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(Special Issue)

Facilitating business through a vibrant and equilibrium
environment for business law

Guest Editors:

Zinatul A. Zainol and Hasani Mohd Ali



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Journal of Social Sciences & Humanities

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Pertanika is an international peer-reviewed journal devoted to the publication of original papers, and it serves as a forum for practical approaches to improving quality in issues pertaining to tropical agriculture and its related fields. Pertanika began publication in 1978 as the Journal of Tropical Agricultural Science. In 1992, a decision was made to streamline Pertanika into three journals to meet the need for specialised journals in areas of study aligned with the interdisciplinary strengths of the university.

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Preface

This special issue of the *Pertanika Journal of Social Sciences and Humanities (JSSH)* comprises 11 revised and extended manuscripts based on papers originally presented at a workshop organised by the Faculty of Law, Universiti Kebangsaan Malaysia on 25 – 26 May 2011 at Puri Pujangga, Universiti Kebangsaan Malaysia. The workshop was aimed at advancing legal publication and citation among members of the Faculty who closely collaborate with other researchers from various disciplines. The theme of this workshop is **“Facilitating business through a vibrant and equilibrium environment for business law.”** The papers published in this special issue of *Pertanika JSSH* underwent strict editorial processes as expected from its status as one of the leading research-based internationally recognised journals.

The law should serve as a facilitative tool to business community driven by innovation. Higher learning institutions should follow suit and this publication effort is part of the long-term strategy to promote the concept of “Entrepreneurial University” and “academic entrepreneurship”, a concept which is driven by the Malaysian innovation initiatives, policy and system. One primary concern in the development of innovative community and the urgent drive of commercialization is the possible neglect of the concerns of the primary stakeholders – the public. This collection of papers specifically addresses the socio-legal impacts of the development by incorporating various business law-related issues including consumers’ protection, traditional knowledge documentation, Islamic finance, other issues on *Shariah*, as well as ethical and regulatory aspects of medical law.

We are grateful to the Faculty of Law, Universiti Kebangsaan Malaysia (UKM) and especially to our Dean, Prof Dr Aishah Bidin, for her support in funding the printing cost of the special issue. The timely publication of this special issue would have not been possible without the full commitment of UPM Press, as well as the strong support and guidance from the *Pertanika* Editorial Office, especially the Executive Editor, Dr Nayan Kanwal and the Journal Officer, Ms Erica Kwan Lee Yin.

The Guest Editors wish to thank the editorial assistance of Prof. Dr. Kamal Halili Hassan, Dr. Jady Hassim and Dr. Haniwarda Yaakub.

Last but not least, special thanks and appreciation go to the Fundamental Research Grant Scheme (FRGS), project code FRGS/1/2011/SSI/UKM/45 research group and Projek Pemacu GPP-2011-017 which have inspired the initiative to collate papers for the purpose of this publication.

Zinatul A. Zainol and Hasani Mohd Ali

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Preimplantation Genetic Diagnosis for Social Sex Selection: Should Parental Autonomy be Limited?

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ABSTRACT

The use of Preimplantation Genetic Diagnosis (PGD) to select the sex of unborn children for social reasons raises concerns on its implications on the child born following the technique. Other than concerns on physical health, critics have further highlighted the potential consequences of the practice on the psychological state of the child. In defending this claim, the notion of 'unconditional parental love' has been advocated by the opponents of the technique to argue that parents should not be permitted to use PGD to select the sex of their child for social reasons. This paper thus aims to analyse the alleged adverse consequences of allowing parents to use PGD for social sex selection in order to determine whether such claims are sufficient to override parental autonomy. To achieve this aim, the alleged risks of PGD for social sex selection to the child's physical and psychological welfare are critically examined. It is argued that such concerns are baseless allegations that are not supported with sufficient evidence to deny parents the autonomy to select the sex of their child.

Keywords: Bioethics, preimplantation genetic diagnosis, parental autonomy

INTRODUCTION

Preimplantation Genetic Diagnosis for Social Sex Selection (PGD for SSS) has been a subject of criticism on various grounds. One of the concerns raised is the potential harm that the technique may cause to the child's physical and psychological welfare. These allegations trigger the calls to prohibit PGD for SSS on the grounds of protecting the welfare of children born from it and thus defeat the parental autonomy to procreate (The President's Council on Bioethics, 2002; King, 2003). A crucial issue, therefore, arises on the extent to which parental autonomy to use PGD for SSS to procreate a child of their desired sex should be respected. This forms the crux of this paper where the concerns about the potential harm of the PGD for SSS on the

child to be born are critically analysed in order to determine whether they can sufficiently outweigh the parental autonomy to use the technique to produce a child of their desired sex. First, however, the science of PGD is briefly discussed.

PGD FOR SSS: THE STATE OF THE ART

PGD or Preimplantation Genetic Diagnosis requires the usage of two techniques; In Vitro Fertilisation (IVF) and genetic testing (Taylor, 2008). Embryos are fertilised *in vitro* and screened, normally three days after fertilisation. Selected embryos are then implanted into the uterus (Taylor, 2008). PGD is primarily used to screen embryos for genetic diseases, to find embryos with tissue-match for organ/tissue

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transplantation and to identify the sex of the embryos (Braude *et al.*, 2002). The use of PGD to select the sex of embryos is usually performed to avoid the transmission of sex-linked diseases which affect male children, such as Haemophilia and Duchenne muscular dystrophy (Chung, 1999). The sex-linked diseases are normally transmitted to the male child through a mother who is a carrier that passes the defective X chromosome to her son (Tasca & McClure, 1998). Using the genetic analysis method, the Fluorescence *in situ* Hybridisation (FISH), PGD determines the sex of embryos produced via IVF, and allows for female embryos to be selected for implantation in order to avoid the passing of these diseases to male children (Chung, 1999). Its use can also be extended to the non-medical or social reasons, where a couple wishes to conceive a male or female child for reasons other than avoiding the transmission of sex-linked diseases such as to balance the family or for cultural or religious reasons that require the birth of a child of a particular sex. However, this raises concerns about the acceptability of performing the PGD for social sex selection such as on the safety of the technique on the child's physical and psychological welfare which is explored in this paper.

PHYSICAL WELFARE OF CHILDREN: HEALTH RISKS TO CHILDREN BORN FROM PGD FOR SSS

Concerns over the welfare of the child to be born following PGD for SSS include the potential health risks as a result of being born through the procedure (Larcher, 2007). This concern arises because the procedure involves producing several embryos through IVF and extracting the cells for the purpose of screening for the X or Y chromosome which determines the sex of the embryo (Flinter, 2001). There is a possibility for the IVF to increase the risk of producing defective babies (Hansen, 2002), and there is also cause for concern on the implications of embryo biopsy for the child born through the technique (Genetics and Public Policy Centre, 2004).

Nevertheless, concerns on the potential adverse effects of IVF on the child born cannot be the basis for prohibiting the PGD for SSS. If IVF has been accepted and legally permissible for infertile couples, despite the risks it poses, a qualitative difference needs to exist for a different stance to be adopted regarding PGD for SSS (Snelling, 2008). For example, a study conducted by the Centres for Disease Control and Prevention has shown that babies born following IVF are highly likely to suffer from health problems and "genetic flaws" (BBC, 2009; Leake, 2010). Thus, prohibiting PGD for SSS on the grounds of the risk to the health of the child born following IVF cannot be defended without a similar prohibition being placed on the IVF. Although the motivations behind the use of IVF for infertile couples and its use combined with PGD for SSS are different where the former is undertaken to produce a pregnancy that would not otherwise occur whereas with the latter the IVF is only used to enable the subsequent use of PGD for SSS, the crucial point is the risks involved in the IVF are within a magnitude that can be consented to by individuals. As explained by the United Kingdom's House of Commons Science and Technology Committee (2005):

"In terms of assisted reproduction, it could be argued that the drugs used to stimulate egg production and the risks associated with multiple pregnancies are such that they justify state regulation. While these risks are real and significant, however, they do not obviously fall beyond the level of risk which people are legally permitted to assume. For example, a valid consent to surgery such as heart transplantation (which carries a significant risk of harm) or to involvement in non-therapeutic research projects, is regarded in law as valid so long as it has been taken by a competent individual." (House of Commons, Science and Technology Committee, Human Reproductive

Technologies and the Law, Fifth Report of Session 2004-05, vol. I (London: The Stationary Office Limited, 2005), p. 20, para 40. Emphasis added).

Similarly, if the autonomy to opt for other 'non-compelling' medical procedures such as cosmetic or hormone replacement therapy is respected, the same attitude should be accorded to individuals exercising their autonomy to use PGD for SSS. Studies on hormone replacement therapy have shown that it can increase the risk of breast cancer (Ross *et al.*, 2000), but women are, nevertheless, allowed to opt for the treatment. Cosmetic surgery such as breast enlargement is also allowed despite the risks it carries, because it has been argued that, "patient autonomy dictates that the individual may willingly undergo risks for the attainment of their perceived benefit from such procedures" (Klipstein, 2005, p. 1352). Indeed:

"The state will only go so far to protect people from themselves, and will intervene only when the risk is deemed unacceptably high or grave. The risks of assisted reproduction, if explained to and understood by, the individual concerned seem to sit firmly within those which can be consented to in law" (House of Commons Science and Technology Committee, 2005).

Moreover, scientific evidence has been advanced on the safety of the procedure of PGD, including when used to determine the sex of the embryos. The European Society of Human Reproduction and Embryology (The ESHRE Task Force, 2003) has reported that there is no evidence indicated that the process of embryo biopsy required in PGD affects the health of the embryo. In addition, it has been reported that there is no evidence pointing that PGD babies are more likely to encounter neonatal problems or defects than babies conceived without assistance (The ESHRE Task Force, 2003). It was also reported that in 2004, more than 1000

healthy babies were born using PGD (Verlinsky *et al.*, 2004). In any event, even if the embryo is damaged from the process of biopsy, it will be "non-viable," and unsuitable for implantation (Human Fertilisation and Embryology Authority, 2004), and thus will not result in a child that is affected by the damage (Deech & Smajdor, 2007). Concerns over the health of the child to be born from PGD for SSS, therefore, are insufficient to justify overriding parental autonomy in using the technique to conceive a child of their desired sex.

Furthermore, the clinical risks involved in the use of PGD for sex selection on medical and social grounds are the same, as both uses involve the same methods and procedure, and as such:

"Talking up the risks of PGD and sperm sorting in order to justify its prohibition in social sex selection, could undermine patient and public confidence in those techniques when they are performed for medical sex selection (or in the case of PGD, for the detection of single gene disorders (Tizzard, 2004).

Given this, concerns over the safety of PGD on the physical health of the child born should be dealt with by scientific evidence, and by obtaining the informed consent of the couple, not by a total prohibition of the technique (Savulescu, 1999). This is because:

"We enter a dangerous realm when we regulate so personal and intimate an aspect of our lives as reproduction because of fuzzy claims about sexism or nebulous fears for the health of yet-to-be conceived children" (Stock, 2001).

PSYCHOLOGICAL WELFARE OF CHILDREN: THE IMPLICATIONS OF PGD FOR SSS ON PARENTAL LOVE

Concerns have also been raised about the psychological welfare of the child as possible grounds for State intervention in restricting

the parental autonomy to procreate using PGD (Roberts, 2002). This concern stems from the argument propounded by the opponents of the procedure that the practice endangers the unconditional parental love that parents should have for their offspring, and that this may have damaging consequences on children (The President's Council on Bioethics, 2002; King, 2003). It has been argued that, traditionally, parental love has been assumed to be "unconditional" where the purpose of having children is for parents to love and care for them regardless of any traits including his/her sex (Stankovic, 2005). For instance:

"Children are not made but begotten. By this we mean that children are the issue of our love, not the product of our wills. A man and a woman do not produce or choose a particular child, as they might buy a particular brand of soap; rather they stand in relation to their child as recipients of gifts" (The President's Council on Bioethics, 2002).

Allowing parents to select the sex of their children grants them a sense of control over the reproduction process, and hence alters the traditional concept of parenthood where parents are usually satisfied with any child that is born to them (Nuffield Council on Bioethics, 2002). This, therefore, fundamentally challenges the traditional notion of procreation and parenthood by apparently rendering parental love conditional upon the child fulfilling the desire of the parents (The President's Council on Bioethics, 2002, p. 759). As King (2003) argues:

"By choosing the characteristics of our children, we turn reproduction into just another consumer experience and this degrades its profound existential significance. Because babies are human beings, not things, it is critical that much is left to chance in their process of coming into being. The act of choosing tends to turn them into just

another human-designed consumer object. When we choose or design our children, the relationship becomes one of designer and object, where the latter is inevitably in a subordinate position."

Selecting the sex of one's child is, therefore, claimed to be morally wrong because, "children should be accepted and loved unconditionally" (British Medical Association, 2004). This apprehension over the practice of PGD for SSS is also shared by members of the public, as is evident from the public consultation exercise held in the United Kingdom in 2003. Here, PGD for SSS was criticised by the members of the public surveyed for treating the child as a means to an end that "...interferes with the unconditional love owed by parents to their children" (Human Fertilisation Embryology Authority, 2003). Suzie Leather stated (when she was the chair of the UK Human Fertilisation and Embryology Authority) that, "the public view was really that great value should be put on the unconditional nature of parental love (BBC, 2008)." There is an intuitive belief held by the public that parents should simply "...accept any child that comes along," and ought not to "pick and choose" their children (Herrison-Kelly, 2007). An issue thus arises as to whether this intuition is well-founded. On what basis can the intuition or notion that parents should accept any child that comes along and not choose the characteristics of their child such as its sex, be defended? More importantly, can this claim of violation of unconditional parental love undermine the parental autonomy in using the PGD for SSS?

QUESTIONING THE NEED FOR 'UNCONDITIONAL' PARENTAL LOVE

The notion of unconditional parental love suggests that parental love has to be based on the mere fact that the child is biologically theirs, and parents cannot choose any trait of their child such as its sex, as the basis of parenting. However, it is questionable whether and why parental love has to be of this nature. Selecting

the traits of children *prior* to birth implies that the love that parents have for their child is not unconditional, and is instead dependent upon the child fulfilling the chosen trait (Watt, 2004). Indeed, Watt (2004) states that:

“Central to the notion of good parenthood which many of us share is unconditional acceptance. Parents who make their love and care conditional on their child displaying certain features are seen as unparental in the way they behave.”

However, merely taking steps to actualise their preference of a child’s sex is insufficient to accuse these parents of not having unconditional love towards their child because what matters is the unconditional acceptance shown by parents to the child *after* he/she is born *regardless* of his/her characteristics such as sex. Unconditional parental love does not mean that parents should merely accept any child they engender, and should not take steps to select any particular trait that they prefer in a child. Parental love need not be ‘unconditional’ in the sense that parents should not be precluded from selecting the sex of children, because there is no reason to suggest that parents who select the sex of their child only love the child if the child has the desired sex, and will not otherwise do so. Supporting this argument, Davis (2008) makes the following analogy:

“Many parents use infant safety seats to protect an actual child, and many pregnant women avoid alcohol to protect a potential child. There is no reason to think that making the possibility more remote makes it more likely that, if C had trait U, you would not love C as much.”

Love is still unconditional if parents accept and love a child once born, even if it does not exhibit their chosen traits. Taking Davis’s (2008) analogy again:

“Even now the odds that your next child will become severely brain-damaged due to injury, or a quadriplegic in a car accident, are extremely remote. However, parents would not be less inclined to continue loving their child simply because the undesirable condition was unlikely before it materialized.”

Moreover, before the advent of modern sex selection techniques such as PGD, attempts to conceive children of a preferred sex by various traditional means, such as timing, and the position adopted during sexual intercourse was not uncommon. Yet, parents who practised these techniques were not accused of lacking in genuine unconditional love for their child. Given this, “does that mean that the moral judgment or lack of justification of a social and medical attitude depends more upon its efficiency than on the underlying principle?” (Sureau, 1999).

