct favouring mosques or Muslim prayer houses, any proceeds derived from this land must be channelled into the maintenance fund of the mosque or Muslim prayer house concerned. With respect to the implementation of *istibdal* for this type of land, where the building of mosques/Muslim prayer houses concerns partial acquisition, the respective agency or developer must bear all costs incurred in relation to maintenance and enhancement of the mosque/Muslim prayer house so as to preserve its original condition, subject to the committee's approval in respect of the mosque/Muslim prayer house concerned. However, where acquisition involves a whole piece of land with a mosque that can no longer be used, it may be replaced with another building for use as a mosque or Muslim prayer house; alternatively, the

existing mosque or Muslim prayer house can be disposed of by way of sale so that a new mosque can be constructed on a new site, and the existing land must be replaced with another land of the same size (Sulung, 2013).

On the other hand, if the acquisition of *waqf* land is specifically for Islamic burial, it needs to be replaced with other land so that the respective tombs can be moved to the new burial ground. Replacing the existing acquired land with monetary compensation might cause problems, especially in procuring new land for the purpose of building a new mosque or Muslim prayer house, which would incur high expenditure. Therefore it is recommended that *waqf* land that is affected by land acquisition by the government be purchased or replaced with other land as soon as possible and money compensation if paid, should not be owned or kept for a long period. Nevertheless, taking into account other factors such as lack of suitable land and the rise in land price, which makes it difficult for MAIDAM to procure new land, the attempt to replace acquired land with land is still preferred, though it may become optional.

Lack of uniformity of *waqf* laws between the states has resulted in differences in terms of process, procedure for issuance of *fatwa*, interpretation of laws and understanding in matters relating to *waqf*. In fact, the absence of specific provisions or comprehensive

enactments with regards to the management and administration of *waqf* in most states in Malaysia except for Selangor, Negeri Sembilan and Malacca would allow the civil courts to intervene even though these matters are under the jurisdiction of the Sharia Court. Therefore, a specific act or enactment on *waqf* should be done in order to coordinate all matters relating to *waqf*.

CONCLUSION

Most *waqf* land affected by land acquisition by the SA has not been replaced with land. The practice adopted by the land administrator in Malaysia is solely to pay monetary compensation. Payment of monetary compensation accommodates the relevant acquiring parties as they are not required to deal with the affected parties other than the land owners concerned, namely, by way of dealing only with the SIRC. *Istibdal* or the practice of acquisition of *waqf* land by substituting money as compensation should be revisited and reviewed from both perspectives of Islamic ruling and the LAA. Although the theory of *istibdal* in the form of monetary compensation is tolerable and meets the basic concept of *istibdal* in Islam, the implementation does not seem to achieve the purpose of *waqf* as laid down in Islam, if SIRC fails to ensure the existence of land assets that SIRC has been entrusted with in fulfilling the rights of the donor (*waqif*).

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Application of Shared Parenting in Malaysia: Appraising the Australian Experience

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ABSTRACT

Internationally, shared parenting has been highlighted and agreed to be the best method in protecting the welfare of the child. The religion of Islam also promotes the concept of shared parenting to ensure that the welfare of the child is well protected. In Malaysia, legislation on child custody emphasises that the welfare of the child shall be given paramount consideration but there are no provisions on shared parenting and specific guidelines on its application. An amendment was made to the laws to include a provision on equal parental rights but it does not directly relate to the principle of shared parenting. The vagueness of the law and the lack of proper guidelines in relation to shared parenting open the doors for the courts to render inconsistent decisions in determining custodial rights, and this often results in decisions in favour of sole custody. The absence of specific laws on shared parenting has also caused difficulties for parents in cooperating for the sake of their children. They tend to stress on their conflicts and fight for their rights rather than focus on the welfare of the children. This paper seeks to discuss the current position of shared parenting after marital separation in Malaysia. As Malaysia practises a dual legal system, this paper will also examine the suitability of applying the shared parenting principle in both systems. A brief comparative review will also be made of Australian law and policies, which are more advanced on the subject of shared parenting.

Keywords: Child custody, welfare of the child, shared parenting, Malaysian law, Australian law

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INTRODUCTION

Historically, the father has the highest authority over his family as he is the breadwinner of the family and his property will be inherited by his children. His wife

comes into inheritance under the concept of unity, where in the event of separation, the wife cannot claim anything and the ties between her and the children are loosened as she has no legal standing anymore, thereby breaking the concept of unity. So, her role is less important and less appreciated. It can be seen that the father is obliged to maintain, protect and educate children. Roman culture is even worse as the father is given absolute decisive power over the family, even over their life and death (Moloney, 2009).

Then, in the late 1990s, maternal behaviour was considered paramount in child development and fathers were often thought to have small significance in parenting as children across the world spent most of their time with their mothers. Some argued that fathers contributed little to children's development except for their economic support. (Sotomayor-Peterson, Cabeza De Baca, Figueredo, & Smith-Castro, 2013) and others believed that fathers were not genetically fit for parenting. Fathers then started to get involved in getting custody of their children as they believed that they could raise their children on their own (Dyer, Day, & Brigham, 2014).

Essentially, shared parenting is the purposeful practice of two parents sharing equally in the domain of child raising, housework, breadwinning and time for themselves. When both parents are fully competent in all four domains, they will find themselves in a harmonious situation without having to inflict negative effects on the children (Vachon & Vachon, 2010). Shared parenting is a kind of arrangement

made by parents that can also be called as and associated with joint physical custody, joint legal custody, time sharing and shared residence (Roslina, 2010). Some people associate shared parenting with equal shared parental responsibility and shared care.

However, shared parenting is different in terms of visitation right. In sole custody cases, visitation right is always given to one parent. In most cases, the court will award the non-resident parent reasonable visitation right and the resident parent must always keep the non-resident parent updated on the progress and development of the children (Sunthari, 2012) but in reality, the resident parent tends to abuse this power by interfering with the visitation right awarded to the non-resident parent. Constant interference creates tension and frustration for the non-resident parent, often resulting in lack of contact with the children (Sano, Richards, & Zvonkovic, 2008). Interference can be in terms of disallowing the children from seeing the non-resident parent, offering or an inappropriate visitation schedule, among others.

Shared parenting arrangement is viewed as a good alternative for the children in the event of divorce because it encourages children to know that both parents are actively involved and share responsibility in their upbringing (Zaleha Kamaruddin, 2011). Children's right to know and love both parents is protected under the shared custody system but not under the 'sole custody and visitation' system. Therefore, children adjust much better to their parents' separation under the shared custody system. Many

countries have opted the shared parenting system; hence, judges and legislators should move quickly to encourage this option in the interest of children, non-custodial parents, grandparents and custodial parents (Spruijt & Duindam, 2008)

Position of Shared Parenting under International Law

Internationally, many organisations and societies are aware of the importance of protecting the welfare of the child and the principle of 'the best interests of the child' has been recognised as a significant part in matters pertaining to children. The Convention on the Rights of the Child 1989 is the first legally binding international instrument to ensure that the world recognises that children have human rights. Malaysia ratified this Convention in 1995. Article 3 stresses that the welfare of the child must be a primary consideration in all cases concerning children. Article 18 clearly emphasises the importance of both parents as being equally responsible for the upbringing of their children (Azizah, 2011).