There is nothing inherently wrong with parents attempting to select the sex of their child prior to birth through PGD because:

“If it’s not wrong to wish for a bonny, bouncing, brown-eyed baby girl, why or how would it become wrong if we had the technology, the choice, to play fairy godmother to ourselves and grant our wishes” (Harris, 2007).

Furthermore, if the use of technologies such as PGD, ultrasound, or amniocentesis to ensure the birth of a healthy baby is accepted, and managed to escape the claim of the breach of unconditional parental love, it is difficult to defend the discriminatory attitude expressed against the practice of selecting the sex of children through PGD. As stipulated by Green (2008):

“[T]hese fears underestimate the power of parental love. The panels of prenatal tests that are commonly used today do not seem to have eroded the

quality of parenting. Parents seeking an able child love a disabled one."

Thus, there is no basis upon which to question the parental love of those who select the sex of their child, because there is no reason to believe that parents who do so only love their child for his/her sex. As such, McDougall's attempt at defending the traditional notion of unconditional parental love is refuted. Arguing from a virtue ethics perspective, a virtuous parent, according to her, should exhibit traits that are conducive to the "flourishing of the child" (McDougall, 2005). Included in these virtuous traits is the "trait of acceptance," which, according to McDougall, relates to the requirement for parents to accept any child that is born to them due to the unpredictable nature of children's characteristics. In her view, without this trait, parents would cease to love a child who, for example, was born healthy but later developed a disease or a child whose hair was brown at birth but subsequently darkened (McDougall, 2005). McDougall offers the following hypothetical scenario in support of her view:

"Reflection indicates that sex is indeed a characteristic that falls within the scope of the parental virtue of acceptance. Imagine, for example, that there exists a particular type of bacterial infection that results in a complete change in a child's sex. On infection, girls become normal boys and boys become normal girls...It seems intuitive that parents who rejected their daughter once she became a son, or vice versa, would act wrongly, just as parents who rejected their child once some other medical condition had radically affected his or her characteristics act similarly wrong" (McDougall, 2005).

I concur with McDougall's hypothesis that good or virtuous parents should have the "trait of acceptance" which is essential in securing

children's development, but question whether this trait of acceptance should preclude parents from having preferences about their child's characteristics, and in turn forbid them from acting upon those preferences before the child is born. It is conceded that parental love towards a child should not cease upon any changes in the child's characteristics or features after the child is born, as described in the examples given by McDougall above. However, that should not necessarily prevent parents from choosing the traits of their child before he/she is born. Rejecting a child due to a change in his/her attributes after the child is born cannot be equated with choosing not to have a child with the undesired attributes in the first place. It is erroneous to assume that just because it is wrong for parents to stop loving their child, for example, once the sex of a child changes due to an illness, or when a child initially born healthy later develops a serious disease, as in the examples cited by McDougall, it is equally wrong for parents to attempt to prevent the undesired characteristics such as the sex or a disease. The crux of the matter is that there is an underlying difference between accepting the child's characteristics after the child is born, which McDougall argues strongly for, and choosing the desired characteristics before birth. The latter does not necessarily imply that parents who attempt that action are guilty of not acting virtuously, or of not genuinely loving their child. For this allegation to succeed, it must be supported with concrete evidence that those parents do not intend to love and care for the child if the child turns out contrary to their expectation, that is, not having the desired sex, which is refuted below.

Additionally, theory on the need for unconditional parental love on the basis of the unpredictability of children's characteristics is now irrelevant in the context of sex selection because:

"Claims that parents ought to accept children of any hair colour, level of intelligence, or height may

(currently) be justified, because those characteristics remain at present unpredictable...But how are we to justify the claim that parents ought to accept children of either sex now that the sex of our children is not unpredictable?...[W]hy is the general parental virtue of acceptance still taken to be applicable to the specific case of sex in the wake of the discovery of reliable sex selection techniques?" (Herrison-Kelly, 2007)

PGD has been hailed as a "more reliable way" of identifying the sex of children when compared to other methods such as sperm sorting (Human Fertilisation and Embryology Authority, 2003). It is stated that, "When performed by skilled clinicians and scientists sexing embryos by PGD has a relatively low misdiagnosis rate (less than one per cent on average)" (Human Fertilisation and Embryology Authority, 2003). In the light of this, McDougall's argument that parents ought not to choose the sex of their offspring on the grounds that those who do so might not love the child if he/she does not live up to parents' expectations, is flawed. With PGD, it is unlikely that parents will not get a child of the chosen sex due to the *reliability* of the technique.

Nevertheless, concerns have been raised on the 'fate' of the child in the event PGD fails to deliver one of the desired sexes:

"If I choose or design a child with certain traits, won't I feel pleased if I succeed and disappointed if the child fails to live up to specification? I may not give my failed product up for adoption, but won't our relationship be tarnished by my sense that this is not what I ordered?" (Green, 2007)

However, even if PGD fails to deliver the child of the chosen sex, it is unlikely that parents will reject this child because "Parental Love Almost Always Prevails" (Green, 2007). Equally, some parents will not ever love their

child regardless of his/her attributes. It cannot, therefore, be assumed that parents who, for example, choose to have a girl only love her because she is a girl, and would not have loved her if she had been a boy.

Glover (1995) argues that in 'normal' reproduction, parents may wish for a child of a particular sex but, in some events, their desire is not met. In this situation, the disappointment that these parents may feel at first will normally be extinguished with the arrival of their new baby. The frustration that parents may feel when the child turns out not to be of their desired sex may be stronger for parents who undergo PGD, due to the burdens and ordeal that they must go through from the procedure rather than conceiving without assistance. Indeed, "how parents might look upon offspring when they enter the process with the belief that a certain kind of child is owed to them and after they have paid a high price for that child?" (Ryan, 1992). However, to suggest that parents who resort to PGD to select the sex of their child will only love their child if he/she is of their chosen sex is implausible, especially when they have spent much time and money on an expensive and burdensome procedure. Additionally, given their experience with PGD, it is arguable that these parents may not wish to undergo the procedure again simply because their first attempt failed to deliver a child of their desired sex. On this argument, I differ with Davis (2009) who opines that:

"The more time, money, and travel that a parent invests in directed procreation, and the more inconvenience, physical discomfort, and medical risk that the parent bears, the more I fear that parent will feel entitled to the desired result. As market forces and medical research make such investments relatively trivial, the less I fear the effect...If choosing the sex or any other trait of one's children was as simple and inexpensive as choosing a bar of soap, I would be much less worried."

If sex selection methods were to become simple and inexpensive, parents may be inclined to 'reject' the child that fails to conform to their expectation, because they can attempt to produce another child. The Ethics Committee of the American Society for Reproductive Medicine (2001), in evaluating the concern on the welfare of the child born from sex selection, concludes that there is insufficient evidence to prove that parents will treat the child badly if their attempt at sex selection fails. In any event, the likelihood of untoward parental attitudes towards their child if sex selection fails can be mitigated by appropriate counselling in order to prepare parents for any possibilities. It is, however, conceded that there are parents who may react negatively towards their child if he/she fails to meet their expectations or for any other reasons, but 'bad' parents exist in every society which can be manifested in many different ways.

There is no reason why parental love should remain 'unconditional,' in that there is no reason to suggest that parents should merely accept any child that is born to them and be precluded from choosing the sex of their child. What matters is for parents to accept and love their child regardless of his/her sex, *after* attempting to select its sex through PGD. Just because parents have selected certain traits does not necessarily imply that they will love their child any less. Indeed, even when the child's sex is not selected prior to birth, there is no guarantee that he/she will be 'unconditionally' loved by his/her parents because, "[n]ot all parents forge good relationships with their children whose personality, for example, they may find difficult, and many parents will bond best with those children whose attributes they particularly value" (McLean & Mason, 2003). Even if social sex selection defeats the unconditional parental love that parents should have for children, the accusation itself is not sufficient to legally prohibit PGD for SSS. Without sufficient proof of harm to children, parental autonomy is a more persuasive argument in favour of PGD for SSS than the counter-argument that allowing PGD is destructive of unconditional parental love. As argued by Gavaghan, it is pertinent to uphold

parental autonomy in using PGD to select children's characteristics because such decisions are meaningful to the individuals involved and indicate the, "...values and priorities or view of what it is that makes life important" (Gavaghan, 2007).

CONCLUSION

Concerns about the welfare of children born after PGD for SSS may qualify as sound justification for state intervention to override parental autonomy in selecting the sex of their unborn child, if supported by sufficient evidence. This stems from the argument that the state has an important role in protecting the vulnerable from harm arising from the conduct of others. In the context of PGD for SSS, children born after the technique represent the vulnerable people whose interests need to be adequately protected by the state from the conduct of parents choosing their sex through PGD. On this basis, this paper has reviewed the claim that PGD for SSS endangers the welfare of the child born after the technique, due to the risks of the technique and concerns about the psychological implications on such children.

The authors have argued that the risks to the safety of the child born after PGD for SSS are not sufficient to outweigh parental autonomy in utilising this technique to produce a child of their desired sex. Although there are risks, their magnitude is such that parents should be allowed the choice of whether they wish to undertake the procedure and run the risks. Meanwhile, claims about the adverse consequences on the child's psychological state are similarly and largely speculative as well as unsustainable. In reaching this conclusion, the notion of unconditional parental love, which forms the main basis upon which the use of PGD for SSS is opposed as being detrimental to the child's welfare, has been analysed and refuted. It is concluded that there is nothing inherently wrong with parental conduct in selecting the sex of their child through PGD, as such an action does not imply that the love that parents have for the child is conditional and dependent upon the child fulfilling the parents'

desires. In the light of these findings, it is concluded that parental autonomy to produce a child of their desired sex through the use of PGD should be respected.

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Traditional Knowledge Documentation: Preventing or Promoting Biopiracy

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ABSTRACT

One of the issues currently being addressed concerning the management of biological resources is the protection of indigenous peoples' resources and traditional knowledge. The reason is the existing legal frameworks especially with regards to intellectual property (IPR) system do not provide adequate protection for the indigenous peoples' resources and knowledge. While the Convention on Biological Diversity (CBD) has introduced an obligation to seek prior informed consent for the use of any traditional knowledge and ensure benefit-sharing, the existing IPR system does not have the requirement for benefit-sharing. The IPR system was also not designed for the protection of traditional knowledge in its original form (i.e. in its oral and non-documentation existence). Such features make the knowledge inaccessible for inspection by the patent officers and therefore "facilitate" biopiracy when patents were granted on innovations that were based on existing knowledge. As a consequence, traditional knowledge documentation (TKD) project has been accepted as an interim tool to overcome the shortcomings of the existing legal framework. This paper evaluates the objectives, form and required framework for TKD. As a case study, this paper specifically looks at the TKD projects in India and identifies the issues and lessons that can be learnt from the Indian experience. As a comparison, similar efforts by Malaysia's Sarawak Biodiversity Centre are also studied. This paper will demonstrate the weaknesses of the existing TKD projects that could eventually lead to "promotion" instead of "prevention" of biopiracy.

Keywords: Traditional knowledge, indigenous peoples, biological resources, biopiracy, intellectual property

INTRODUCTION TO THE LEGAL FRAMEWORK

Although traditional knowledge plays, a vital role in the daily lives of the vast majority of people, the international community has only recently sought to recognise and protect traditional knowledge. Such protections were established under the United Nations Convention on Biological Diversity 1992 (CBD). The CBD sets out principles governing access to genetic resources and the knowledge associated with

them, and the sharing of benefits arising from such access (ABS). In addition to ensure the ABS, Article 1 also establishes the two further objectives of the CBD, namely, the conservation of biological diversity and the sustainable use of its components.

Article 8(j) of the CBD is an important provision in the context of protecting traditional knowledge. The provision is specifically concerned with the traditional knowledge and recognises indigenous peoples' status as both

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providers of knowledge and as conservers of biodiversity. Due to indigenous peoples' contributions in both the knowledge and conservation of biodiversity, Article 8(j) states that their contributions must be "respected" and consent must be sought before such knowledge can be disseminated or used, as well as 'encouraging' the equitable sharing of the benefits. The provision calls upon states to include such communities in negotiation for benefit-sharing and prior, informed consent (PIC) mechanism. Even though a state is not obligated to unilaterally dictate how benefits should be shared in private transactions, the state has an obligation to facilitate the equitable sharing of benefits. Article 8(j) seeks to protect traditional knowledge, by establishing obligations for the recognition of traditional knowledge and requirements concerning PIC, as well as attempting to ensure equitable ABS.

The relationship between the intellectual property rights' (IPR) system under the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) and the ABS principles of CBD, in the context of traditional knowledge, are of particular importance. While many scholars argue that IPR is theoretically an important method of protection for traditional knowledge (Combe, 1998; Brush & Stabinsky, 1996; Anuradha, 1997; Bengwayan, 2003; Tobin, 1997), the existing IPR system was not designed for the protection of traditional knowledge in its original form, often consisting of undocumented and oral knowledge.

Before proceeding further, it is worth mentioning here that the relevant IPR protection issue is patent under Article 27 of the TRIPS Agreement. Article 27(1) mandates patent protection for all new products and processes generated using any fields of technology, including biotechnology. Pursuant to Article 27 TRIPS, an invention is patentable upon fulfilment of three conditions, namely if it is new; involves an inventive step; and is industrially applicable. The three aforementioned conditions are currently applied to any invention under section 11 of the Malaysian Patents Act 1983 (MPA).

An invention is only considered to be new if it is not anticipated by prior art. The term 'prior art' applies to any worldwide disclosure of a work to the public through written publication, oral disclosure, by use or in any other way, before the priority date of the application for patent. The contents of a domestic patent application having an earlier priority date are also considered to be prior art (MPA, S14(2)). The MPA also provides a list of inventions that are not patentable, despite meeting the above mentioned prerequisites (Azmi, 2000, 2002).

The existing IPR law does not explicitly protect traditional knowledge, but it seeks to prevent acts of misappropriation of traditional knowledge by inventors. Any inventions created based upon the existing knowledge, including traditional knowledge, are not patentable because it is said to be anticipated by prior art. However, the nature of traditional knowledge in its original form, often undocumented and oral knowledge, makes the determination of its existence as prior art by patent officers difficult, if not impossible. As a result, patents have been granted on inventions that were based upon existing knowledge, rather than new knowledge (Prakash, 2005; Devraj, 2000). Arguably, the existing patent application legal framework can be viewed as 'facilitating' biopiracy.

The "turmeric" and "basmati" cases in India reflect the weaknesses of the existing IPR system when patent protections are granted to 'new' products of biotechnology that are based upon existing knowledge, rather than new knowledge. Although contemporary provisions in the patent system provide possible revocation of such patents (Article 32 TRIPS & Section 33C MPA), the patenting of products arising from the existing knowledge, particularly indigenous knowledge, is almost impossible to prevent (Commission on Intellectual Property Rights, 2002). In the absence of any accessible written record, a patent examiner is often unable to access any information that would challenge the inherent novelty or inventiveness of an application based on traditional knowledge.

Furthermore, the existing IPR system does not have requirements for benefit-sharing as provided in the CBD. As a result, an ongoing debate exists regarding the amendment of the TRIPS Agreement in order to impose PIC and benefit-sharing; and strengthen the link between the TRIPS Agreement and the CBD (Nordin, 2010a, 2010b). During the review of Article 27(3)(b) at the TRIPS Council Meetings in 1999 and 2000, many developing states recognised the conflict and demanded that explicit provisions should be included in the TRIPS Agreement to: (i) prevent the grant of patents to existing traditional knowledge; and (ii) ensure the sharing of benefits derived from the patents granted to new inventions based on traditional knowledge. In response, the developed states argued that the existing provisions on patenting are adequate and the problem arises from the absence of properly documented traditional knowledge are readily available to patent officers in order to perform searches regarding the existence of such knowledge as prior art (Gopalakrishnan, 2005).

The debate continued during the WTO Ministerial Meeting in Doha, resulting the WTO requested the TRIPS Council to consider the potential conflicts between Article 27(3)(b) and the CBD; and to provide express provisions in the TRIPS Agreement stipulating the disclosure of the information in the patent specification, including the origin of the genetic resources and the traditional knowledge associated with them, and the benefit-sharing requirement. Developed states opposed this proposal, on the basis that it would require new conditions for the grant of patent and the identification of the source; and geographical origin of genetic resources was not always practical. Even though the European Union agreed to the need for disclosure of information, it joined the USA in arguing that it should not be made a condition precedent for the grant of a valid patent (Gopalakrishnan, 2005). Although the debate is still on-going amongst the states and the international organisations, many states view documenting traditional knowledge (TKD) as a crucial interim tool to overcome the shortcomings of the existing legal standards

domestically. India is among the states which have engaged in extensive domestic efforts to combat biopiracy and engage in TKD projects.

This article will consider whether TKD is a crucial interim tool to overcome the shortcomings of the existing legal framework and can ultimately be utilised to prevent biopiracy. This article will conduct the analysis by first looking at the objectives and form of TKD. The legal framework to support TKD is then discussed, with a focus upon the status of collective knowledge. The analysis later examines various TKD projects to identify potential lessons learned from the various experiences. Finally, this article considers the TKD effort undertaken by the Sarawak Authority in Malaysia.

TKD: OBJECTIVE AND FORM

The purpose of providing TKD is to provide information regarding traditional knowledge as prior art. The assumption is that patent examiners will consider the information provided by such documentation and prevent *mala fide* patent application or infringement after the completion of the patent process. TKD also assists in the identification of the indigenous communities with whom the benefits of the commercialisation of such knowledge is to be shared.

In India, TKD is typically compiled in electronic databases and digital libraries such as the Community Biodiversity Registers initiated by the Foundation for Revitalisation of Local Health Traditions and Centre for Ecological Sciences at the Indian Institute of Science and the People's Biodiversity Registers of the non-governmental organisations (NGO). An effort was also initiated by the Science and Technology Department to set up the Traditional Knowledge Digital Library (TKDL) to establish a national database containing the details of medicinal plants that allows the inventors to search the database to determine whether they can patent their product (Stanton, 2004). Establishing such databases within the registers necessitates taking into account the international classification

standards such as the World Intellectual Property Organisation (WIPO) International Patent Classification (IPC) system which requires the proof of prior art and a system easily accessed by patent examiners. The potential use of traditional knowledge databases is being examined by a specialised task force of WIPO with the aim of determining how traditional knowledge databases can be integrated into the existing search tools by patent officers (Commission on Intellectual Property Rights, 2002).

A further initiative of the Indian government is known as the National Innovations Foundation, led by the NGO SRISTI that seeks to recognise and reward the folk healers, farmers and artisans for grassroots innovations and outstanding contributions to traditional knowledge (National Innovation Foundation, 2005). The Indian government has also joined the NGO Kalpavriksh to establish the National Biodiversity Strategy and Action Plan, whose aim is to develop participatory plans for sustainable use and equitable sharing of public domain biodiversity resources at the district and national levels.

At the grassroots level, the registration effort takes place in the form of a peoples' biodiversity register (PBR). PBRs contain documents periodically updated by local school teachers, students and NGO researchers concerning peoples' knowledge; practices of use; and conservation of bioresources, both wild and domesticated (Gadgil, 2006). The PBR is not undertaken purely for IPR, but also serves as a social process and a historical record of knowledge and knowledge holders. Consensus has been reached concerning the documentation process of PBRs, which includes: (i) clarifying project rationale and obtaining peoples' approval; (ii) identification of knowledgeable individuals and potential users; (iii) interviews, field visit and mapping of project area; and (iv) public discussion. Furthermore, it is agreed that the documentation should remain within the control of the community at the local level. Aside from functioning as a preventive tool for biopiracy, the registration also assists in the identification of the knowledge holder by the *bona fide* potential user of the knowledge (bioprospector/researcher) to

facilitate the benefit-sharing. The registration of traditional knowledge therefore becomes guidance for bioprospecting or research in traditional knowledge.

However, research in traditional knowledge also raises questions on the benefits to local and indigenous communities. Some of the research projects are seen to encourage or facilitate biopiracy, since they typically seek to further corporate interest. Among the examples of governmental entities and/or private collaborators attempting to procure IPR on traditional knowledge for their own gain can be demonstrated by events in Thailand and Nepal. In Thailand, a collaborative effort between the Thai government and Portsmouth University to collect marine fungi from mangrove and coastal areas in southern Thailand for study resulted in a legal battle when the sample was kept in the UK and requests by the Thai government for its return were refused. In Nepal, samples of the life-saving fungi, *asco mycetes* collected from the Gurung Community of Chhamdila were taken to the US by a professor without any arrangement for benefit-sharing in case of commercialisation (Kalpavriksh, 2002).

LEGAL FRAMEWORK TO SUPPORT TKD

Although the IPR requirements concerning prior art are met by having TKD, the documentation is not sufficient to guarantee benefit-sharing with regards to profits. Statutory regulation is still necessary to establish benefit-sharing mechanisms at the national level. PBRs have been recognised by the Indian Biodiversity Act 2002 (IBA, S19-21) as prior art documentation to be scrutinised for patent applications, as well as the basis for equitable benefit-sharing. The relevant provision in the act requires consent to be sought from the National Biodiversity Authority (NBA) for any access to biological resources and knowledge, and to ensure benefit-sharing. The provision also mandates the NBA to oppose any infringement of Indian biodiversity and knowledge and prevent biopiracy. The Indian Patent Act (IPA)

reinforces such provisions of the IBA, requiring applicants to disclose information on the source of origin of biological resources and knowledge (Utkarsh, 2002). Patenting of any innovation resembling traditional knowledge is prohibited and biodiversity registers, such as PBRs, can serve as evidence of such prior knowledge.

The IPA has undergone various amendments to provide protection on traditional knowledge associated with genetic resources. Section 3(p) of the IPA expressly states that traditional knowledge is not an invention in an effort to prevent patenting of traditional knowledge in India. A further provision was added, providing that the knowledge available within local and indigenous communities, oral or otherwise, and within India or elsewhere, will be treated as prior art (IPA, S25&64). By expressly noting that oral knowledge within communities is recognised as prior art, the government seeks to ensure that the largely undocumented knowledge of Indian local and indigenous communities cannot be patented.

A further amendment to the IPA concerns disclosure. The provision obligates the applicant to disclose details of the source and geographical origin of the biological material in the specification in order to determine whether traditional knowledge was used in inventions related to generic resources. The requirement in S10 for technical details to be included in the specifications of the patent application arguably necessitates the inclusion of the person or institution from whom the material is obtained and the details of the information regarding the material, including the details of the traditional knowledge associated with the material and its holder. Furthermore, the IPA explicitly states that the patent application can be opposed or revoked if the information provided is erroneous or omits certain details.

However, there is no obligation on the patent applicant (for inventions based on traditional knowledge) to obtain PIC to use the traditional knowledge or share the benefits derived out of such use before filing a patent application. Section 6 of the IBA makes it obligatory for the patent applicant to obtain PIC from the NBA for an invention based on genetic

materials of Indian origin. Failure to obtain PIC or satisfy the conditions stipulated in the PIC is actionable under the act. Although the obligation exists to obtain PIC, failure to obtain PIC has no impact on the grant of patent or enjoyment of the patent rights. While the obligation for a patent applicant to obtain PIC exists in legislation, there are no obligations under IBA or IPA to produce evidence that PIC has been obtained prior to the grant of patent, nor are there provisions to oppose or revoke the patent once issued for failure to obtain or satisfy the conditions of PIC. The failure to include enforcement mechanisms in the legislation renders the provision meaningless (Gopalakrishnan, 2005) in preventing an applicant from utilising traditional knowledge in a patented invention without due recognition of the holder of the traditional knowledge.

However, unlike India, Malaysia does not have a provision in the MPA obligating the applicant to disclose details of the source and geographical origin of the biological material or traditional knowledge used in the patent specification. Furthermore, the MPA does not contain provisions explicitly recognising TKD as evidence of prior art or that traditional knowledge does not qualify as a patentable invention. Malaysia has no other law that regulates the use and promotes protection of traditional knowledge. Although Malaysia is legally bound to incorporate into the national policy the set of commitments under the convention following its ratification of the CBD in 1994, Malaysia has not yet enacted national access and benefit-sharing (ABS) legislation regulating access to biological resources.

Limited legislation exists in the states of Sabah and Sarawak, that have enacted the Sabah Biodiversity Enactment 2000 and Sarawak Biodiversity Centre Ordinance 1997 (Kate & Wells, 1998; Osman, 2001) respectively, but broader reaching national measures have not yet been implemented. The process to develop national ABS legislation began in 1994 and culminated in the adoption of the final text of the first draft Access to Genetic Resources Bill (AGR Bill) by the Task Force on Access to Genetic Resources in October 1999 (Carrizosa

et al., 2004). However, there has been no further progress regarding the ABS legislation since the adoption of the draft bill over a decade ago. If PBRs were established in Malaysia, such databases would prove ineffective since the existing legislation fails to recognise traditional knowledge as prior art and no mechanism exists to guarantee benefit-sharing on the basis of the use of traditional knowledge. Due to significant distinctions between relevant Indian and Malaysian legislative acts, the use of TKD as an interim tool to protect traditional knowledge in Malaysia would lack effective legal effect in practice in Malaysia.

STATUS OF COLLECTIVE KNOWLEDGE

Another relevant issue related to TKD is the claim to rights over knowledge *vis a vis* collective rights of the traditional knowledge. The issue is important since most traditional knowledge is considered to be held by the whole community or a group of individuals. Thus, all members of such community or group are considered the owners or holders of the knowledge, retaining collective rights, rather than individual rights, over such knowledge. In order to adequately protect collective rights, distinct models from those already presented may have to be utilised. Although legal propositions have been made, no legal norm has been implemented. The most debated proposition is the creation of a national register of either traditional knowledge or plants belonging to everyone involved in the use and conservation of traditional knowledge or plants, registered or not, and could be conceded to the local community, or tribe, in a generic manner. The community would then be the owner of a modality of IPR. All community members would have the right to exploit such knowledge according to their traditions.

Costa Rican law establishes community rights, providing protections regarding inventoried existing knowledge of each community. The existing IPR system also does not apply to community rights as it is not possible to identify an individual inventor due to

the collective nature of indigenous knowledge. Though idealistic (the cost of such a complete inventory makes it unrealistic), the legal system has demonstrated flexibility and an openness to adapt to difficult issues. A problem that is left unresolved, however, is the situation where two distinct groups hold identical knowledge, as dual ownership is not permitted. From an anthropological point of view, it is completely possible that two different communities utilize a plant in the same way or use the same methods to conserve a natural space. In the context of multiple indigenous peoples with credible claim to traditional knowledge, the issue arises on which party should be entitled to give consent. According to Vandana Shiva, a moratorium on access to traditional knowledge should be declared until this issue is resolved (Tobin, 1997).

In Malaysia, the draft AGR Bill (Carrizosa *et al.*, 2004) provides the exclusion of three contentious issues. One of the issue concerns the collective rights of the indigenous peoples. The establishment of a system of community intellectual rights for the purpose of the recognition of ownership rights of communities over their knowledge and innovations, the protection of the communities' knowledge and innovations, and for ensuring the equitable benefit-sharing is channelled back to the communities (Carrizosa *et al.*, 2004). As a result, the indigenous communities in Malaysia are responsible for the setting up of a collection system and registration of traditional knowledge and innovations, establishing technical institutions, and registering indigenous and local communities' organisations themselves. It will not be the responsibility of the national competent authority that shall be established under the proposed law. Unlike the position in Sarawak, for Peninsula Malaysia, the Federal government has rejected any responsibilities towards management of communities' traditional knowledge. This position will leave the communities with insufficient skills and the appropriate financial resources in managing their knowledge.

TKD: CRITIQUE AND LESSON

Contemporarily, debates exist as to whether TKD should be published or maintained in a state of secrecy. A prominent argument is that traditional knowledge can best be protected, both from erosion and biopiracy, i.e. through publicity but not secrecy. Unique knowledge may best be fully registered through refereed databases, while PBRs make claims to such knowledge, alongside public domain knowledge and resources (Utkarsh, 2002).

On the other hand, unlimited and unrestricted accessibility to this documentation leads critics to question whether TKD would effectively prevent biopiracy or facilitate biopiracy and the further exploitation of traditional knowledge. While many indigenous people have made their traditional knowledge available to the public in an attempt to protect their traditional knowledge, concerns, based upon both cultural and economic arguments, have been raised that such acts have left the indigenous peoples open to exploitation. A report entitled, "The Role of Registers and Databases in the Protection of Traditional Knowledge" was prepared by the United Nations' expert Brendan Tobin, who argues that "obliging indigenous peoples to offer public documentation of traditional knowledge for intellectual property protection purposes is insensitive to cultural practice in many places and may lead to injustice". Tobin's argument is principally concerned with the refusal of patent offices to accept oral evidence and the scrutiny of evidence of prior art by personnel in the patent offices (Kirby, 2004).

Tobin argues that legal systems should be able to prevent the piracy of traditional knowledge without jeopardizing the cultural integrity and ways of the indigenous peoples. For example, while Inuit communities maintain a very high level of secrecy, the government officials are allowed confidential access to their traditional knowledge. At the same time, international law should be amended to provide oral evidence of traditional knowledge in confidence and access to confidential databases should be restricted. While registers and

databases developed and held by the indigenous peoples' groups, museums, botanical gardens and universities are essential for protecting traditional knowledge (Kirby, 2004), as the existing institutions lack a common code of conduct such as an obligation for the explicit acceptance of the rights of the indigenous peoples over their knowledge a pre-condition to the access of such information.

Economically, some view that by putting the information on public domain would actually facilitate biopiracy, since the existing IPR law is inadequate to detect biopiracy; and ensure patents granted are genuine and not based on the existing knowledge (Barsh, 2001). Further arguments suggest academic publications focussed upon indigenous knowledge make indigenous medical knowledge readily accessible in the public domain, in turn posing a greater threat to biopiracy of the indigenous knowledge than the patent system. Using statistical evidence, Barsh (2001) showed that few patents derived directly from indigenous medical or ecological background. On the other hand, most patents with origins in indigenous knowledge were inspired by data or information readily available in the public domain (Barsh, 2001). Therefore, according to Barsh's study, TKD will only facilitate biopiracy, thus should not be encouraged.

Others argue that indigenous peoples should be pragmatic and cautious of the government's real intention in such projects, as the recognition of TKD should not be linked to decision-making processes on benefit-sharing and other issues related to traditional knowledge. Contemporary government initiatives are often viewed as token gestures attempting to accommodate traditional knowledge within biased IPR systems, rather than a means to guarantee collective rights to such communities (Barsh, 2001). The argument closely follows Michael Dove's argument that the politico-economic elites of a state will ultimately be the beneficiaries of such initiatives. Issues concerning the protection of the indigenous knowledge should be resolved by the state, through the creation, modification and implementation of national laws concerning

traditional knowledge and genetic resources. Further arguments have been put forward stating that in order to protect the traditional knowledge, innovations and practices of the indigenous peoples', one has to protect their right to land (Sharom, 2006). The indigenous peoples' resources and knowledge are closely associated to their land, so if the land rights are not protected, then neither are the resource rights. Therefore, the indigenous knowledge associated with resources that are not protected is also not being protected.

The Filipino government has made a sincere effort to empower indigenous communities by recognising their rights over their ancestral land in the Indigenous Peoples Rights Act. Similarly, the Indian Constitution recognises the decision-making power of village bodies (Panchayats) on biological resources. Therefore in India, not only their resources and knowledge are protected, their autonomy and self-determination is also receiving due recognition by the government. Further, national law should recognise indigenous peoples as negotiation partners to be heard in consultations. The ability to negotiate on their own and their possession of lands are pre-conditions for empowerment, which is a crucial element for managing their knowledge and resources efficiently.