In addition, the South Asian Association for Regional Cooperation (SAARC) Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia is established as a medium to facilitate and help in the development and protection of the full potential of South Asian children with understanding of all relevant rights, duties and responsibilities. Article 3 of the said Convention affirms that the Convention should be referred to as a guiding force by

the state parties relating to child welfare and that they should uphold 'the best interests of the child' as an important principle.

Furthermore, the first international interdisciplinary organisation of divorce scholars and family practitioners, the International Council on Shared Parenting, has come to a consensus that sole custody does not really uphold the principle of the best interest of the child. Instead, shared parenting is the best arrangement for the development of the child. The amount of shared parenting time considered as the best is a minimum of one third the time with each parent up to equal (50-50) parenting time. Thus, shared parenting encompasses parental responsibilities as well as parental rights over the children.

Another instance of international recognition on shared parenting is the African Charter on The Rights and Welfare of The Child. The unique factors of the African socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflict, exploitation and hunger make people realise that African children need to be protected and they need to live in a healthy surrounding to ensure sound development of their mental and physical well-being. Article 4 of the Charter provides that the best interests of the child shall be the primary consideration in all actions concerning the child undertaken by any person or authority. In addition, in all judicial and administrative proceedings, children shall be given rights to express their views and the authority shall take their views into consideration.

Position of Shared Parenting under Islamic Law

Generally in Islam, the concept of shared parenting is illustrated in the Quran in *surah At-Talaq* verse 6, where Allah says, “Take mutual counsel together, according to what is just and reasonable.” Islam advises parents to cooperate and come to mutual agreement on what is best for their children. Islam will support whatever decisions they make if those decisions benefit the children (Fatma & Sayyid, 2001). However, in the event of divorce, children often bear the most painful consequences. Islamic law takes their needs into account and ensures that they are cared for (Huda, 2013). In the Quran (*Al-Baqarah*: 233), Allah advises the husband and wife to consult each other in a fair manner regarding their children’s future after divorce.

Although Islamic law does not directly mention shared parenting or equal parental responsibility, it can be understood that the parents must have a good agreement between themselves concerning the children’s well-being. This principle was long established by jurists almost 900 years ago. The ultimate purpose of *hadhanah* (custody) is to ensure that the welfare of the child is protected.

Malaysia’s Perspective on Shared Parenting

Malaysia practises a dual legal system of family laws, in which civil law governs non-Muslims while *Sharia* law governs Muslims. The laws that govern the guardianship and custody of children for non-Muslims are the

Guardianship of Infant Act 1961 (GIA 1976) and the Law Reform (Marriage & Divorce) Act 1976 (LRA 1976). These statutes are based on English law, while common law cases are also frequently referred to by judges. On the other hand, laws that govern Muslims are the Islamic Family Law Enactment of the States and Islamic Family Law (Federal Territories) Act 1984 (IFLA). An amendment was made to the GIA 1961 in 1998 to include a provision to provide equal parental rights to a child’s custody, upbringing and administration of property. However, it only refers to “parental rights” and not “parental responsibility” (Roslina, 2010). Therefore, it appears that parents have more rights than responsibilities over their children (Sunthari, 2012).

Although courts grant joint custody to parents and order parents to be equally responsible for their children, it can be seen that physical custody is given to one parent and in most cases, it ends up with the non-custodial parent only enjoying rights of visitation but without opportunity to make decisions for the children. For instance, in *Mohandass a/l Viran v Annuradha a/p Turasamy* [2013] MLJU 78, the Civil Court granted joint custody to the parents and ordered them to be equally responsible for the child’s expenses, which included education, health and her other needs, but the judgement did not seem to cater for the protection of the welfare of the child as a whole because the “custody, care and control” was given to the mother. It seemed that the mother would have greater attachment to the child compared to the

father. This is similar to the case of *Jennifer Patricia Thomas v Calvin Martin Victoria David* [2005] 7 CLJ 133, in which the Civil Court granted joint guardianship to both parents but the daily custody, care and control of the children remained with the mother.

As for Muslims, IFLA 1984 and the Islamic Family Law Enactments of the States do not have any provisions on shared parenting. The laws are silent on the concept of equal shared parenting or shared parental responsibility but they have placed the principle of welfare or best interests of the child as the central theme of child custody arrangements. Despite this, the laws generally retain the traditional pattern of granting sole custody in which the parent who is considered better and more fit in the upbringing of the child will be awarded the custody of the child. Usually, the mother is presumed to be the best person entitled to the custody of the child, particularly if the child is still an infant (Normi, 2001).

In *Sharia* courts, the judges are inclined to grant sole custody as there are not many joint custody cases being tried. However, although some judges do decide for joint custody, there is no further explanation as to why courts grant the order and how they assess the merits of joint custody. In *Hasanah bt Abdullah v Ali bin Muda* (1999) 2 JH, the *Sharia* Court ordered the parental agreement to be altered, besides reducing the amount of contact with the father as the court viewed that the child's well-being would be affected if the child's place of residence were frequently changed.

In the case of *Noor Kamar bt Mohd Noor v Mohd Rizal bin Zainal* (Case no. 14700-028-0145-2013, 2013, September 2, Unreported), the *Sharia* Court ordered that custody be given to the mother while the father was awarded visitation rights only. It is common for the courts to give one parent the right for custody and the other parent visitation rights only as the courts and the parties involved do not want to encounter any further complications later on.

However, in certain cases, the court grants joint custody to parents but this judgement is rarely rendered. Mostly, this judgement is taken in cases where the parents are cooperative and able to come to an agreement for the benefit of the children as in the case of *Siti Nabilla bt Ismail v Mohd Faisal Bin Wahid @ Mohamad* (Case no. 14200-028-0326-2012, 2012, April 23, Unreported), when the *Sharia* Court did not hesitate to grant joint custody as both parents were in mutual agreement as to the arrangement of the children's lives and the parents were not in a high-conflict relationship.

The above cases show the inconsistency of decisions, be it in the civil court or *Sharia* court, due to the absence of proper laws and guidelines on shared parenting or joint custody. Lack of uniformity in practice by the courts in dealing with family and children's matters as well as lack of detailed explanation on joint custody somehow affects the child in custody disputes. This lack occurs in both courts but in the civil court, the judges furnish an explanation on the joint custody order, but in the *Sharia*

court, the order is issued mostly without any reasons given for the judgement. In addition, cultural sensitivity is believed to be the reason for the difficulty in solving problems relating to the best interest of the child (Rojanah & Najibah, 2011).

Civil and *Sharia* courts in Malaysia normally prefer sole-custody arrangements instead of joint-custody arrangements. Thus, under sole custody, the courts normally award the residence of the child and parental responsibility and care for the child after divorce to the mother and visitation rights to the father. Furthermore, both civil and *Sharia* laws indicate that the party awarded residence will have the final say on the education and upbringing of the child.