Finally, the TKD project requires new technical skills and adequate financial resources. Most communities possessing traditional knowledge are marginalised, living in a state of extreme poverty. Thus, an efficient TKD project requires collaboration between the respective indigenous communities and the initiator (state government). Ultimately the success of this project will require the state government to provide its full commitment in the provision of adequate and continuous resources, required skills and freedom of the indigenous people in deciding; (i) whether to participate in the project; (ii) the rationale of this project; and (iii) the preservation of the document according to the respective lifestyle and tradition of the indigenous communities.

TKD PROGRAMME BY SARAWAK AUTHORITY

Sarawak is the first state in Malaysia that formulated laws regulating ABS, namely the Sarawak Biodiversity Centre Ordinance 1997 and Sarawak Biodiversity Regulation 2004. Despite the criticisms and lack of clarity on the status of TKD at the international level, Sarawak established a local TKD agency, the Sarawak Biodiversity Centre (SBC), in 1998. The SBC maintains a library of extracts of biological resources collected; undertakes studies, research and documentation of traditional knowledge use of biological resources by native communities in the state; and provides the facilities for screening of bioactive compounds. The SBC also facilitates the TKD of communities' use of biodiversity; and the development of biodiversity-biotechnology databases for Sarawak. Other functions of the SBC include the regulation biodiversity research in Sarawak through the use of a research permit system and research agreement scheme (Chua & Yen, 2000), and the implementation of bioprospecting programmes on Sarawak's indigenous biodiversity (Nordin, 2008).

The main objective of the TKD programme carried out by the SBC is to facilitate the indigenous peoples (natives) in the state in preserving their traditional knowledge through proper recording or documentation techniques. The SBC's efforts regarding this have included capacity building workshops to provide the indigenous communities with the necessary skills, such as documentation techniques, propagation and management of useful indigenous plants (SBC, 2011). The programme was introduced in 2001 which involved 12 ethnic groups in 25 locations. SBC has begun its own pilot project in compiling a log of medical knowledge among the Bidayuh Dayaks. The communities that opted to document their traditional knowledge are free to keep the data to themselves, while possessing information that serves as a basis for claims, financial rewards, or other future benefits. The immediate benefit is that such communities have documented and preserved their traditional knowledge for

future generations (Chalmers, 2001). Similar to the Indian PBRs, SBC's documentation project is participatory in nature. However, while the Indian PBRs are published as prior art information, the SBC's documentation is currently maintained in secrecy. While the objective of the SBC's TKD project is to facilitate the preservation and protection of the indigenous peoples' traditional knowledge, it is not clear whether the documentation project will be converted into databases that contain information on prior art in a fashion similar to the Indian PBRs. However, the Patent Unit, MyIPO Malaysia is currently working on the establishment of the TKD databases.

The SBC's documentation project has in 2006 prompted the United Nations Development Programme Global Environment Fund to nominate the SBC as a centre of excellence for TKD for the Asia Pacific Region (Star, 2006). SBC stated that there were two reasons for documenting traditional knowledge: "firstly, it is our heritage for future generations and secondly, it is for the sharing of knowledge for mutual gain." What was not clear from the statement was whether the TKD agency was to serve as a means for the indigenous communities to pass traditional knowledge on to future generations or whether they perceived it as a potential tool for commercialisation. This is very crucial because as a facilitator, the SBC should allow the communities to decide the rationale for the documentation. For many communities, it is imperative to ensure that their traditional knowledge are preserved and respected, rather than to obtain monetary compensation or profit. While it may be said that they are ignorant of the potential monetary value of their knowledge, the decision by the communities have to be respected.

The SBC has also confirmed that almost 90 percent of researches in the SBC's laboratory are guided by traditional knowledge. As in 2006, "SBC has collected more than 1,500 plants from a dozen ethnic communities in 27 villages and they have performed bioassays on nearly 200-plus plants and more than 35 percent have shown good activity against cancer cell lines

when tested" (Star, 2006). The centre further views that they should assign the rights back to the communities. In this respect, it may be assumed that the approach to traditional knowledge used by SBC was premised upon contemporary notions concerning the PIC of the respective communities. The process, however, has raised concerns about the potential commercialisation of traditional knowledge related to bioprospecting.

Part VI of the Sarawak Biodiversity Regulations 2004 provides that no person shall undertake ethnobiological research except with a permit issued by the council and the permit holder shall sign a research agreement with the Sarawak government. Further, the permit holder may be required to make payment to the natives as rewards for the knowledge or information provided in connection with the ethnobiological research, regardless of whether the research results in commercial development of any medicinal or other products. If the research leads to commercial development, the patent or IPR shall be shared with the natives who supplied the knowledge or information.

The precise role of the SBC in relation to ethnobiological research, however, is not clear. As a multi-tasking agency, the SBC functions as: (i) a facilitator of the TKD; (ii) an end user of such knowledge (bioprospector); and (iii) a regulator which exercises its regulatory function via research permit system and research agreement scheme. As a result, the SBC's functions seem to overlap and it is unclear whether the SBC requires the explicit permission of the Sarawak Biodiversity Council and the Sarawak government when it conducts ethnobiological research. If permission is required, the SBC is obligated to get a permit from the Sarawak Biodiversity Council as a bioprospector sign a research agreement with the Sarawak government, which is normally represented by the SBC for the conclusion of such agreements. A subsequent issue which would then need to be resolved is whether the SBC is required to make payments to the communities affected by its ethnobiological research activities as required by the provisions,

as well as what form the benefit-sharing. The final issue is whether SBC makes payment to the respective natives for the use of the knowledge as required by the provision and in what manner and form the benefit-sharing shall take place (benefit-sharing mechanism).

In short, the activities and issues associated with the SBC could serve as further fuel for debates regarding the effectiveness of the TKD projects, such as databases and libraries, in safeguarding traditional knowledge against biopiracy or exploitation by politico-economic elites in power in the state government (Kalpavriksh, 2002). Therefore, the SBC's TKD initiative may be seen as the successful means of protecting and preserving traditional knowledge only if the above issues are resolved accordingly.

CONCLUSION

It is important to stress that the IPR regime does not protect traditional knowledge via patents. It should prevent the potential exploitation of traditional knowledge that arises when traditional knowledge is used in inventions without the owner(s) of such knowledge receiving any benefits/profits from the commercialisation of such knowledge. However, the existing legal framework in the CBD and TRIPS Agreement do not provide adequate protection for the indigenous peoples' rights on their resources and knowledge. Many communities now have been influenced or encouraged to document their resources and knowledge so that the documentation of their traditional knowledge may serve as a tool to prevent future misappropriation of their knowledge, as well as an effort to ensure benefit-sharing in the event the knowledge is used for research. The communities also believe that the documentation of traditional knowledge is as a mean to preserve the knowledge for future generations. For these reasons, parties like national/state governments, private entities and NGOs have initiated such projects all over the world.

On the other hand, local communities and indigenous peoples (the traditional knowledge holders) often find themselves disagree with

their governments because of the fundamental difference in their perception of traditional knowledge and the need for its protection. By and large local communities and indigenous peoples are averse to the privatisation of traditional knowledge, while interested parties and the government themselves are interested in the commercialisation of such knowledge. As a result, the government initiatives are often seen as adversarial on issues related to the protection of traditional knowledge, rather than efforts to protect the interests of the communities affected.

Though the rationales of the documentation projects differ between the PBRs in India and the one in Sarawak, both countries should tackle this issue from a bigger perspective. This can be done by recognising the indigenous peoples' rights to property and self-determination. Without these recognitions, TKD projects, especially those initiated by the state government and private collaborators, shall continue to be seen as opportunities to further exploit the already marginalised indigenous peoples' resources and knowledge. The owner of any TKD projects should model its programmes and initiatives based on the lessons from the models put forward in practice in India in an effort to avoid the stigma associated with the other state initiated efforts elsewhere in the world.

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Contempt of Court in the *Syari'ah* Courts

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ABSTRACT

The purpose of this article is to examine the *Syari'ah* courts' power to punish for contempt. In the last nineteen years, the state authorities have recognised the importance of expressly providing the *Syari'ah* courts with the power to punish for contempt. There are specific categories of contempt of court before the *Syari'ah* courts specified in the relevant statutes, though these categories are not consistently specified in terms of the categories themselves, how the categories are defined and to what extent a party can be punished for committing these categories of contempt. Cases of the *Syari'ah* Courts examined here showed consistency with contempt before the civil courts, with majority of the contempt cases being committed are disobeying a court order and the contempt in the face of the court. Statutes applicable to the *Syari'ah* courts have provided different sentencing limits for different categories of contempt. This article explores the scope of contempt of court in the *Syari'ah* Courts, their sentencing limit and weaknesses. The research methodology adopted in this article is doctrinal research.

Keywords: Contempt of court, *Syari'ah* Court, federal constitution, state enactments

INTRODUCTION

A basic definition of contempt of court can be when a legal persona (be it a natural person or a company) interferes, by act or omission, with the administration of justice. This may be committed by anyone, anywhere, and in any context. It is a power given to every court, expressly by statute, or through the inherent jurisdiction of courts. In the context of the Malaysian Court, contempt can occur both in the civil courts as well as the *Syari'ah* Courts. It is instructive to refer to Common Law in tracing the history of contempt of court. Contempt of Court is capable of great diversity of form and in fact, the many forms of contempt have unnecessarily complicated the understanding of this judicial power.

Bhag Singh (2007) wrote that defining 'contempt of court' continues to be an issue of current concern. There are many definitions of this concept, but the versatility of its forms makes it difficult to encompass all these forms into a single definition, other than a broad one. A definition that is quite specific may neglect to include the full scope of the various forms, and a definition that is quite broad may only provide a general idea of the concept, but be lacking in specific details. The law on the contempt of court has a rich history, stemming from the United Kingdom from centuries ago, and extending to a number of the country's former colonies, many of which, still have such laws based on the same source. In the United Kingdom, this can historically be traced to

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the auspices of the King and the courts as His channel of justice. V.R. Krishna Iyer (2002) wrote, “this branch of vintage jurisprudence is of Anglo-Saxon heritage and regal mintage, the King being the fountain of justice and the Judges lions under the throne...” Steve Shim CJ of the Malaysian Federal Court in *Zainur bin Zakaria v. Public Prosecutor* observed that contempt of court is a “... means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally.” This highlights the important dual perspective that a judge has to often be mindful of, that of ensuring a smooth and fair process in the case before the court at the time, but also giving a warning to others about what is expected of them in the conduct of a trial generally as illustrated by the courts’ using contempt of court to hold accountable various parties in a case for improper conduct, from lawyers and their clients failing to attend trial without a valid excuse, such as in *Lai Cheng Chong v. Public Prosecutor*; litigants not fulfilling the terms of court orders expeditiously as in *Hardial Singh Sekhon v. PP*; witnesses giving false testimony, as in *Jaginder Singh & Ors. v. Attorney-General*; and members of the audience disrupting the proceedings, as in *Public Prosecutor v. Lee Ah Keh & Ors.* A great deal is expected of a judge, perhaps too much. C.K.G. Pillay (1985) wrote that a judicial officer’s life is by no means easy because too much is expected of him. Whether such expectations are fair or not, judges too are subject to scrutiny regarding their professional behaviour. Judicial decisions and comments are often reported and highlighted by the media. Therefore, judicial remarks can affect the public’s regard and respect for the legal system. Since the law on the contempt of court is intended to uphold the integrity of the legal system, judges exercising this power should be all the more concerned that their decisions and comments in such cases do not invite public ridicule. Another common description of the contempt of court is that it is intended to ‘protect’ the administration of justice such as so described by Balia Yusof Wahi J. of

the High Court in *Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn. Bhd.* that “the court has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process...” Lowe and Sufrin (1996) wrote that contempt of court plays “... a key role in protecting the administration of justice”, whereas Rashid (2002) says that “the law of contempt of court plays a key role in protecting the administration of justice.”

Islam recognises offences related to contempt of court. Since courts are the mechanism for dispensing justice, Islam requires respect towards the judiciary which implements justice according to the Islamic law. Allah SWT says in Surah *Al-A’Raaf*, verse 3, “follow what has been revealed to you from your Lord and do not follow guardians besides Him how little do you mind.” Thus, disobeying the Prophet SAW could be regarded as a contempt against the judicial authority.

LITERATURE REVIEW

There are not many writings on the contempt of court in *Syari’ah* Court in Malaysia. Basir Mohammad (2005) discussed the definition of contempt of court, the history of contempt in Islam, the contempt of the *Syari’ah* Court, the suitability of contempt of court with Islamic law and the various forms of contempt of court. The word ‘contempt’ in Arabic means *ihqiqar*, *imtihan*, *intihak hurmah*, *istirdhal* and *qillat al-ihqiram*. All those words when combined together (*intihak al-mahkamah*, *ihqiqar al-mahkamah* and *imtihan al-mahkamah*) carry the same meaning, i.e. the contempt of court. Contempt of court is defined as any act which can be construed as ridiculing or weakening the process of the court or disobeying the court order. According to him, the contempt of court (*intihak al-mahkamah*) can be divided into two categories, i.e. direct (*mubashir*) and indirect (*ghayr al-musabshir*). The direct contempt is an act of contempt committed in the court or before the judge presiding in court. A similar contempt also refers to refusal to be a witness. It may include disobeying the court’s order.

An indirect contempt of court (*intihak al-mahkamah al-ghayr al-mubashir*) refers to an act of contempt outside the court premises and not seen by the judge.

Basir outlines six forms of contempt of court as follows: (i) refusal to attend court trial, (ii) making false charges, (iii) refusal to be a witness, (iv) giving false testimony, (v) making false oath and (vi) defaming a judge. Meanwhile, A. Mukhti (2007) examined contempt of court in the *Syari'ah* courts, although the author also compared this particular law as it applies to civil courts as well. In more specific, the author examined the Malaysian authorities; about 11 Malaysian cases and 11 Malaysian statutes related to the *Syari'ah* statutes applying to the federal territories and the state of Selangor. This presents an instructive review of the contempt of law in the civil and the *Syari'ah* courts. Mukhti also analysed the concept of contempt of the *Syari'ah* Court in the context of the *al-maqasid al-Syari'ah*. *Al-maqasid al-Syari'ah* is the primary objective of the *Shari'ah* in the realization of benefit to the people, concerning to their affairs both in this world and the hereafter. It is generally held that the *Shari'ah* in all of its parts aims at securing a benefit for the people or protecting them against corruption and evil. Thus, contempt of court was viewed from the principle of *maqasid al-Syari'ah*, in which the ultimate purpose is to achieve respect and adherence to the judicial authority. Similarly, N. Yaakub (2000) discussed contempt of court in the *Syari'ah* Court and its effects on journalists. The article focuses more on the threat of contempt which could befall on journalists while carrying out their work.

RESEARCH METHODOLOGY

The research methodology chosen for this article is doctrinal research. A.A. Razak (2009) defines this particular research methodology in the following way; "doctrinal research asks what the law is on a particular issue. It is concerned with analysis of the legal doctrine and how it has been developed and applied." What is attempted is a thorough examination of the current law on

the contempt of court in Malaysia, as evidenced from statutory provisions and judicial principles. This is typical of the doctrinal research as commented by Hutchinson who writes that doctrinal research is library research based on primary materials - the actual sources of the law (legislation and case law), and secondary materials - including commentaries on the law (from textbooks and legal journals) (Hutchinson, 2002). Chynoweth (2009) similarly writes that "the methods of doctrinal research are characterised by the study of legal texts and, for this reason, it is often described colloquially as 'black-letter law'". This detailed review of existing law will then be used as a platform to consider proposals for reform. The Pearce Committee labels this part as reform-oriented research." This is described as "research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting" (Pearce *et al.*, 1987). In short, the academic legal writing is based on the analysis of law on a given problem which this article has adopted. The authors relied heavily on the various States' enactments which contained provisions on the contempt of court and analyse them accordingly. The cases of the *Syari'ah* Courts that pertained to the contempt of court are also referred to in order to examine the approaches adopted by the courts in dealing with such offences. This review is intended to highlight that while many statutes and some cases have specific provisions for the contempt of court before the *Syariah* courts in the territories and states, there are still a number of uncertain and inconsistent issues in the law of contempt of court before the *Syariah* courts.

LEGAL ANALYSIS STATUTORY PROVISION OF CONTEMPT POWER

The *Syari'ah* courts' power to punish for contempt seems to have been expressly provided by statutes in all the territories and states (Farid, 2003). All the *Syari'ah* courts have been given the power to generally punish for contempt, except in the state of Sabah, although even in this State, as will be discussed below, the power to

punish for specific categories of contempt have been provided. This general power, however, has been granted in slightly different words. The *Syari'ah* courts in the Federal Territories of Kuala Lumpur, Putrajaya and Labuan (1998), the States of Kelantan (2002), Pahang (2002), Selangor (2003), Terengganu (2001), Malacca (2002), Penang (1999), Perak (2004), Perlis (2006), Negeri Sembilan (2003) and Sarawak (2001) have the jurisdiction to commence proceedings against any person for the contempt of court. The *Syari'ah* courts in the State of Johor (1993) shall have the power to punish any contempt of itself, while each *Syari'ah* court in the State of Kedah (1993) has the power to impose a penalty for any act, omission or conduct that is deemed to be a contempt of court. Strangely in the State of Sabah (1993), there is a corresponding statute, but it does not seem to be a corresponding provision on this particular issue.

Considering that the express statutory power to punish for contempt is less consistently given to the civil courts, it is surprising why this issue seems to have been so consistently recognised by the State authorities for the *Syari'ah* courts. Having statutes providing rules of procedure for cases before the *Syariah* courts of every territory and state does not fully explain why the power of contempt is so consistently included as rules of procedure have been provided for many non-*Syari'ah* courts such as the Special Court, Court for Children and Labour Court without including a contempt power for these courts. Yet, the contempt power seems to have been specifically included in these statutory rules of procedure for all the *Syari'ah* courts.

CATEGORIES OF CONTEMPT IN STATUTES INCONSISTENTLY SPECIFIED, DEFINED AND PUNISHABLE

There are specific categories of contempt of court before the *Syari'ah* courts specified in the relevant statutes, though these categories are not consistently specified in terms of the categories themselves, how the categories are defined

and to what extent a party can be punished for committing these categories of contempt. In particular, there are four categories specified in these statutes. The first category specified is the contempt of a court order. This category is specified for the *Syari'ah* courts in the territories and all the states, except for the states of Pahang, Malacca, Perak, and Perlis. This appears to be a common category of contempt specified, yet has been defined differently, with quite different maximum sentences provided. For the *Syari'ah* courts in the federal territories of Kuala Lumpur, Putrajaya and Labuan (S.10, 1997), the states of Terengganu (S.11, 2001), Penang (S.10, 1996), Johor (S.10, 1997) and Sarawak (S.10, 2001), this category is defined as any person who defies, disobeys, disputes, degrades or brings into contempt any court order and is punishable with a fine not exceeding RM3,000, an imprisonment for a term not exceeding 2 years, or both. Yet, in the state of Sabah (S.104, 1995), this category refers to any person who disobeys, opposes, disputes, disgraces, humiliates or refuses to comply with any court order and is punishable with a fine not exceeding RM1,000, an imprisonment for a term not exceeding 6 months, or both.

This category for the *Syari'ah* courts in the states of Kelantan (S.31, 1985) and Kedah (S.31, 1998) is defined as any person who fails to comply with, contravenes, objects to, derides or refuses to obey a court order and is punishable with a fine not exceeding RM1,000, an imprisonment for a term not exceeding 1 year, or both. Yet, in the state of Selangor (S.15, 1995), this category relates to any person who defies, disobeys, degrades or brings into contempt a court order and is punishable with a fine not exceeding RM3,000, an imprisonment for a term not exceeding 2 years, or both. This particular category is defined in the most detailed for the state of Negeri Sembilan (S.109, 1992). Here, this category involves any person who knowingly disobeys an order promulgated by a public servant lawfully empowered to do so directing him to abstain from a certain act or to take a certain order with certain property in his possession or under his management. If

the disobedience causes or tends to cause (or risks causing) any obstruction, annoyance, injury to any person lawfully employed, this is punishable with a fine not exceeding RM500, an imprisonment for a term not exceeding 3 months, or both. If the disobedience instead causes or tends to cause danger to human life, health or safety, a riot or affray, it shall be punishable with a fine not exceeding RM1,000, an imprisonment for a term not exceeding 6 months, or both.

It should be noted that these definitions are broader than just failing to fulfil a court's order, which is the most common form of contempt appearing in the civil courts. It is unclear why the scope of this category of contempt is much broader than its counterpart before the civil courts, or why this category is so commonly specified for the *Syari'ah* courts, yet defined in such different terms and the same category being punishable to such a different extent, ranging from a fine of RM500 to RM3,000 and an imprisonment for a term not exceeding 3 months to 2 years. The civil courts have different sentencing limits for contempt, which are according to the level of court, not to the specific category of contempt, as appears to be the case for contempt of court before the *Syari'ah* courts.

The second category of contempt specified for the *Syari'ah* courts is contempt of law. This category is specified for the *Syari'ah* courts in the territories and states, except for the states of Pahang, Malacca, Perak and Perlis. This particular category is also variously defined and punishable under the *Syariah* criminal offences statutes ranging from RM1,000 to RM5,000 and an imprisonment for a maximum of 6 months to 3 years. For the *Syari'ah* courts in the Federal territories of Kuala Lumpur, Putrajaya and Labuan (S.7(c)), the states of Terengganu (S.8(c)), Penang (S.7(c)), Johor (S.7(c)) and Sarawak (S.7(c)), this category refers to any person who orally, in writing, by visible representation or in any other manner degrades or brings into contempt any binding law related to the religion of Islam and is punishable with a fine not exceeding RM3,000, an imprisonment for a term not exceeding 2 years, or both. Yet, in the states of Kelantan (S.28) and Kedah (S.28),

this category relates to any person who derides or despises any binding law and is punishable with a fine not exceeding RM1,000, an imprisonment for a term not exceeding 6 months, or both.

In the state of Selangor (S.10(c)), this category is where any person who, by words that are capable of being heard or read, by drawings, marks or other forms of representation that are visible or capable of being visible, or in any other manner degrades or brings into contempt any binding law related to the religion of Islam in this state. This category is punishable with a fine not exceeding RM5,000, an imprisonment for a term not exceeding 3 years, or both. In the state of Negeri Sembilan, this category involves any person who, by spoken or written words, signs, visible representations, by any act, activity or conduct or otherwise in any other manner (insults or puts into contempt) any fatwa legally issued by the Mufti under the Administration of the Islamic Law (Negeri Sembilan) Enactment 1991. Those penalized under this category is punishable with a fine not exceeding RM5,000, an imprisonment for a term not exceeding 3 years, or both. In the state of Sabah, this category is where any person who, by spoken or written words, visible representation or in any other manner insults or brings into contempt or ridicule any lawfully issued *fatwa* by the *Majlis* or the *Mufti* under the provisions of any law or this Enactment. This category is punishable with a fine not exceeding RM2,000, an imprisonment for a term not exceeding 1 year, or both.

This category is inconsistently defined and punishable between the *Syari'ah* courts in the territories and states, not typically recognised in statutes or cases involving the contempt of court in the civil courts, and inconsistently punishable with contempt of a court order before the *Syari'ah* courts. The third category of contempt specified before the *Syari'ah* court appears to be acting or taking proceedings on behalf of another without lawful authority. This category relates to any person doing any act or taking any proceedings in the name or on behalf of another person, knowing himself not to be lawfully authorised by that person to do so, shall be guilty of contempt of court. This

category is specified for the *Syari'ah* courts in all the territories and states, except for the states of Kedah and Sabah. This category appears to be quite consistently defined, but no maximum punishment is specified. It is unclear why this category is similarly common as contempt of a court order and contempt of law before the *Syari'ah* courts, yet unlike these categories, more consistently defined and without a maximum punishment specified for this category of contempt. This category is also not typical of the statutes and cases for civil courts.

The fourth category of contempt specified before the *Syari'ah* courts relates to the contempt of a court officer. However, the only state that seems to have a specific provision on this issue is the state of Sabah. This particular category is defined as any person who denies, goes against, opposes or derides the lawful authority of any officials of any court and is punishable with a fine not exceeding RM1,000, an imprisonment for a term not exceeding 6 months, or both. This category is not commonly specified for the *Syari'ah* courts, and limited to officials of any court, which is not clear if it extends to Official Assignees and Receiver/Manager as in the contempt cases before the civil courts, and although the State authorities recognise this particular category of contempt as being sufficiently significant to specifically provide for, but not deserving of a particularly harsh sentence limit. The categories of contempt specified for the *Syari'ah* courts do not appear to be consistently provided, defined or punishable between the *Syari'ah* courts of different territories and states, and in comparison to the contempt cases before the civil courts. It is also unclear why these categories have been specifically provided by statute when, as courts, *Syari'ah* courts would also arguably have the inherent discretion to

punish any form of contempt. These inconsistent patterns do not seem to have been explained in any judicial or academic forum. Perhaps, they indicate different priorities and a lack of cross-referencing between the state authorities drafting such legislation.

In a more general perspective, not limited to the *Syari'ah* courts in specific states or categories, the *Syariah* Judiciary Department issued Practice Direction No. 13 of 2004 regarding contempt of court outside of *Syariah* Courts. In this document, it is stated that contempt of court outside of the *Syari'ah* court includes a refusal to comply with any order issued by the *Syari'ah* Court or the issuance of a statement by any person or body or an association or an organization either orally or in writing that makes a mockery of the *Syari'ah* Court. Contempt proceedings outside the Court may be initiated by either a *Syari'ah* Prosecutor or any interested person. The court shall hear the application to register contempt of court under the provided law. If the Court is satisfied that the person who commits contempt of court should be imprisoned, an order of committal to imprison on the offender shall be imposed on him until he apologizes unconditionally to the Court and others who have interests. These provisions appear to give some categories 'included' in contempt of court, but still allow other categories to be recognised in other statutes and cases.

UNCERTAIN PRINCIPLES AND RULES OF PROCEDURE TO BE APPLIED IN CONTEMPT CASES

The categories of contempt that have appeared before the 6 reported *Syari'ah* cases are 4 cases on disobeying a court order (*Azman Abdul Talib lwn. Suhaila Ibrahim*¹, *Roslaili bt Abdul Ghani v. Ahmad Azman b Yaacob*², *Zainip bte Ahmad*

¹ In this case, the plaintiff applied to commit the respondent to prison for contempt of court for disobeying an interim custody order requiring the respondent to hand over their child to the plaintiff. This court order was granted by the *Syariah* High Court. The court found the respondent not guilty of contempt of court as the plaintiff failed to comply with a number of procedural rules.

² In this case, the plaintiff contended that a husband failed to comply with a court order to hand over their children to the wife. The court accepted the defendant's defence that the court order was unclear and rejected the plaintiff's committal notice.

*v. Abdul Aziz bin Hussain*³ and *Hasnan Yusof lwn. Yasmin Mohd Jacob*⁴, 1 case on providing false testimony in court (*Ahmad Shapiai lwn. Hani Itam Ali Husin & Yang Lain*⁵ and 1 case on abusing the legal process (*Hasnah bte Mohd Ali v. Bukhari bin Kahar*⁶). These cases are consistent with contempt before the civil courts in terms of most of the contempt cases (the first 4 cases) being committed by disobeying a court order and the second most common category being contempt in the face of the court (the latter 2 cases). To use the terms in the statutes for *Syari'ah* courts, these categories would be contempt of a court order and contempt of law. The court only imposed a sentence for contempt in 1 of these cases, and that was imprisonment for 4 months. The cases of contempt before the *Syari'ah* and civil courts appear to involve similar categories, though the categories provided for these parallel courts do not seem to share this similar approach.

Kamaluddin Maamor A.J. of the *Syari'ah* Appeal Court at Perak in *Ahmad Shapiai lwn. Hani Itam Ali Husin & Yang Lain* held that the charge should be read and explained to the contemnor until he gives his verbal plea of guilty or not guilty. The court concluded that the appellant was not given an opportunity to defend himself before being convicted by the lower court which was an injustice. As such, the court unanimously agreed to allow this appeal, overturn the conviction of contempt of court and set aside the lower courts' decisions. The court relied on 3 cases of civil courts as authority for the principle above that the charge should be read

and explained before a verbal plea is given. The court noted that these cases were not binding, but still relied on these authorities. As such, the *Syari'ah* courts, even the *Syari'ah* Appeal Court, have been willing to refer to cases from the civil courts to clarify the law. There is a similar problem of having uncertain rules of procedure for contempt cases before the *Syari'ah* courts.

The only rules of procedure provided for contempt proceedings before the *Syari'ah* courts are on the issue of the service of a notice to show cause in contempt proceedings before all the *Syari'ah* courts, except in the state of Kedah. Nonetheless, there are no further rules of a procedure specific to contempt proceedings provided in the statutes. It is unclear why the procedure provided is so woefully incomplete. The incomplete procedure has been noted by the judges in the *Syari'ah* courts. Abdul Rahman Yunus J. of the *Syari'ah* High Court in Pahang in *Azman Abdul Talib lwn. Suhaila Ibrahim* noted that the rules of procedure for contempt proceedings before the *Syari'ah* courts were not provided by statute. As such, the court elected to use the relevant rules of procedure in the Rules of the High Court 1980. The court found the respondent not guilty of contempt of court for a number of points, including that the plaintiff did not attach a fair copy of the court order. Rules of the procedure, thus, have been significant in the case, even though, as noted by the court, not fully provided by statute.

Hj Saarani Ismail J. of the Shariah High Court in Shah Alam in *Roslaili bt Abdul Ghani v. Ahmad Azman b Yaacob* found that since a

³ In this case, the applicant contended that the respondent was in breach of court orders to make child support payments. The court held the respondent guilty of contempt of court and imposed imprisonment for 4 months.

⁴ In this case, the plaintiff alleged that the respondent committed contempt of court by failing to obey the terms of a court order. The respondent succeeded in showing the cause why he was not in contempt of court as he did not breach the court order.

⁵ In this case, the appellant was found guilty of contempt of court for deceiving the court and giving false evidence in his divorce proceedings. The *Syariah* Appeal Court in Perak allowed the appeal and overturned the conviction and sentence due to procedural errors done in the lower court.

⁶ This case involved divorce proceedings. The husband had told the court that he would submit written responses to the issues in the proceedings. The court, therefore, postponed the case for for 4 months to allow him time to submit his written response. He did not submit this response and did not appear on the date of the next hearing. The court found this to constitute contempt of court for failing to fulfil his promises to the court. The court then granted the wife's application for divorce.

proper procedure for a notice to show cause was not clear from the relevant statute, the court could adopt the procedures in Order 34, rule 1 of the Subordinate Courts Rules 1980. The court proceeded to accept the defendant's defence that the court order was unclear and rejected the plaintiff's committal notice. In this case again, the court noted the procedural rules to be incomplete, adopted the relevant rules for non-*Syari'ah* courts and found failing to adhere to these procedural rules to be significant. In this case, this failure resulted in the court dismissing the committal proceedings. Zulfikri Yaso J. of the *Syari'ah* High Court in Kuala Lumpur in *Hasnan Yusof lwn. Yasmin Mohd Yacob* noted that the relevant statute did not contain rules of procedure for notice to show cause and referred to the guidelines explained by the court in *Roslaili bt Abdul Ghani v. Ahmad Azman b Yaacob*. The court noted that it is not bound by the case from Selangor, but it is appropriate to refer to these guidelines. This case illustrates that the *Syari'ah* courts seem to be willing to refer to cases before the civil courts and the *Syari'ah* courts in other states, even though both these cases are not binding to clarify uncertainty in the applicable statutes.