Civil and *Sharia* laws essentially provide that the interests or the welfare of the child shall be of paramount consideration and not based on the interests of the disputing parties (Normi, 2001). Shared parenting is not a very common concept in Malaysia, where laws emphasise more on sole custody. Nevertheless, sole custody will lead to problems such as reducing contact between the child and the non-custodial parent, non-fulfilment of child support obligations and denial of contact between the child and the non-custodial parent (Zaleha Kamaruddin, 2011).

Australian Perspective on Shared Parenting

In Australia, there was a significant amendment to the *Family Law Act 1975* and as a result, the *Family Law Amendment (Shared Parental Responsibility) Act 2006*

came into the picture. The amendment encourages separated parents, if safe to do so, to continue to take a significant role in their children's lives, in which parents cooperate and agree on parenting arrangements outside the legal system (Fehlberg, Millward, & Campo, 2009).

Under Australia's Family Law Amendment (Shared Parental Responsibility) Act 2006, the court begins with the principle of equal division of custody. Although the parents do not live together, they still want a relationship with their children and share legal custody (Smyth, Chisholm, Rodgers, & Son, 2014). The presumption of shared parenting may be rebutted by evidence if the court is satisfied that it would not be in the best interests of the child for the parents to have equal shared parental responsibility for the child (Skelton, 2012).

It can be seen that after the amendment, the courts are ready and keen to support the concept of shared parenting; for instance in *Spain v Spain* [2007] FamCA 883, the court granted an order of equal shared responsibility as it viewed that it would be in the best interests of the child. This is in spite of the fact that there was high conflict between the parents regarding the prior parenting arrangements. In *Waring & Boswell* [2007] FamCA 597, the court granted equal shared responsibility with the parents and considered that spending equal amount of time with each parent is reasonably practical and could serve the child's best interests because the father lived in reasonable proximity with the mother who had cared for the child since their separation.

The Family Court judge or federal magistrate should presume that it is in the best interests of the child for the child's parents to have 'equal shared parental responsibility' except where there are 'reasonable' grounds to indicate a history of family violence or child abuse. This requires the court to consider whether shared parenting is reasonable to be practised (Bagshaw, 2008).

Although the parents do not live together, they still want a relationship with their children and share legal custody (Smyth, Chisholm, Rodgers, & Son, 2014). Shared parenting following separation is recommended rather than a court action being needed for contact between children and either parent to be maintained. Consideration could be given to developing a satisfactory form of a legal default position whereby child-parent contact continues to be shared unless there is valid reason for the contrary being ordered (Bruch, 2002).

CONCLUSION

Shared parenting is found to work best when parents are cooperative, child-focussed and flexible, have reached agreement without legal assistance and have exercised their responsibilities jointly and co-operatively before their separation, in addition to taking an active caregiving role.

Children's welfare is well-protected if the parents are in minimal conflict and have good cooperation when it comes to matters concerning their children. Policy makers should take serious action in handling issues on parenting arrangement after divorce by

having a proper parenting plan so that the parents' responsibility comes first instead of their rights on the children.

It is apparent that Malaysian legislation has no provisions on shared parenting, particularly on equal parental responsibility. They only govern matters concerning custody of the child, of which most of the provisions refer to parental rights over the children. It is observed that, in order for Malaysia to acquire a comprehensive law, local laws must be improved by setting a standardised law to govern this matter, comparable to the position in Australia. Therefore, there is a need to review and improve the provisions in the existing law and any loopholes in the law must be filled as soon as possible.

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***Maqasidic* Approach in the Management of *Waqf* Property: A Study with Reference to Malaysian Contemporary Issues**

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ABSTRACT

In Malaysia, *waqf* is becoming a popular mechanism among Muslims to bequeath property to gain a reward from Allah. Hectares of *waqf* land given away for different purposes will certainly lead to many managerial issues. Some issues are easily resolved while others are not. Sometimes it is enough to resort to the legal provisions to solve the problems of *waqf* land. However, there are many other issues with no clear legal solutions as in the statutes. Without a clear statute, *maqasid al-shariah* (objectives of *Sharia*) may come into the picture to offer an alternative in addressing issues relating to *waqf* land. Among some of these issues is land that is donated for specific unrealistic purposes and land that cannot be developed because of lack of funding. Using the qualitative and policy-centred approaches as the method of research, this paper aims to entertain the issues by applying the principles of *maqasid al-shariah*. This paper examines the actual objectives behind the *waqf* rules (*fiqh al-waqf*) in Islam and those objectives will be used as the parameter and guideline to address contemporary issues relating to *waqf* land. The application of the said parameter can be recognised as the '*maqasidic*' approach.

Keywords: Contemporary issues, *maqasid al-shariah*, policy, *waqf*

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INTRODUCTION

The word *maqasid al-shariah* is derived from two Arabic words, *maqasid* and *al-shariah*. *Maqasid* is a plural word which means 'aims' (Majma', 2004), 'purposes' or 'goals' (Auda, 2008). Meanwhile, *al-shariah* means what is prescribed by Allah S.W.T for his creation by way of religious duty. The combination of the words *maqasid* and *al-*

shariah connotes whatever objectives that are aimed by the Quran and the *Sunnah* to be achieved through instructions, prohibitions and permission (Al-Qaradhawi, 2012).

There are three phenomenal types of *maqasid al-shariah* as introduced by Imam al-Haramayn al-Juwayni (Muhammad, 2007): *al-maqasid al-dhoruriyyah* (the essential objectives), *al-maqasid al-hajiyah* (the complementary objectives) and *al-maqasid al-tahsiniyyah* (the embellishment objectives). This categorisation is unequivocally embraced and accepted by Muslim jurists and is their focal point in discussing *maqasid al-shariah*. The essential objectives are the aims that are to be achieved for the religious and material well-being of individuals, failing which life would be chaotic and destructive in this world and thereafter, whereas the complementary objectives refer to the aims to remove hardship and severity of life, in which such hardship and severity are not to the extent of making life chaotic and destructive. The last type refers to the aim of beautifying and refining the customs and conduct of the people.

According to Imam al-Ghazali, *maqasid al-shariah* revolves around the five principles or objectives, namely, protection of religion, life, intellect, lineage and property (Muhammad, 2007). Some quarters have said that these five objectives are the extended categorisation for the *maqasid al-dhoruriyyah*, while some others have

said that these five principles are actually the methodology to find and establish the *maqasid al-dhoruriyyah*.

Waqf literally means ‘to refrain’, ‘to restrain’ or ‘to stop’ (al-Bustani, 1986). In Islamic legal literature it means, technically, dedicating a particular property that is transferrable and useable for a certain period and for the sake of Allah (Zain, 1982). Several purposes govern the principle of *waqf*: The first is charitable *waqf* (*waqf khairi*), which is property donated in perpetuity for general charitable and religious purposes. It is further divided into public *waqf*, which is specifically made for public and quasi-public (a particular group of individuals) use. The second is family *waqf* (*waqf dzurri*) is property donated in perpetuity for the benefit of the donor, his family and his descendants. The third is a combination of public and family *waqf* (*waqf mushtarak*), which is property that is partially donated as *waqf khairi* and partially as *waqf dzurri*. An example of this type is the donation of agricultural land for the benefit of the donors’ descendants as well as for the benefit of the public (Laldin, Mahmud, & Sawari, 2008). The last is *waqf irsada*, which is the donation of moveable and immoveable property by the State of any property belonging to the Baitulmal for public interest such as mosques, schools, hospitals and others (Mahamood, Ab Rahman, Ahmad, & Muhamad, 2007).

Maqasid Al-Shariah in Charitable Transactions

There is a plethora of mechanisms in donation, for instance, *hibah*, *sodaqah*, *wasiyyah* and *waqf*. According to Ibnu A'shur (2001), generally, the objectives of *Sharia* with regard to charitable transactions are as follows:

- a) *Al-takthir* (Augmentation): *Sharia* has paved the way for mankind, through charitable transactions, to augment donation in order to be disciplined against greed and to gain a reward from Allah.
- b) *Tayyib al-nafs* (Sincerity of the soul): Charitable transactions in Islam open the way for those who sincerely want to donate on recommendable basis which eventually purifies one's soul.
- c) *Al-tawassu'* (Dilation): This refers to diversification in the methods of donation. This objective is to complement the first objective (*al-taksir*) as mentioned above.
- d) *Ghair zaria'h li idhoa'ti mal al-ghair* (Not to be a tool to oppress others): The regulation on charitable transactions is not to oppress others. For example, the right of the creditor will be preserved before the will is executed and the right of heirs will also be preserved by limiting the amount in the will to not more than one third.

Maqasid Al-Shariah for Waqf. It is pertinent to note that *waqf* has its objectives and it also works as a tool to achieve or protect *maqasid*

al-shariah. *Waqf* has two main objectives, *Al-qurbah*, which is for the sake of submission and obedience to Allah, and *Al-a'thoya*, which in fact, is a gift for the people for any purpose. Besides that, *waqf* plays an important role in preserving *al-maqasid al-dhoruriyyah* (the essential objectives), *al-maqasid al-hajiyyah* (the complementary objectives) and *al-maqasid al-tahsiniyyah* (the embellishment objectives).

Waqf in Preserving al-Maqasid al-Dhoruriyyah

Al-maqasid al-dhoruriyyah protects five essential areas, according to Imam al-Ghazali:

1. Protection of religion: There are several specific objectives under the umbrella of protection of religion that can be achieved through the establishment of *waqf*: (i) Propagation of the religion of Islam, for example, donations towards the *da'wah* movement; (ii) Enjoining good and eliminating evil, for example, the establishment of mosques; (iii) Implementing Islamic-based education, for example through development of Islamic schools and universities; (iv) Eradicating apostasy and deviant teaching; this objective complements the first objective; and (v) Islamic scholarship, for instance, the foundation of research centres.
2. Protection of life: There are several specific objectives in ensuring protection of life through *waqf*: Firstly, maintaining health among individuals

and in society, for instance, through the establishment of public hospitals and health centres. Secondly, taking care of orphans and widows, for example, through establishment of orphanages to protect their interest and prevent them from being exploited.

3. Protection of intellect: Usually, *waqf* plays the role of protecting the intellect by providing an avenue for education and research. *Waqf* on education generally is an entrenched method to pave the way for donations for contemporary modern society. In Malaysia, this kind of *waqf* can come up to a whopping amount without help from the government.
4. Protection of lineage: There are many ways in which *waqf* can play an important role in protecting lineage, for example, *waqf* can create an avenue for marriage among the poor by providing a venue or financial support for the wedding.
5. Protection of property: This is the main objective of *waqf* as *waqf* is a property-related endowment.

Waqf in Preserving al-Maqasid al-Hajiyyah

This functions to avoid hardship in society. The endowment of property should be encouraged. Islam prescribes that property should be acquired through lawful (*halal*) means and obligations attached to the ownership of property that should be duly fulfilled such as the obligation to pay *zakat* and other taxes. However, in exceptional

circumstances or in the interest of equitable distribution or social justice, the authorities can impose certain limits or exceptions on *waqf* property for the *maslahah* of the people at large. In the field of *muamalah* (*Shariah*-compliant transaction), there are many mechanisms that are regarded as tools to address *al-maqasid al-hajiyyah*. It is observed that *waqf* can co-exist with *al-maqasid al-hajiyyah* mechanisms in order for *waqf* to be seen as preserving *al-maqasid al-hajiyyah*. For example, Muslim jurists agree that *al-ijarah* (Islamic lease) is regulated and allowed by *Sharia* in order to achieve *al-maqasid al-hajiyyah*. Therefore, *waqf* property can be managed through *al-ijarah* to make it fully beneficial. Hence, indirectly, *waqf* can also be involved in the process to attain *al-maqasid al-hajiyyah*.

Waqf in Preserving al-Maqasid al-Tahsiniyyah

This functions seeks to attain refinement and perfection in the customs and conduct of the people at all levels. The *tahsiniyyah* is important in managing and developing *waqf* since its main purpose is the attainment of refinement and perfection in all aspects. Therefore, specific laws and policies governing the management and development of *waqf* are necessary.

Waqf property can work to provide a better life. It is not accurate to think of *waqf* property as being for the provision of necessities only. It can also benefit the people in other ways. For instance, through *waqf*, the public are given the opportunity to do charity and benefit from investment.

Waqf can be developed in many ways. However, to make *waqf* property beneficial at the utmost expense is considered as attaining refinement and perfection only and it is not as crucial as avoiding harm.

Maqasid Al-Shariah as a Guidance in Framing Policy on Waqf. There are many issues pertaining to waqf property that require innovative managerial and administrative policy. However, it is an obligation to observe *Sharia* principles relating to *waqf* in order to ensure any new policies pertaining to *waqf* comply with *Sharia* principles. In addition, *maqasid al-shariah* also can be a parameter in scheming the solutions to solve any waqf issues. It is comprehended that to preserve the rights of Allah and the interests of human beings, the regulations or policy must not only be *Sharia*-compliant but also *maqasid al-shariah*-compliant. This paper analyses *waqf* issues and suggests the *maqasidic* solution as policy. The very first issue to be addressed pertains to huge *waqf* land that is donated for specific purposes. For example, in Perak 1,613 acres of land are donated for use as a Muslim graveyard (Shakrani, Noor, & Ali, 2014). The purpose is clear but it does not serve the maximum objective of the charitable transactions and *maqasid al-sharia* as outlined above. This is because the graveyard does not need such a huge area of land. It only requires 10 to 20 acres for several generations. It would be a waste if the remaining land does not bring benefit to the Muslim community or the donors. If left undeveloped, the general objectives

of *Sharia* for charitable transactions as discussed above would not be served. Even the intention of the donors, which was likely to augment doing good and to gain a reward from Allah, would have been in vain. The function of *waqf* to preserve *maqasid al-dhoruriyyah* would also be neglected. The neglect of *maqasid al-shariah* would marginalise the rights of Allah and the interests of the people.