Applying the principles from the civil contempt cases requires the *Syari'ah* judges to be well-versed with the contempt cases before the civil courts or at least be able to easily identify such cases. *Syari'ah* judges may be less involved with the lawyers, judges and cases before the civil courts and as such, may not be aware of the relevant cases before these courts. With many different key words being used in the law reports for contempt cases in the civil and *Syari'ah* cases, identifying relevant civil case law could also be difficult. The *Syari'ah* judges have found the incomplete rules of procedure for contempt cases before these courts to be a problem. Since these rules of procedure have been significant in contempt cases before the *Syari'ah* courts, rather than referring to such rules for civil cases, it may better protect the rights of the parties to have more complete rules of the procedure for contempt cases before the *Syari'ah* courts, especially since these courts

have been entrusted by the statute to use their contempt powers, which they have so used.

INCONSISTENT SENTENCING LIMITS FOR CONTEMPT CASES

Statutes applicable to the *Syari'ah* courts have provided different sentencing limits for different categories of contempt. These statutes also have further sentencing limits for contempt of court cases in general (where no specific category is specified for these limits). Interestingly, these sentencing limits differ, not just by territory or state, but also by which statute has been breached. The *Syari'ah* civil procedure statutes for the *Syari'ah* courts in all the territories and states, except for Kedah and Sabah, specify a sentencing limit for contempt of court before the *Syari'ah* courts. The limit specified is consistent that the *Syari'ah* courts can impose imprisonment for a term not exceeding 6 months or a fine not exceeding RM2,000 for contempt of court.

Meanwhile, the *Syari'ah* criminal procedure statutes for *Syari'ah* courts are more consistent in that a limit is specified for the *Syari'ah* courts in all the territories and states. However, the limits specified are not consistent. These limits are a fine not exceeding RM100 for Kedah, a fine not exceeding RM1,000 for the Federal territories of Kuala Lumpur, Putrajaya and Labuan and the states of Kelantan, Pahang, Terengganu, Malacca, Penang, Perak, Negeri Sembilan, Perlis, Sabah and Sarawak, and a fine not exceeding RM2,000 or imprisonment for a term not exceeding 1 year or both for the states of Selangor and Johor. These differing sentencing limits can be very confusing to apply with the sentencing limits differing by category, definition of category, territory or state and statute. The rationale for this convoluted pattern is not evident from these statutes or reported cases. This pattern is not consistent with the statutory provisions of sentencing limits for the contempt of court before the civil courts, where greater statutory limits are provided for the courts of superior jurisdiction. It is unclear why the sentencing limits for contempt cases before the

Syari'ah courts are given in a different approach than such cases before the civil courts and why the sentencing limits for such cases before the *Syari'ah* courts differ so much according to so many criteria. The *Syari'ah* courts of different levels in a territory or state are given the same sentencing limits. Is the contempt of court considered to be more serious according to the form and category of contempt, statute being breached and geographical boundary of where the offence was committed? This seems to be difficult to rationalise or justify.

CONCLUSION

The law for the *Syari'ah* courts is expressly provided by statute for all the courts, and the same power is given to the courts at all levels in a territory or a state and the categories of contempt are defined differently for many territories or states. The principles and rules of the procedure applicable to contempt proceedings have been held to be significant in contempt cases before the *Syari'ah* courts. The *Syari'ah* courts have resorted to relying on the *Syari'ah* cases from other states and civil cases on contempt law. The courts are often bound by very few other courts (limited to the courts of higher jurisdiction in that territory or state alone). The *Syari'ah* courts have adopted points from the *Syari'ah* cases from other states and civil cases. Relying on the *Syari'ah* cases from other states may be difficult since very few cases have been reported, and even those appear under different key words in the law reports. The *Syari'ah* courts have also relied on the contempt cases before the civil courts. There do not seem to be any non-*Syari'ah* court deciding a contempt case that has relied on a *Syari'ah* case on contempt so far. Thus, the *Syari'ah* courts seem to be more reliant on the civil courts' explanations of contempt law, rather than vice versa. In which case, the uncertainties and inconsistencies in the contempt law before civil courts are more likely to extend to the *Syari'ah* courts, rather than the other way around.

The sentencing limits for contempt cases seem to be a hotchpot of different rules,

depending on the how a category of contempt is defined, the territory or state involved, and the statute applicable to the case. All levels of the *Syari'ah* courts in a territory or a state is entrusted with the same applicable sentencing limit. It is clear that all levels of the *Syari'ah* courts, in all the territories and states, are given the power to punish for contempt of court and that some of these courts are using this power. As such, it is submitted that it is critical that this law to be made clear and consistent for cases of similar facts. Suggesting that greater clarity and consistency is desirable is in line with the current reforms being suggested for the *Syari'ah* law, i.e. to make these laws more consistent between the territories or states, and with those of the civil laws.

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The Meaning of a Valid Consent to Medical Treatment in Malaysia: Tan Ah Kau V Government of Malaysia Revisited

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ABSTRACT

A doctor can treat his patient only when a consent is deemed legally valid under the eyes of the law. A valid consent justifies any medical treatment or procedure that a patient requires. Since most treatment will usually involve some kind of physical contact between a doctor and his patient, any medical treatment given without first obtaining a valid consent can tantamount to a battery under the law of torts in Malaysia. However, medical cases relating to the issue of consent have always been decided by the courts in this country under the spectrum of the law of medical negligence as opposed to the law of trespass, specifically, battery. Consequently, there exists a need to determine what is actually meant by a valid consent in law. This determination is crucial as it will enable the aggrieved party to choose the most appropriate cause of action to be taken when the validity of consent given is being challenged.

Keywords: Consent, battery, negligence, medical treatment

INTRODUCTION

It is the aim of this article to determine what is accepted by the law in Malaysia as being a valid consent to medical treatment. Is a consent considered to be valid once the patient had signed the consent form, or is a consent can be said to be valid only if the patient has been informed of the nature and purpose of the medical procedure that is going to be performed on him? The determination of what constitutes a valid consent is relevant as it will in turn determine the most appropriate cause of action that can be taken by the patient against his/her doctor should there be a dispute regarding the giving of consent by the affected patient. In this article, the discussion will be made by referring to the meaning of a valid consent according to common law principles.

Regarding the issue of what is meant by a valid consent in Malaysia, the discussion will be based largely on the case of *Tan Ah Kau v The Government of Malaysia* ((1997) 2 AMR 1382). Tan Ah Kau is the most relevant case in respect of this issue on validity, as in this case, the High Court had decided that the consent given by the patient/plaintiff was not a valid consent. One would have thought that since no valid consent was given, the case should have been decided under the sphere of trespass law. However, the plaintiff in Tan Ah Kau had brought his case as a medical negligence case, and henceforth, despite declaring that the consent was not valid, the court proceeded to decide the case under the law of negligence. Unfortunately, no discussion or analysis was made by Justice Low Hop Bing on the legal consequences of treatment given

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by a doctor when the consent of his patient was found to be invalid especially in reference to the law of battery.

A REAL CONSENT IS A VALID CONSENT: THE COMMON LAW POSITION

With regard to the English case of *Chatterton v Gerson* ((1981) 1 QB 432), Justice Bristow held that a real consent is a valid consent in law. Thus, the question must be - what is meant by a real consent? According to him, a real consent is a consent given by the patient after the doctor has explained to him/her in broad terms the nature of the procedure that is going to be performed on him/her. Therefore, in order to be valid, the consent must be real. Failure on the part of the doctor to explain in broad terms the nature of the procedure will vitiate any consent given by the patient. This will consequently cause any treatment involving any form of physical contact perceived as battery. However, the judge in the above-mentioned case then went on to say that failure to disclose inherent risks present in the medical procedure will not vitiate the consent. The consent is still valid in law but the doctor had committed a breach in his duty to give advice. This breach of duty is to be dealt with under the law of medical negligence and not trespass, specifically battery. The principle enunciated in *Chatterton v Gerson* ((1981) 1 QB 432) was subsequently approved and applied in *Hills v Potter* ((1983) 3 All ER 716), whereby in this case, it was decided that since the patient had given his consent to the surgery performed on him, the consent would negate the doctor's liability under battery. Rather, failure to disclose information such as inherent risks present in the procedure falls under the sphere of a doctor's duty to give advice in the law of negligence and it will not vitiate any consent given. Justice Hirst in *Hills v Potter* ((1983) 3 All ER 716) held:

As to the claim for assault and battery, the plaintiff's undoubted consent to the operation which was performed (to cure the neck deformity) negatives any

possibility of liability under this head ... the proper cause of action, if any, is negligence.

The principle in *Chatterton* was also affirmed by the Court of Appeal and the House of Lords in the landmark case of *Sidaway v Board of Governors of Bethlem Royal Hospital* ((1984) 1 All ER 1018 (Court of Appeal) and (1985) AC 871 (House of Lords)). At the Court of Appeal, Lord Donaldson held that:

I am wholly satisfied that as a matter of English Law, a consent is not vitiated by a failure on the part of the doctor to give sufficient information before the consent is given.

What is accepted as a valid consent under the English common law was aptly summarised by Lord Donaldson in *Freeman v Home Office* (No.2) ((1984) 1 All ER 1036). According to His Lordship:

If there was real consent to the treatment, it matters not that the doctor was in breach of his duty to give the patient the appropriate information before the consent was given. Real consent provides a complete defence to acclaim in the tort of trespass to the person ... subject to the patient having been informed in broad terms of the nature of the treatment, consent in fact amounts to consent in law.

Therefore, what is actually meant by the phrase 'nature of the procedure'? Kennedy and Grubb (1998) opined that the phrase is:

...a relatively narrow notion encompassing by description the character of the act(s) to be done by the doctor, and qualitatively, the intended effect(s) of the procedure and its purpose.

From the opinion given above, it can be concluded that the phrase 'nature of the procedure' includes the patient's understanding of the purpose or effect desired from the proposed procedure. Therefore, even though the court in *Chatterton v Gerson* ((1981) 1 QB 432) had employed the word 'nature', at present, it is the norm for the courts in England to use the phrase 'nature and purpose of procedure'.

In order to succeed in his claim against his doctor in a case based on battery, the patient must prove that there was in fact no valid consent in the first place. However, in circumstances where he had been informed in broad terms the nature of the procedure, he would have no redress under the law of battery. Justice Bristow was of the view that it is against the principle of justice to allow a patient who was already informed of the nature of the medical treatment and procedure to take an action for battery against his doctor ((1981) 1 QB 432).

It is thus clear that under the English common law, the courts in England have divided the types of information that a doctor needs to disclose to his patient for the purpose of determining whether the consent given is a real consent or otherwise. A consent is real and therefore valid only if the patient is given the information regarding the nature and purpose of the proposed medical procedure. Failure to give those information will vitiate the consent and consequently render the doctor liable for battery. On the other hand, failure to perform his duty under the law to disclose the information regarding the inherent risks present in the proposed procedure will only render him liable for negligence but the consent remains legally valid.

**TAN AH KAU V THE GOVERNMENT OF
MALAYSIA ((1997) 2 AMR 1382):
AN ANALYSIS**

In this case, Tan Ah Kau as the plaintiff sought to claim damages for the alleged negligence of the defendant as the servant and/or agent of the defendant. The plaintiff's claim for damages was founded on the defendant's negligence and/

or breach professional duties in carrying out a surgical operation on him. The surgical operation performed by the defendant had resulted in the plaintiff being paralysed completely from the waist down. In his testimony, the plaintiff claimed that he signed two blank forms, and at the same time, no explanation was given to him by the doctor relating to the reason for the operation before it was carried out ((1997) 2 AMR 1382). The doctor did not explain that the surgery would cause the blockage of blood flow. In fact, the plaintiff did not know that it was cancer before the operation ((1997) 2 AMR 1382). Therefore, the question for the court to decide was whether at the time the plaintiff signed the consent forms, he understood the nature and consequences of the consent, and also whether the plaintiff knew the subject matter which was central to his consent in light of the evidence that most patients opt out when the complications (especially the risk of paralysis) are explained to the patient. The plaintiff was not fully informed, therefore, he was not given the opportunity to decide whether to opt for or opt out of the operation ((1997) 2 AMR 1382).

During the trial, it was also revealed that during the operation, the surgeon discovered that the tumour was intramedullary and a biopsy was done. However, the consent was taken on the basis that the tumour was extramedullary. The court was of the opinion that in relation to the intramedullary tumour, to constitute a valid consent (that is valid in light of the surgical discovery), a consent to cover this would be necessary and advisable ((1997) 2 AMR 1382). Therefore, a fresh consent ought to have been obtained based on the finding that the tumour was intramedullary. The doctor who performed the operation also admitted during trial that he had not explained to the plaintiff that during the operation itself, there would be an incision or cutting through the tumour resulting in bleeding and swelling of the spinal cord and that itself would cause the plaintiff immediate paralysis. He further admitted that explaining the information would cause the plaintiff to reject the operation. To the above testimony by

the doctor, Justice Low Hop Bing held that no valid and proper consent was obtained from the plaintiff ((1997) 2 AMR 1382).

Consequently, the High Court held that the whole question of obtaining the consent of the plaintiff in relation to the surgical operation remained cloudy and had not been satisfactorily established by the defendant. Therefore, no consent was obtained from the plaintiff at all, or even if the consent had been obtained, the content of such consent had not been fully and comprehensively explained to the plaintiff in order to enable him to understand the nature and consequences of the consent in relation to the operation and the diagnosis ((1997) 2 AMR 1382). Furthermore, the plaintiff was not given the opportunity to decide whether to opt for or to forego the operation. Therefore, in this case, the defendant was held liable for medical negligence.

As stated above, Tan Ah Kau was a negligence case. The approach taken by the court and the absence of any reference to the law of battery clearly showed that the court accepted that the correct law to be applied is the law of negligence. However, it is submitted that this approach clearly went against the principle that a valid consent must be a real consent as enunciated in *Chatterton v Gerson* ((1981) 1 QB 432). By holding that, "*no consent was obtained from the plaintiff at all, or even if the consent had been obtained, the content of such consent had not been fully and comprehensively explained to the plaintiff in order to enable him to understand the nature and consequences of the consent in relation to the operation and the diagnosis*" ((1997) 2 AMR 1382), the court must be taken to mean that there was no consent at all or that the consent given by the plaintiff was vitiated by the doctor's failure to explain to him the nature and purpose of the operation. The plaintiff's consent was, therefore, not a real consent as envisaged by Justice Bristow in *Chatterton* ((1981) 1 QB 432). His Lordship had also in fact specifically stated that the consent was not a valid and proper consent ((1997) 2 AMR 1382). Again, this statement clearly went against the principle of a valid consent under the common

law. Thus, the question remains whether despite the wordings of judgment mentioned above, the consent was in fact still valid for the purpose of sanctioning and justifying the physical touch to the plaintiff's body.

It is submitted that if the court had applied the common law approach in a case such as this, the court should identify whether there is a valid consent or otherwise in order to do so, the court must determine first of all, what is meant by 'the nature of the procedure' and whether it had been explained to the patient. If the learned judge had applied this approach at the first instance and concluded that the nature of the procedure was not explained to the plaintiff as required by the common law, then he could have justified his finding that no valid and proper consent was obtained from the plaintiff.

Nevertheless, in this respect, one might perhaps be tempted to argue in defence of the Lordship that what he really meant by the above-mentioned finding was, the facts that were not disclosed to the plaintiff were the facts relating to the risks present in the operation (i.e the risk of paralysis) and not the nature of the operation itself. The validity of the consent remained unaffected. Hence, in such circumstance, negligence was the correct cause of action in accordance with the principle in *Chatterton* ((1981) 1 QB 432).

In response to such an argument, it is however submitted that, where the risk is so serious and significant that it could affect the decision of the plaintiff as to opt for or opt out of the operation, the risk must be explained and failure to do so would vitiate the consent given by the plaintiff. Hence, any operation done thereof would constitute a battery against the body of the plaintiff.