To avoid such occurrences, Muslim scholars have allowed diversion from the original purpose of donating *waqf* land to new purposes such as developing the land in order to protect *maqasid al-shariah* (the interests of the people and donors). The benefit from the development of the *waqf* land will impact society and allow for its maintenance (<http://e-muamalat.gov.my/>, 2015). The decision to allow the development of *waqf* land was actually a *maqasidic* policy (policy based on *maqasid al-shariah*). According to the Pahang Fatwa Council, the main thing to be preserved in framing the development of *waqf* land is to protect the five areas of *maqasid al-shariah*, namely, religion, life, intellect, lineage and property land (<http://mufti.pahang.gov.my>, 2015).

Besides that, it is strongly urged by certain quarters that the State Religious Councils (Majlis Agama Islam Negeri (MAIN)) as a trustee for *waqf* property to propose comprehensive rules to sub-manage and sub-develop *waqf* property. Meaning to say that it is suggested that MAIN should have the power to privatise and corporatise *waqf* land in order to optimise

the nation's assets for the benefit of the nation, generally, and *waqif*, specifically. Nowadays, there are no specific laws that govern the privatisation and corporatisation, in terms of management, of *waqf* property.

The fact is MAIN does not have enough manpower to oversee the development of the abundance of *waqf* land. This is due to the lack of staff and expertise. However, despite all the obstacles, MAIN are reluctant to give up their authority to develop this land because of certain sensitive issues like the erosion of the power of the sultan and the state as well as its internal problems. That is why this suggestion requires strong political will. Moreover, the laws for the corporatisation of *waqf* land must ensure the preservation of the power of the sultan and the state.

Corporatisation is suggested here because it is very much accommodative in achieving the first and third *maqasid al-shariah* in conducting charitable transactions as mentioned above. Through corporatisation, *waqf* property can be expanded in terms of capital, profits and benefits. This addresses the first *maqasid, al-taksir*. In addition, corporatisation of *waqf* will allow benefits from *waqf* property to be diversified, and this achieves the third *maqasid, al-tawassu'*.

CONCLUSION

Waqf as a concept is provided for by Islam to achieve certain objectives known as *maqasid al-sharia*. There are general and specific objectives of *waqf*, which

can be a guideline in the management of *waqf* property. *Maqasid al-sharia* ensures that any innovation with regards to the management and development of *waqf* is *Sharia-compliant*.

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Towards an Apex *Sharia* Court in Malaysia

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ABSTRACT

Malaysia has 14 *Sharia* court systems. The main reason for this state of affairs is the distribution of legislative powers under the Federal Constitution between the Federation and the states where Islam and Islamic law are state matters. This paper looks at the consequences of having several distinct *Sharia* court systems. The *Sharia* courts and the laws differ from one state to another. This paper looks at the legal possibility of having one apex court for all the 14 *Sharia* court systems to streamline the administration and decisions of the *Sharia* courts.

Keywords: Federalism, Islamic law, legal system, *Sharia* courts

INTRODUCTION

Malaysia is a multiracial and multi-religious country in the region of Southeast Asia. For centuries, this country was the centre of amalgamation of many cultures, with people of different races and religions living together.¹ Malaysia has a unique blend of three distinctive legal systems, namely,

English common law, Islamic law and customary law. The judiciary in Malaysia is largely influenced by the common law of England and Islamic law. There are three court systems in operation, namely, the civil court system, the *Sharia* court system and the Native Court system. Unlike the civil court system in Malaysia, which is a federalised court system, the *Sharia* court system is primarily established by state law (Shuaib, 2012). Therefore, Islamic law in one state might differ from that of another state.

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Civil Court System

Before we consider the *Sharia* court system, let us look at one of the major court systems in Malaysia, namely, the civil court system. In this system, there are superior courts and inferior courts. The superior courts consist of the High Courts, the Court of Appeal and the Federal Court, which are at the apex of our legal system, whereas the Sessions Court and the Magistrates' Court collectively form the inferior courts or subordinate courts. The establishment of these courts is spelt out under Part IX of the Federal Constitution. The jurisdiction of the courts in civil or criminal matters is contained in the Subordinate Courts Act 1948 (Revised 1972) and the Courts of Judicature Act 1964 (Revised 1972).

There are two High Courts in Malaysia, one in West Malaysia, known as the High Court in Malaya, and the other in East Malaysia, known as the High Court in Sabah and Sarawak. The two High Courts in Malaysia have general supervisory and revisionary jurisdiction over all the subordinate courts² and jurisdiction to hear appeals from the subordinate courts in civil and criminal matters.³ The High Courts have unlimited civil jurisdiction.

The other appellate courts are the Federal Court and the Court of Appeal. The Court of Appeal hears appeals from

the High Court relating to both civil and criminal matters⁴ while the Federal Court hears appeals from the Court of Appeal.⁵ The Federal Court is the ultimate 'appellate court' in all civil and criminal matters⁶ and is a final interpreter of the law of the land and the Federal Constitution.⁷

The Native Court System

The Native Courts in Sabah and Sarawak are established to hear and determine disputes among natives in relation to native customary laws (Phelan, 2003). Thus, in Sabah and Sarawak, in addition to the civil courts and the *Sharia* courts, there are the Natives Courts established under the Sabah Natives Courts Enactment 1992 and the Sarawak Native Court Ordinance 1992. Both the Natives Courts in Sabah and Sarawak hear cases arising from a breach of native law or custom, where all the parties are natives and the case involves native customary law.

The *Sharia* Court System

The *Sharia* court system is one of the three separate court systems that exist in the Malaysian legal system (Shuaib, 2008a). Under Article 121(1A) of the Federal Constitution, exclusive jurisdiction in matters with respect to Islamic laws is

²See sections 31 to 37 of the Court of Judicature Act 1964 (Revised 1972).

³See section 27 of the Court of Judicature Act 1964 (Revised 1972).

⁴See Article 121(1B) of the Federal Constitution.

⁵See Article 121(2) of the Federal Constitution.

⁶See sections 96, 97 and 87(1) of the Court of Judicature Act 1964 (Revised 1972).

⁷See Article 128 of the Federal Constitution.

conferred to the *Sharia* courts.⁸ There is a parallel system of state *Sharia* courts that have limited jurisdiction over matters of state Islamic law (*Sharia*). The *Sharia* courts of the states and the Federal Territories were established by virtue of item 1 of the State List of the Federal Constitution and item 6(e) of the Federal List for the Federal Territories.⁹ All states and the Federal Territories have their separate sets of the *Sharia* Court system (Shuaib, 2015). These are spelt out in the state enactments such as the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) and the Administration of the Religion of Islam (Selangor) Enactment 2003.

The *Sharia* courts have jurisdiction over Islamic matters, and can generally pass sentences of not more than three years imprisonment, RM5,000 in fines and six strokes of the cane.¹⁰ As established by the states, they have jurisdiction within the respective state boundaries only.¹¹ The hierarchy of the *Sharia* Courts in Malaysia

consists of the *Sharia* Court of Appeal, the *Sharia* High Courts and the *Sharia* Subordinate Courts. Administratively, the *Sharia* Subordinate Courts in every state are bound by orders from the *Sharia* High Courts. At present, there are 14 *Sharia* Courts of Appeal in Malaysia, including one *Sharia* Court of Appeal in the Federal Territories, functioning as the apex court in each state in dealing with appeals from the lower court.

CONSEQUENCES OF HAVING MULTIPLE *SHARIA* COURT SYSTEMS

Looking at the above description of the *Sharia* court systems, it should be clear that in Malaysia there are 14 *Sharia* court systems established under different laws.¹² The main reason for this situation is the distribution of legislative powers under the Federal Constitution between the Federation and the states (Aziz, 2007). Islam and Islamic law are state matters. Item 1 of the State List of the Ninth Schedule, Federal Constitution confers sole jurisdiction to the state to enact Islamic law as applicable to Muslims. With respect to the Federal Territories, Parliament has the legislative power to enact Islamic law.¹³ Since *Sharia* courts are established under the State List,

⁸*Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 *Malayan Law Journal* 793. ⁹Ninth Schedule of the Federal Constitution

¹⁰See section 2 of the *Sharia* Courts (Criminal Jurisdiction) Act 1965 (Revised 1988). Consider a Bill to amend the Act to increase the power of the *Sharia* courts brought by a Member of Parliament, Abdul Hadi Awang, on 25 May, 2016; see *Sharia* Court (Criminal Jurisdiction) (Amendment) Bill 2016.

¹¹*Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 *Malayan Law Journal* 354.

¹²See, for instance, the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505); the Administration of the Religion of Islam (Johore) Enactment 2003 (Enactment No 16 of 2003); the *Sharia* Court Enactment 2008 (Kedah) (Enactment No 08 of 2008/En.12).

¹³See item 6(e) of the Federal List.

states have powers to enact their own laws and procedural matters. The outcomes of these legislative powers are the varied legislations, albeit slight, as well as the varied decisions of *Sharia* courts in the states of Malaysia.

Non-Uniformity of Laws

The different administration of the *Sharia* court systems in each state and the Federal Territories produce several consequences. The first is non-uniformity of laws. The state has the power to impose its own laws in its *Sharia* Court in dealing with the subject matters that fall within its jurisdiction. Thus, one may find that the law of the *Sharia* Court in one state might be different from that of the other states.

Territorial Limit of Jurisdiction

The second consequence, territorial jurisdiction, refers to the geographical limitation imposed on a particular court. For instance, in the civil court system, a Magistrates' court in Perak has no jurisdiction to hear and determine a cause of action which arose in the states of Sabah and Sarawak. In similar vein, the Native Courts of Sabah and Sarawak have no jurisdiction to hear and determine a cause of action outside their respective territorial limits. This is stated in the Native Courts Ordinance 1992 (Sarawak) and the Native Courts Enactment 1992 (Sabah).

Similarly, the *Sharia* Court in one state has no jurisdiction to hear and determine a cause of action which has accrued in other

states. For instance, a *Sharia* Court in the Federal Territories has no jurisdiction to hear an application for jointly acquired matrimonial property if an order for divorce was granted by a *Sharia* court in Selangor. This is because it is the *Sharia* court in Selangor that has jurisdiction to grant a related relief, such as an order for jointly acquired property¹⁴, when granting an order for divorce. In short, if the court proceeds to hear the dispute and makes a decision when it lacks the necessary territorial jurisdiction to do so, the entire proceeding is illegal or void and any judgement made is liable to be set aside irrespective of whether the defendant objects to the jurisdiction or not.

Territorial Limit of Orders

Another consequence is that the orders of a *Sharia* court in one particular state are enforceable generally within the territorial limit of that state only.¹⁵ This is due to the fact that the *Sharia* courts are established by the states, not the Federation. Thus, there may be a problem in enforcing a judgement of a *Sharia* court if one of the parties is residing in another state. Similarly, the *Sharia* courts of one state are not bound by the decision of *Sharia* courts from other states. There are also difficulties in serving summonses

¹⁴See section 122 of the Islamic Family Law (State of Selangor) Enactment 2003.

¹⁵*Kassim @ Osman bin Ahmad v Dato' Seri Jamil Khir bin Baharom Menteri di Jabatan Perdana Menteri (Hal Ehwal Agama Islam) & Ors [2016] 7 Malayan Law Journal 669.*

and warrants outside a state in which they are issued and in enforcing a *Sharia* Court decision outside of the state. For instance, maintenance orders made by a *Sharia* Court is unenforceable outside the state. Although most of these problems have been resolved through reciprocal enforcement of orders between the states, some states have still not adopted the mechanism.

Jurisdiction of the Court Depends on Residence of the Parties

The next consequence is related to jurisdiction. In relation to the different state administration of *Sharia* courts and their territorial jurisdiction, the jurisdiction of *Sharia* courts depends on the residence of the parties. For instance, section 4 of the Islamic Family Law (Federal Territory) Act 1984 provides: "Save as is otherwise expressly provided, this Act shall apply to all Muslims living in the Federal Territory and to all Muslims resident in the Federal Territory who are living outside the Federal Territory." It can be seen from this provision that apart from being a Muslim, being a resident of one state is a requirement for a person to initiate a case in the *Sharia* Courts.

Under section 2 of the Islamic Family Law (Federal Territories) Act 1984, "resident" means a person permanently or ordinarily living in a particular area. The 14 states of Malaysia, including the Federal Territories, provide a similar interpretation of residence. In Perlis, the interpretation of residence is slightly different, where section 2 of the Islamic Family Law (Perlis) Enactment 2006 provides that "resident"

means a person permanently living or ordinarily residing in a particular area or certified by the Syarie Judge as such.

In contrast, the Islamic Family Law (Kedah Darul Aman) Enactment 2008 uses the term "*bermastautin*" for residence without translating it and provides that it means "permanently living or ordinarily *bermukim* in a particular area." It also has a provision on "*bermukim*," which means "residing or living in a particular place temporarily". In addition, section 4 of the said Enactment provides that the Enactment shall apply to "all Muslims who are *bermukim* in the State of Kedah Darul Aman, or *bermastautin* in the State of Kedah Darul Aman but who are living outside the state."¹⁶ In this respect, the application of Islamic Law in this state is wider than in other states in Malaysia as it has jurisdiction not only on a resident but also a person living temporarily in the state of Kedah. Although on the face of it the Kedah Enactment may seem to be wider, the Federal Territories' Act also provides that it is applicable to Muslims "living" in the Federal Territories.

Forum Shopping

Another consequence is forum shopping. When multiple courts seemingly have concurrent jurisdiction over a plaintiff's cause, the plaintiff may choose a *Sharia* court from a state that will treat his or her cause most favourably. Some litigants prefer

¹⁶Emphasis is the author's.

their legal case to be heard in the court which will apply the law more favourably to their case.

In the case of *Aishah bt Abd Rauf v Wan Mohd. Yusof bin Wan Othman*,¹⁷ after the application for polygamous marriage was dismissed by the *Sharia* Appeal Court in Selangor, the husband filed another application in Terengganu, where he eventually succeeded in his application. This is the impact of the difference of requirements in both states in dealing with polygamous marriage.