In support of the above submission, reference can be made to the points put forward by Jones in his book titled *Medical Negligence* (Jones, 2001). He stated that, there are views that disagree with the division on the types of information to be disclosed to a patient (Jones, 2001). According to him, it has been forcefully argued that the distinction created by the courts is untenable as it assumes an inherent difference

in terminology and substance between the nature of the treatment and the risks inherent in the treatment. Some risks may be so significant that they relate to the nature of the operation itself, so non-disclosure of the risks would vitiate the consent and lead to liability in battery (Tan Keng Feng, 1987). Therefore, it is his contention that there are risks which are so significant that they are closely related to the nature of the treatment and thus making failure to disclose those necessary information fatal to the consent given by the patient. This will, of course, expose the doctor to an action for battery (Jones, 2003). However, Jones admitted that it is not really clear on what is meant by the phrase 'nature of a medical treatment,' and this will eventually depend on how a person chooses to characterise the nature of a particular activity.

In contrast to the Tan Ah Kau's case, in *Dr. Ismail Abdullah v Poh Hui Lin* (administrator for the estate of Tan Ah Moi @ Ong Ah Maury, deceased) ((2009) 2 MLJ 599), the doctor did inform the deceased and her family members that he would attempt to remove the stones in the gall bladder by the endoscopy method, failing which he would undertake an operation called cholecystectomy. Apparently, the deceased consented to it. However, the defendant was sued for medical negligence for *inter alia*, which was failing to advise the deceased of the risks of acute pancreatitis and acute respiratory syndrome. During the trial, the deceased's understanding as to the nature and purpose of the procedure was never questioned. Instead, the focus was on the issue of what types of risks which are required to be disclosed to a patient. The High Court held that only material risks of injury arising from a treatment or surgery will need to be disclosed. The court stated that, the decision of the Federal Court in *Foo Fio Na v Dr. Soo Fook Mun & Anor* ((2007) 1 CLJ 229) represents the law in this aspect.

In *Foo Fio Na* ((2007) 1 CLJ 229), the Federal Court had cited with approval the principle propounded by the Australian High Court in *Rogers v Whitaker* ((1992) 109 ALR 625). In *Rogers*' case, it was held that in relation to the duty to disclose risks, a doctor has the duty

to warn a patient of a material risk inherent in the proposed treatment. A risk is material if in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would likely to attach significance to it, or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk would likely to attach significance to it. The Federal Court then decided that the test in *Rogers v Whitaker* ((1992) 109 ALR 625) would be a more appropriate and viable test of this millennium.

However, one must bear in mind that the decision of the Federal Court had nothing to do with the issue of the validity of the plaintiff's consent, as that issue was never raised by the counsels. The consent was accepted to be valid by all quarters. Instead, the question posed to the Federal Court was whether the Bolam's test in the area of medical negligence should apply in relation to all aspects of medical negligence, that is, the doctor's duty in giving diagnosis, treatment and advice (disclosure of information). Consequently, the decision of the Federal Court is important in so far as the issue of the applicability of the Bolam's test (*Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582) in medical negligence cases.

Referring back to Dr. Ismail's case, since the validity of the deceased patient's consent was not questioned by the court, it is not relevant to discuss the issue of the validity of the deceased patient's consent from the perspective of the common law principle as envisaged in *Chatterton v Gerson* ((1981) 2 QB 432).

The wisdom of creating a distinction between the types of information disclosed to a patient was also questioned by Somerville. She suggested that some risks could be so serious and probable that they should be regarded as part of the basic nature and quality of the act of the act (Somerville, 1987). For example, if an operation has a 90 percent risk of death (but despite this, the patient wants to proceed with it to avoid a certain death at a later time without the operation), the nature and degree of risk could be regarded as part of the basic nature and quality of the act of surgery (Somerville, 1987).

The opinion and suggestion by both Jones and Somerville could be based on the fact that a risk which is so significant that it relates to the nature of the proposed treatment will undoubtedly influence the patient in deciding whether to agree to the proposed treatment or otherwise. Subsequently, in such circumstances, the consent by a patient without first being given the necessary information is not a real consent. Thus, the doctor can therefore be sued for battery. Expanding the scope relating to the meaning of a real consent will eventually give more room for the law of battery to function in the consent to medical treatment cases. The case of *Kelly v Hazlett* ((1976) 75 DLR (3d) 536) is a case in point, where it was held that in some cases it may be difficult to distinguish and separate the matter of consequential or collateral risks from the basic nature and character of the operation or procedure to be performed. The more probable the risk, the more it could be said to be an integral feature of the nature and character of the operation.

It is humbly submitted that it cannot be denied that there are cases where the risks involved are so serious that they should be treated as being part of the nature of the medical procedure proposed. The case of *Tan Ah Kau v The Government of Malaysia* is a perfect example. If the issue of whether a risk is so significant that it is related to the nature of the procedure, and that it must be disclosed to the patient is brought up in court, it is incumbent for the court to hear expert evidence before deciding whether the consent given by the patient is a real valid consent or otherwise according to the principle established in *Chatterton v Gerson* ((1981) 1 QB 432).

In 1999, the trial judge in the case of *Foo Fio Na v Dr. Soo Fook Mun* ((1999) 6 MLJ 738) had the opportunity to delve further on the issue of the validity of a patient's consent. The learned judge had observed that regarding the first operation performed on the plaintiff who had rendered her paralysed from the neck down, the procedure (operation) and the reason for it was not told to the plaintiff. He went on to hold that the failure to do so and the misrepresentation

by the second defendant that it was a minor operation clearly shows that the plaintiff would not consent to such an operation, and the consent, if any, was not obtained properly. In response to that statement, the questions should be - Was there a valid consent in the first place? If there was a consent but it was not obtained properly, what were the legal consequences? Can it still be accepted as a valid consent in law? Unfortunately, no further discussion was made by the learned judge on what he meant by "the consent, if any, was not obtained properly". Thus, the possibility of the case being tried under the law of trespass remained undetected by all parties involved. Moreover, as is the norm in Malaysia in consent to treatment cases, the case was decided under the law of negligence as the focus was on the duty of the defendant doctor to disclose information and/risk to the plaintiff.

Although drawing distinctions between the defective consent which gives rise to a cause of action in battery and defective consent which gives rise to a suit in negligence may appear to be only or largely a theoretical exercise, it actually has very real significant ramifications to medical practice (Somerville, 1987). This is because, there can exist situations where it would not be possible for the patient/plaintiff to establish negligence on the part of the doctor because a reasonable standard of care has not been breached. On the other hand, it would be possible for him to establish battery, as battery does not depend on the breach of a reasonable standard of care. The consent of a patient has the effect of transforming what would otherwise be unlawful into accepted and therefore acceptable contact, and battery consists of unconsented touching to the patient (Cockburn & Madden, 2006). Henceforth, there can be battery regardless of whether the touching is done with reasonable care or not. To put it simply, if battery is not available, a patient/plaintiff may be without a cause of action in cases where the treatment is performed in the absence of a valid consent as the doctor has not committed a breach of the duty of care (Somerville, 1987). This view is shared by Grubb who agreed that a doctor can be sued for battery if he does not disclose information

relating to the nature of the procedure (Grubb, 1985). As Teff put it, to hold that a patient has given his valid consent to a medical procedure where he is not aware of what is really involved, is at best over-literal and artificial. The consent given by a patient in such circumstances should not be regarded as an obstacle that will prevent him from taking an action against his doctor for battery (Teff, 1994).

One good example of an incident that could have been brought under the law of battery is an incident in Penang, where one doctor was suspended from the Malaysia Medical Register for a period of one year for disregarding and/or neglecting his professional responsibilities. Despite being informed of his patient's election for an open procedure, he went against the wish and performed a Laparoscopically Assisted Vaginal Hysterectomy instead. He did not explain the risks to the patient nor did he seek her consent for the said procedure (Press Release, Disciplinary Punishment By The Malaysian Medical Council Against Errant Registered Practitioners in The Year 2008). Even though the case was not brought to court, it is humbly submitted that should the patient have decided to sue her doctor, such a case would have fallen under the sphere of the law of battery. This is because, an action for battery is the most appropriate form of action compared to negligence in cases where a different treatment is given to that which has been consented to (Cockburn & Madden, 2006).

CONCLUSION

In conclusion, it is submitted that the meaning of a valid consent in Malaysia is still uncertain. The law of torts in this country is formed by applying legal principles developed from cases decided by the courts in England. However, from the case of Tan Ah Kau ((1997) 2 AMR 1382), it is not clear whether the courts in Malaysia really adhere to the common law principle relating to the meaning of a valid consent as accepted in England. This position will remain cloudy as long as there is no case brought to the Malaysian High Courts pertaining to this issue.

Be that as it may, it is submitted that in consent to treatment cases, one should not overlook the role that can be played by the law of battery. This is because, it cannot be denied that there are cases where there is in fact no valid consent given by the patient. Failure to explain or disclose to a patient the risks that are so significant and serious that they affect the nature of a particular procedure should be held capable of vitiating the validity of the patient's consent and thereby give rise to an action for battery. Legal clarity pertaining to this issue will enable parties intending to commence legal proceeding against their doctors to choose the best cause of action to take, whether negligence or battery, according to the facts of each particular case. As stated above, the development of the law of torts depends on cases decided by the civil courts in Malaysia. Therefore, it is the duty of the judges to use their wisdom in interpreting legal principles to ensure legal clarity and certainty for the purpose of justice.

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Legal Approaches to Unfair Consumer Terms in Malaysia, Indonesia and Thailand

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ABSTRACT

In a global economy, the advancement in new technologies and the liberalisation of trade present challenges to the consumer protection regime of every jurisdiction. The survival of any regime of consumer protection law now depends on how it caters for ways and means to correct the inequalities in the global market. Achieving a fair balance between the needs of market providers and the consumers is indeed a major challenge to law makers. In the course of remedying market failure, one of the most important developments in the area of consumer protection is the evolution of exclusion clauses. The increasing use of standard form contracts and the use of such clauses have now become a predominant feature of many consumer contracts. The growth of welfarism within the law of contract and consumer law has encouraged the courts and legislature to intervene to limit the autonomy of contracting parties, where significant inequalities of bargaining power are reflected in contractual terms. By applying the content analysis research method, this article aims at exploring the judicial and legislative intervention on unfair terms in Malaysia and comparing the legislative provisions on unfair terms in the Malaysian Consumer Protection Act 1999 with the Indonesian and the Thai legal frameworks.

Keywords: Unfair terms, judicial-legislative intervention, Malaysia, Indonesia, Thailand

INTRODUCTION

The 19th century witnessed the system of *laissez-faire*, the non-interference policy of the government, and the principle of *caveat emptor*, let the buyer beware, which were the birthmarks of capitalism that reigned proudly in Europe. The common law being the handmaiden of “laissez-faire constitutionalism” has become indistinguishable from the extreme free-market ideologies. Noga Morag-Levine (2007) opines that its putative opposite was nothing more than the sensible governmental involvement in society and the economy in pursuit of remedies to the inefficiencies and inequities of the market

place. In contrast with the civil law, it gave judges and juries the final say on the necessity of regulatory interventions to protect public health and safety, empowering them to oversee actions by both administrators and legislators.

Market ideology during the 19th century was indeed ignorant of consumer welfare. The idea of equal bargaining power was created then by marketers to justify the existence of freedom of contract, the cardinal rule of contract law (Azimon & Sakina, 2009). It cannot be denied that the current modernisation trend in human thinking has produced diversity in creativity and creation of latest technologies in the market that meet and satisfy consumer

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demands. Modern technologies are increasing in consumer trading environment and have sparked a new phenomenon in the future of any consumer protection regime when traders are taking this opportunity to create standard form contracts which can be found in every corner of consumer transaction. Online sales transactions of goods have proven that technological sophistication has been absorbed into consumer daily environment which directly adopts such contracts as the practice of traders in these virtual transactions. Nowadays, sellers or suppliers have created an absolute free market for the smooth flow of their products, and at the same time, ways and means to discharge their liabilities and increase their rights at their own whim, often at the disadvantage of the consumers. Their most potent tool to discharge their liability is thus through the utilisation of manipulative method of drafting contract in what is now known as the 'unfair terms'. These unfair terms, which are part of the *laissez-faire* legacy, have further eroded the protection of consumers in many commercial transactions and thus call for the paternalistic role of the government.

The subject of 'Unfair Terms in Contract' has attained grave importance in recent times, not only in relation to consumer contracts but also in regard to other contracts. The subject has assumed great importance currently in the context of tremendous expansion in trade and business, as well as consumer rights. In the last two decades, several countries had gone in for new laws on the subject in order to protect consumers and even smaller businessmen from bigger commercial entities. Furthermore, several law commissions across the world have taken up the subject for study and recommended new legislation. The British and Scottish Law Commission has prepared its latest report in 2004 on 'Unfair Terms in Contracts' (Law Com No. 292, Scot Law Com No. 199) with a new draft bill annexed to the report after reviewing its earlier laws. In addition, the South African Law Commission, in its report in 1998 on 'Unreasonable Stipulations in Contracts and the Rectification of Contracts' has reviewed the comparative law in several countries and has

come forward with a draft bill. The Discussion Paper of 2004 from Victoria (Australia) proposed by the Standing Committee of Officials of Consumer Affairs, the Interim Report of 2005 from Canada (British Columbia) prepared by the British Columbia Law Institute and the Reports of the New Zealand Law Commission and Ontario Law Commission have added new dimensions to the subject (Law Commission of India, 199th Report, 2006). In the south-eastern Asian region, the development in this area of law in certain jurisdictions is also commendable. The enactment of laws in Malaysia, Indonesia and Thailand to curb the harshness of unfair terms evinces the commitment of the respective governments in ensuring ethical and healthy market environment and competition.

With the above introduction, it is the aim of this article to look into the above highlighted issues, namely, the issues of unfair contract terms in consumer contracts. A study on the Malaysian position with regard to unfair terms in particular exclusion clauses shall be made with reference to case laws and statutes alike. Upon ascertaining the Malaysian judicial and legislative intervention, a comparative study with the Indonesian and Thai legislative approach shall then be made.

THE RISE OF PATERNALISM IN CONSUMER CONTRACT

To understand the development which has taken place in the area of unfair terms, we must be mindful of the policies in play; these are, on one hand, the traditional concern for freedom of contract, the cardinal rule of contract law, and on the other hand, the concern to curb unfairness resulting from significant inequality of bargaining power, and in this context, known as the principles of consumer protection. Classical contract legislation, which was fully controlled by the economic theories in the 19th century, has placed contracting parties as an economic unit which should possess equal negotiation strength together with freedom to make any decision. 'Market individualism' was the ideology then. This ideology was partly based on the main

theme dominating contract law throughout this century, namely, the principle of freedom to contract, the cardinal rule of contract law (Atiyah, 1979). To guarantee integrity in free and individual market economies, this principle clearly suggests that the court holds the parties to the terms of the contract independently negotiated. The idea behind the supremacy of this principle is rooted by the economic and market factors. An individual is given full freedom to decide and choose the terms of the contract he/she wishes to enter. This eases the supplier of goods to know thus provide supplies in any form, either products or services, which are required and demanded by the buyer. In a long-term market, this practice gives room to the consumers to obtain goods based on their agreed prices.

In the late 19th century, the doctrine of freedom of contract and the principles of *laissez-faire* had a great influence on judges. This was manifested by the courts' persistent refusal to intervene in contracts on the basis of fairness (Bradgate, 2000). According to Lord Diplock in a landmark case, *Shroeder Music Publishing Co. Ltd. v Macaulay* [1974] 1 WLR 1308, this non-interventionist approach adopted by the courts was justified on the basis that it "facilitates the conduct of trade by promoting certainty." *Laissez-faire* and freedom of contract can truly be said to symbolise the ideology of market individualism. Richard A. Epstein (1996) stated:

Laissez-faire capitalism, and its associated doctrine of freedom of contract, had many stalwart defenders during the nineteenth century. But it has received a rocky reception from many legal and philosophical commentators in the twentieth century. Freedom of contract has often been pronounced "dead on arrival" as an organizing principle for complex contemporary societies. That principle has been said to be insensitive to differences in wealth, status, position and power that make the exercise of contractual choice a myth for the weak and dispossessed.