***Sharia* Courts of One State Do Not Have to Follow the Decision of *Sharia* Courts of another State for the Same Parties in the Same Case**

An example of a case where a *Sharia* court did not have to follow a decision of another *Sharia* court from another state is the case of *Aishah bt Abd Rauf v Wan Mohd. Yusof bin Wan Othman*,¹⁸ where the appellant succeeded in setting aside the application to contract a polygamous marriage by the respondent in the *Sharia* Appeal Court in Selangor. Dissatisfied with the order, the respondent filed another application in Terengganu, where he eventually succeeded in his claim. In this respect, what is crucial is that the order issued by a *Sharia* court in one state did not bind another *Sharia* court in other states.

¹⁷(1412) 7 *Jurnal Hukum* 152.

¹⁸(1412) 7 *Jurnal Hukum* 152.

Legal Possibility of Establishing an Apex *Sharia* Court at the National Level

The discussion so far has shown that the existence of 14 *Sharia* court systems, while faithful to the concept of federalism as agreed in the formation of the Federation of Malaya and later Malaysia, causes problems in the administration of *Sharia* justice. The creation of an apex *Sharia* court for the federation may not solve all the problems, but may in the long run reduce them.

The setting up of an apex *Sharia* Court at the national level in Malaysia has to take into account the position of Islam under the Federal Constitution (Aziz, 2006). Before we delve further into the issue, let us briefly look at the relevant provisions of the Federal Constitution, particularly on the division of power between Parliament and state Legislatures, to fully understand the constitutional limitations and ultimately, to find ways to overcome such constraints.

Federalism

One of the main problems in the setting up of an apex *Sharia* Court of Appeal is the distribution of legislative and executive powers under the Federal Constitution (Aziz & Shuaib, 2009). There is no one entity that has monopoly of legislative and executive powers in Malaysia because Malaysia is a new entity formed by the agreement of the states (Fong, 2008). This system of a central power, while at the same time maintaining the existence of the partnering entities is known as federalism. Federalism is a

political organisation that brings together separate political units under an umbrella of one political system but retains the integrity and uniqueness of each political unit (Beri, 2003). Federal systems allow this by distributing powers between the central and the constituent authorities in a way that preserves their existence and authority.

The distribution of powers between the central authority and state authority is found in Article 74 of the Constitution, which it provides for the division of powers of these two authorities as found in the Ninth Schedule of the Federal Constitution. Due to the nature of federalism, the determination of legislative powers depends on the subject matter concerned, whether it falls under the Federal List, the State List or the Concurrent List.

Distribution of the Legislative Power between the Federation and the States

Being a federation, legislative power is distributed between the Federation and the states. The Constitution does this by establishing three main Legislative Lists in the Ninth Schedule, providing, respectively, the schedule of matters with respect to which the Federal Parliament (Parliament), the state legislature and both of these bodies can enact laws. Part VI of the Federal Constitution is the segment that specifically deals with the distribution of legislative powers. It starts with Article 73, which provides for Parliament to hold exclusive power to make laws for the whole or any part of the Federation while the state

legislature has the power to make laws for the whole or any part of the state.

Under Article 74, Parliament has the exclusive power to make laws over matters falling under the Federal List, whereas each state, through its Legislative Assembly, has legislative power over matters under the State List.¹⁹ In addition, both Parliament and state legislatures share the power to make laws over matters under the Concurrent List, but Article 75 provides that in the event of conflict, federal law will prevail over state law.

Another important article is Article 76, which identifies the legislative power of Parliament to legislate laws for states in certain cases. This is the exception to Article 74 and it is in fact, a provision that plays a crucial role in paving the way towards establishing an apex *Sharia* Court. We shall deal with this provision later.

Under the Ninth Schedule, the Federal List has 26 paragraphs that set out the matters in respects of which Parliament has exclusive power to make laws. It

¹⁹There are supplements to the State List (List IIA) and the Concurrent List (List IIIA) that apply only to Sabah and Sarawak. These give the two states legislative powers over matters such as native law and customs, ports and harbours (other than those declared to be federal), hydro electricity and personal law relating to marriage, divorce, family law, gifts and intestacy. See for instance *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* [1997] 3 *Malayan Law Journal* 23.

covers external affairs, defence, internal security to civil and criminal law and procedure and others. For the purpose of this study, the following may be noted: Item 4 of the Federal List contains enlisted civil and criminal law and procedure and the administration of justice, including: “(a) constitution and organisation of all courts other than *Sharia* Courts.” In this respect, the Federal Government has the authority to enact laws on the constitution and organisation of civil courts,²⁰ but not to constitute *Sharia* courts.

The State List under the Ninth Schedule consists of 13 paragraphs which set out the matters in respect of which state legislature has exclusive power to make laws. This includes Islamic Personal Law, local government, state works and water, state holidays and others. It also has a special list supplemented for the states of Sabah and Sarawak known as List IIA.²¹ One thing that needs to be highlighted is that the constitution, organisation and procedure of *Sharia* courts fall under the authority of the state legislature.

***Sharia* Court Being under the State List**

Item 1 of the State List of the Ninth Schedule confers the power to the state legislature to enact laws on the constitution, organisation

and procedure of *Sharia* courts (Aziz, 2007). Is the state then the authority to establish the apex *Sharia* Court since such a question relates to matters in Item 1, namely, *Sharia* courts? A straight answer cannot be given because generally, as stated under Article 73 of the Federal Constitution, state law is enforceable within the state territory. Thus, a state cannot enact a law applicable to the whole of the federation, as seems to be the case in establishing an apex *Sharia* court at the national level.²² We will consider some options in the following sections.

LEGAL OPTIONS IN ESTABLISHING A FEDERAL *SHARIA* COURT OF APPEAL

Several possible methods may be examined to establish an apex *Sharia* court.

Parliament Enacting Uniform Laws

Firstly, although states have the legislative power to legislate on *Sharia* courts, the Federal Constitution allows Parliament to enact state matters under certain circumstances. In this respect, paragraph (b) Clause (1) of Article 76 of the Federal Constitution provides that Parliament may legislate for “the purpose of promoting uniformity of the laws of two or more states.” Article 76 further provides that “a law made ... shall not come into operation

²⁰See the Courts of Judicature Act 1964 (Revised-1972) and the Subordinate Courts Act 1948 (Revised 1972).

²¹*Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* [1997] 3 *Malayan Law Journal* 23.

²²See for instance *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* [1997] 3 *Malayan Law Journal* 23.

in any state until it has been adopted by a law made by the Legislature of that state, and shall then be deemed to be a state law and not a federal law, and may accordingly be amended or repealed by a law made by that Legislature.”

According to the Reid Commission, the power of Parliament to legislate over states’ subjects is not meant to undermine states’ wishes but to help states in drafting complicated legislation. The process of the required adoption by the state of the relevant Acts would ensure the sovereignty of the states over the subject matters.²³

Despite the fact that religion falls under the State List, Parliament is authorised to enact laws on any matter provided in the State List as embodied in paragraph (b) Clause 1 of Article 76. This is a relevant provision that can be invoked to promote uniformity of laws of all states in an attempt to set up an apex *Sharia* court at the national level (Ibrahim, 2013). However, it needs to be borne in mind that laws on Islamic matters require consultation with state governments as stipulated under Article 76(2) of the Federal Constitution. Additionally, a particular law may not be enforced until and unless the State Legislative Assembly adopts the law by

enacting a specific enactment on the said law. Furthermore, the said law must be regarded as a state law and not a Federal law, and can be amended or repealed by a State Legislative Assembly.²⁴

Conference of Rulers to Decree Uniform Laws

The Conference of Rulers as an institution that brings together the Head of States in Malaysia should be fully utilised. Article 3(2) of the Federal Constitution confers power to the Ruler of every state to be the Head of the Religion of Islam while the Yang Di-Pertuan Agong (YDPA) is the Head of the Religion of Islam for states not having a Ruler such as Malacca, Penang, Sabah and Sarawak and also for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.

A glance at Article 3(5) of the Federal Constitution suggests that Parliament may by law make provisions for regulating Islamic religious affairs as well as setting up a Council to advise the YDPA on matters relating to the religion of Islam. In this regard, the Conference of Rulers may advise the YDPA on matters relating to the religion of Islam and on legislation related to Islam. The Conference of Rulers could be used as a unifying and legitimising mechanism for states to arrive at an agreement in establishing an apex *Sharia* court.

The National Council for Administration of Islamic Religious Affairs (Majlis

²³Para. 84. See also *East Union (Malaya) Sdn Bhd v Government of the State of Johore & Government of Malaysia* [1981] 1 *Malayan Law Journal* 151. See also *Lim Chee Cheng & Ors v Pentadbir Tanah Daerah Seberang Perai Tengah, Bukit Mertajam* [1999] 4 *Malayan Law Journal* 213.

²⁴Article 76(3) of the Federal Constitution.

Kebangsaan bagi Hal Ehwal Agama Islam ‘MKI’) could be used to channel this proposal to the Conference of Rulers.²⁵ Thus, the Conference of Rulers could be used to fulfil the requirements of Article 76(1)(b) and 76(2), namely, on the purpose of having a uniform law on the apex *Sharia* court and on consultation with the state government.

Constitutional Amendment

Another route that one may take in enabling Parliament to establish an apex court at the national level is by amending the Federal Constitution to give such powers to Parliament. The Constitution may be amended by Parliament under Article 159 of the Federal Constitution, which generally requires the support of two thirds of the total number of the House of Representatives and the Senate.²⁶ However, if the amendment directly affects the privileges, position, honours or dignity of the Rulers, the consent of the Conference of Rulers is required.²⁷ Since the Rulers

are the Heads of the Religion of Islam, it is arguable that an amendment that extends their power to establish *Sharia* courts for the whole Federation is invalidated by this requirement. Additionally, such an amendment requires the concurrence of the Yang di-Pertua Negeri of the states of Sabah and Sarawak as it would affect matters that Parliament may not make into law, in this case legislation on Islamic matters for the states.²⁸ We will list out the proposed amendment before any observation is made.

An amendment to clause (4) of Article 76 of the constitution. Ahmad Ibrahim suggests that this can be done by conferring power to Parliament to enact laws on the constitution, organisation and procedure of *Sharia* courts by inserting the words “membership, organisation, and jurisdiction and powers of *Sharia* Court” after the words “local government” in Clause (4) of Article 76 (Ibrahim, 2013).

A new part IX(A) on *Sharia* judiciary. The Federal Constitution is amended by inserting a new part, namely, “Part IX(A) *Sharia* Judiciary,” after “Part IX The Judiciary,” which will specifically deal with the constitution and organisation of *Sharia* Courts in Malaysia.

An amendment to Article 132 to include judicial and *Sharia* law service. Article 132 of the Federal Constitution is amended

²⁵On MKI and uniformity of laws, see for instance Johari, A. S. (2014). Ke arah merealisasikan penyeragaman penggubalan undang-undang syariah di Malaysia: Pengalaman, pelaksanaan dan kerjasama antara persekutuan dengan negeri. In *Seminar bidang kuasa perundangan syariah: Penyeragaman oleh persekutuan vs pelaksanaan oleh negeri: “Lesson learnt and the way forward”*, Putrajaya: Attorney General’s Chambers.

²⁶Article 159(3) of the Federal Constitution.

²⁷Article 38(4) of the Federal Constitution.

²⁸Article 161E(1)(c) of the Federal Constitution.

by adding a paragraph (a) on “the judicial and *Sharia* law service” after paragraph “(b) the judicial and legal service”.

A new Article 138A to establish a *Sharia* judicial and legal service commission.

Article 138 is amended by inserting Article 138A after Article 138 to provide for a *Sharia* Judicial and Legal Service Commission.

Amendment to the Ninth Schedule to provide legislative power to Parliament.

The Ninth Schedule of the Federal Constitution is amended by replacing the phrase “other than the *Sharia* Court” in Item 4(a) list I under the Federal List with the phrase “constitution and organisation of all courts including *Sharia* Courts”.

One might wonder how an appeal from *Sharia* courts can be brought to such a court. Generally, an appeal can be made to the Sultan of a particular state, who will then refer the matter to the Federal *Sharia* Appeal Court for the court to give its advisory opinion. Here, the decision of the Court would be the decision of the Sultan. In the context of *Sharia* courts, the courts can “advise” the state religious authority, namely, the Sultan, concerning the decision of the appeal. In order to maintain the relationship between the appeal and the state from where it originates, a judge from that state should be one of the members of the panel sitting to decide the appeal (Shuaib, 2008b).

CONCLUSION

There are several legal obstacles in establishing an apex *Sharia* Court at the national level. The very nature of the Federation of Malaysia, which provides limited autonomous powers to states on matters of Islam, makes interference and diminishes such powers as being delicate and sensitive. The distribution of executive and legislative powers under the Federal Constitution provides for Islamic matters, which include the *Sharia* courts, to be under the powers of the states.

However, the Federal Constitution itself envisages a situation where Parliament may be allowed to legislate on state matters. Nevertheless, in order to protect the limited autonomous powers that states have, such legislation may require concurrence and adoption by state governments and their legislature. Be that as it may, it is still a viable option coupled with the use of the Conference of Rulers and the MKI as unifying and legitimising vehicles for national-level decisions on Islam.

A more drastic enabling method to establish an apex *Sharia* court at the national level is by amending the Constitution to give the required powers to Parliament. However, it is our view that this would be contrary to the concept of federalism agreed to by the states at the formation of the Federation of Malaya and then Malaysia, and, realistically, it would be very difficult to obtain the required consent of the Conference of Rulers.

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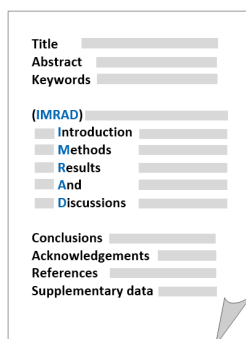
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