Beginning mid 19th century, there was a belief that equality was no longer an ideal concept in the trading world. As trading became more and more complex, it transformed the contract environment, thus changed the issue on the reality of an agreement between two parties with unequal bargaining strength (Mulcahy & Tillotson, 2004). With the rise of consumerism, the 20th century had seen paternalistic approach in consumer protection. When the era of consumer welfarism takes place, legal intervention is seen as a requirement in addressing the negative effects of unfair terms in the standard form consumer contracts. Both the judiciary and the legislature have adopted new attitude and measures in promoting consumer welfarism. Consumerism, thus, has an interventionist character, which is a far cry from the doctrine of contract freedom.

Nevertheless, according to Gregory M. Duhl (2009), the malignant spread of unfair terms in consumer contracts is partly due to the attitude of the lawyers in drafting contractual documents. Commenting on the case of *United Rentals, Inc. v. RAM Holdings, Inc.* 937 A.2d 810, 814-15 (Del. Ch. 2007), he stated:

Part of lawyers' professional obligation is to draft clear contractual language for their clients. Furthermore, lawyers have an ethical obligation to reveal known inconsistencies that exist in the agreements that they are drafting, and not to contribute to such inconsistencies. Where the language of the agreement is ambiguous, there is a risk-especially from application of the four-comers rule-of courts not enforcing the obligations to which the parties consented. This risk poses a challenge to consent and other autonomy-based theories of contract.

THE MALAYSIAN SCENARIO

The Judicial Intervention

In Malaysia, the standard form contracts have come to dominate more than just routine

transactions. Unlike Thailand, where there is specific legislation dealing with unfair terms, the laws in Malaysia *vis-à-vis* unfair terms are very much contained in case laws. Malaysia does not regulate unfair contracts by way of specific legislation. In the area of unfair terms by virtue of section 3 and 5 of the Civil Law Act 1956, the common law principles have been applied. The general rule on interpretation is that, the court will construe the words in any written document “in their plain, ordinary, popular meaning, rather than their strictly precise etymological, philosophic, or scientific meanings” (*Malaysian National Insurance Sdn. Bhd. v. Abdul Aziz Bin Mohamed Daud* [1979] 2 MLJ 29, 31). Nevertheless, when interpreting unfair terms, the courts are hampered by the theory of freedom of contract and consequently unable to prohibit these terms, but within this theory, they have developed strict rules relating to the incorporation of such clauses as terms of the contract as well as interpreting them *contra proferentem* (Sakina, Azimon & Suzanna, 2010): the words of written documents are construed more forcibly against the party putting forward the document; in the case of exclusion clauses, this is the party seeking to impose the exclusion. This rule of construction is only applied where there is doubt or ambiguity in the phrases used, and provides that such doubt or ambiguity must be resolved against the party proffering the written document and in favour of the other party (*Lee (John) & Son (Grantham) Ltd. v Railway Executive* [1949] 2 All E.R. 581). Although the courts have long interpreted ambiguities strictly, in certain jurisdiction, such as the United States, recent cases have shown that the strict interpretation has been rejected. David Horton (2009) claims that the rejection of the strict-against-the-drafter rule stems from the confusion about its normative foundation. Judges and commentators have offered three rationales for the doctrine: it discourages ambiguity, corrects unfairness, and redistributes wealth. These theories share the goal of improving the quality and legibility of standard-form terms.

Judicial development in Malaysia on unfair terms has concentrated very much on a species

of unfair terms, that is exclusion clause. The first judicial principle on exclusion clause can be traced back as early as 1959 in a business to business (B2B) transaction. In *Sze Hai Tong Bank Ltd. v Rambler Cycle Co. Ltd.* [1959] MLJ 200, the Privy Council adopted a strict interpretation to narrow down the scope of exclusion clause so as not to allow fundamental breach of contractual obligation. The *contra proferentem* rule was later applied in *Sharikat Lee Heng Sdn. Bhd. v Port Swettenham Authority* [1971] 2 MLJ 27 and later by the Privy Council in *Port Swettenham Authority v T.W. Wu and Company (M) Sdn. Bhd.* [1978] 2 MLJ 137. The Federal Court in *Sharikat Lee Heng Sdn. Bhd.* held “that the *contra proferentem* rule should apply to the construction of Rule 91(1) just as much as it does to any exemption clause in a contract.” Ong CJ stated that:

In the absence of clear and unequivocal language to the contrary, I am of the opinion that the onus lies on the Authority to show that it has taken all reasonable care of the goods and that the loss thereof occurred in circumstances which showed no lack on its part.

In cases involving a consumer, it is difficult to ascertain the attitude of the Malaysian Courts towards unfair terms due to the scarcity of cases. Nevertheless, granted that cases in this area have been very limited, the decisions in these cases have not been a great champion of consumer rights. In *Malaysian Airlines System Bhd. v Malini Nathan & Anor* [1995] 2 MLJ 100, Malaysian Airlines was sued for breach of contract for failing to fly the first respondent, a fourteen-year-old pupil back to Kuala Lumpur. In denying the liability, MAS relied on Condition 9 under the Conditions of Contract printed on the airline ticket, which reads:

Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch.

Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carrier or aircraft, and may either alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

The Supreme Court held that MAS was entitled to rely on the clause, and thus, was not in breach of the contract. However, cases involving damage due to a negligent act of one of the parties to the contract demonstrate a strict attitude of the Malaysian courts towards exclusion clauses. In the case of *Chin Hooi Chan v Comprehensive Auto Restoration Service Sdn. Bhd. & Anor* [1995] 2 MLJ 100, the court took a very strict interpretation of this type of clauses in cases involving damages caused by negligence. In allowing the plaintiff's claim, Siti Norma Yaakob J stated that:

It is settled law that an exemption clause however wide and general does not exonerate the respondents from the burden of proving that the damages caused to the car were not due to their negligence and misconduct. They must show that they had exercised due diligence and care in the handling of the car.

However, the decision of Elizabeth Chapmen JC in *Premier Hotel Sdn. Bhd. v Tang Ling Seng* [1995] 4 MLJ 229, in the Kuching High Court, has caused some concern as it indicates the court's readiness to give effect to a clearly worded exclusion clause in the event of negligence:

General words of exclusion clauses would not ordinarily protect a contracting party from liability for negligence. To protect him from

liability for negligence, the words used must be sufficiently clear, usually either by referring expressly to negligence or by using some such expression as 'howsoever caused'.

The case law development in this area of the law in Malaysia has shown grave concern for consumer protection. Hence, it is submitted that the uncertainties and inconsistencies by way of judicial intervention could be resolved through legislative measures.

The Legislative Approach

The legislative development in Malaysia prior to 2010 has also shown disregard towards the problems posed by unfair terms. In Malaysia, there is no legislation equivalent to the United Kingdom's Unfair Contract Terms Act 1977. The courts here have also been slow in recognising the doctrine of inequality of bargaining power. Lack of legislation in this area of the law should justify the courts taking a stricter view of the exclusion clause and protect the consumers against onerous terms. The court should recognise that the notion of freedom to contract on one's own terms in consumer transaction is nothing more than a fiction. Since there is no specific legislation regulating unfair terms in consumer contracts in Malaysia, the court should take a more active role in protecting the weaker party and not merely taking a strict constructionist approach. Visu Sinnadurai suggested that the courts should exercise this role by invoking their inherent powers in refusing to sanction certain contracts on the grounds of public policy or under section 24(e) of the Contracts Act 1950 (unlawful objects and consideration). Nevertheless, this proposal has never been taken up in any cases. Lack of consistencies in judicial approach to unfair terms in consumer contracts has indeed called upon legislative intervention in this matter.

The Sale of Goods Act 1957, which governs dealings between business to business (B2B) as well as business to consumers (B2C) simultaneously accords no protection to

consumers as far as unfair terms are concerned. Instead of regulating the use of exclusion clauses in sale, the 1957 Act by virtue of section 62 allows the exclusion of the implied terms and conditions by 'express agreement'. The Consumer Protection Act 1999 (CPA 1999) came into force on 15 November 1999. The Act goes some way towards remedying the forces of inequality. As Wu Min Aun (2000) pointed out, it restores some equilibrium between suppliers and consumers. CPA was enacted to provide a comprehensive protection to consumers. Section 6 of the Consumer Protection Act 1999 prohibits contracting out of the provisions of the Act. The section further provides that every supplier or manufacturer who purports to contract out of any provision of this Act commits an offence, and under section 145, those persons are liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both (Sakina & Rahmah, 2008). The introduction of Part IIIA of the Consumer Protection (Amendment) Act 2010 has to some extent resolved the problems associated with the use of unfair terms in consumer contracts in Malaysia. Under this part, where a court or tribunal comes to the conclusion that a contract or term is procedurally or substantively unfair or both, the court or tribunal may declare the contract or the term as unenforceable or void. Under section 24C, "A contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or the manner in which or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and the supplier." A contract or a term of a contract is substantively unfair, under section 24D, "if the contract or the term of the contract – (a) is in itself harsh; (b) is oppressive; (c) is unconscionable; (d) excludes or restricts liability for negligence; or (e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification." In addition to the contract or the term being held unenforceable or void, Part IIIA provides for a criminal penalty for

contravention of its provisions. Under section 24I, if a body corporate contravenes any of the provisions in Part IIIA, the corporate body shall be liable to a fine not exceeding RM250,000; and if such person is not a body corporate, to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding three years or both.

The 2010 Amendment approach by dividing unfairness into procedural and substantive unfairness is similar to the approach proposed in the Law Commission of India 199th Report on Unfair (Procedural & Substantive) Terms in Contract. Nevertheless, the necessity of dividing the contract or the term into procedural and substantive unfairness is questioned as the civil and criminal sanctions imposed are the same may it be procedurally unfair or substantively unfair. One of the many weaknesses of the new Part IIIA lies in the uncertainty of its application to unfair notices. Failure of Part IIIA to mention notices and draw attention to standard form contract as defined in section 24A may lead to limited application of its scope. The ambiguity of this Part also lies in section 24B. The new amendment provides that the new Part shall apply to all contracts but fails to appreciate the limited application of the Consumer Protection Act 1999. The 1999 Act is very limited in its application. By virtue of section 2(4):

The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations.

As such, the problem posed by section 62 of the Sale of Goods Act 1957 shall continue to exist since the 1999 Act does not have a prevailing effect over the Sale of Goods Act 1957. The phrase 'all contracts' also leads to ambiguity as to whether Part IIIA applies to contracts which apply foreign laws. Although the new amendment expressly lists down clauses which exclude or restrict liability for breach of express or implied terms of the contract without adequate justification as procedurally unfair, Part IIIA fails to provide a test for determining what amounts to 'adequate justification'.

Unlike its Indonesian and Thai counterparts, the new amendment to the 1999 Act also fails to provide a list of examples of unfair terms. The 1999 Act also narrowly defines the term 'consumer' as "...a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption." Part IIIA contains many weaknesses which could have been addressed by enacting a single comprehensive piece of legislation on unfair terms for Malaysia.

In short, the legislative development on unfair consumer terms in Malaysia has not been a great champion of consumer rights. As such, enacting specific laws is seen as the best solution to the malignant spread of abuses in the use of unfair terms in consumer contracts.

THE INDONESIAN FRAMEWORK

The Indonesian legal system is complex because it is a confluence of three distinct systems. Prior to the first appearance of Dutch traders and colonists in the late 16th century and early 17th century, indigenous kingdoms prevailed and applied a system of *adat* (customary) law. The Dutch presence and subsequent colonisation during the next 350 years until the end of World War II left a legacy of the Dutch colonial law. A number of such colonial legislations continue to apply today. Subsequently, after Indonesian declared its independence on 17 August 1945, the Indonesian authorities began creating a national legal system based on the Indonesian precepts of law and justice. These three strands of *adat* law, the Dutch colonial law and the national law co-exist in modern Indonesia.

In Indonesia, the interest for the enactment of a comprehensive legislation governing consumer protection has existed since the 1980s (Sakina & Rahmah, 2006). Lack of a comprehensive legislation and awareness on the part of the consumers are the two major contributors to consumer problems in Indonesia. In dealing with these problems, *Undang-Undang No. 8 tentang Perlindungan Konsumen* or Law No. 8 on Consumer Protection 1999 of Indonesia was enacted and came into force on

21 April 1999. Until the enactment of the Law No. 8 on Consumer Protection in 1999, there was no comprehensive legislation providing a framework for consumer protection in Indonesia. Although the enactment of the Law No. 8 on Consumer Protection 1999 was rather recent, prior to 1999 consumer protection in Indonesia nevertheless existed in several piecemeal laws, which protected the interest of consumers in the field of hygiene, electricity, health, food, banking, copyright, patent, trademark and environment. The main ideas behind the enactment of the Law No. 8 on Consumer Protection 1999 are as follows:

- (a) The aim of the national development is to realize a just and materially as well as spiritually prosperous society in the era of democratic economy based on the 1945 Constitution and the Pancasila (State Philosophy);
- (b) The national economic development in the globalization era must support the growth of businesses enabling the production of various goods and/or services with technology which can promote the welfare of society at large and at the same time ensure that goods and/or services obtained through trade are not harmful to consumers;
- (c) With the market which is increasingly opening up as a result of the economic globalization process, the improvement of social welfare and certainty in respect of the quality, volume and security of goods and/or services obtained in the market must be guaranteed;
- (d) In order to improve the dignity of consumers, there is a need to improve the consumers' awareness knowledge, attention, capability and independence in order to protect themselves and to develop a responsible business behaviour;
- (e) Law provisions protecting consumers' interests in Indonesia have not been adequate yet; and
- (f) For all the reasons above, a set of laws and regulations is needed in order to achieve

continuity in the protection of the interests of consumers and business entities for creating a fair economy.

Law No. 8 on Consumer Protection 1999 contains 15 chapters and 65 articles. It provides for the establishment of the National Consumer Protection Board and Consumer Dispute Settlement Boards. The law specifically regulates unfair competitions, standard clauses, warranties and guarantees, advertisements and product liability. Law No. 8 on Consumer Protection 1999 highlights the need to balance between the consumer and the commercial interests. The 1999 Law confers rights and imposes obligations on both the consumers and business entities. The Law also provides for the sharing of responsibility for consumer protection between the government and non-governmental agencies.

The relevant clause of Law No. 8 on Consumer Protection 1999 on unfair terms can be seen in Chapter V which governs the 'Provisions on the Inclusion of Basic Clause'. Article 1 of Chapter 1 of the Law defines 'basic clause' in clause 10 as "any regulation or provisions and requirements previously and unilaterally drafted and stipulated by a business enactor as drawn up in a document and/or binding agreement and must be fulfilled by consumers." The 1999 Law regulates both the form and content of these unfair terms. Article 18 of Chapter V provides for basic clauses, which are prohibited from being included in any document and/or agreement in the following events:

- (a) State the transfer of responsibility of the business enactor concerned;
- (b) State that the business enactor concerned is entitled to refuse the resubmit goods purchased by a consumer;
- (c) State that the business enactor concerned is entitled to refuse the refunding of money paid for the goods and/or services purchased by a consumer;
- (d) State the granting of power of attorney by a consumer to the business enactor concerned,

either directly or indirectly, to undertake all actions unilaterally in relation to the goods purchased by a consumer in instalments;

- (e) Set forth requirements for providing evidence in respect of the lost benefit of the goods or the services acquired by a consumer;
- (f) Authorise the business enactor to reduce the benefit of service or to reduce the consumer's assets being the object of sale and purchase of the service concerned;
- (g) State the applicability of regulations in the form of new, supplementary, follow up and/or further amendments stipulated unilaterally by the business enactor to consumers during the time such consumers are using services acquired by them;
- (h) State that the consumer authorises the business enactor to secure, pledge or impose other security rights on goods purchased by a consumer on instalments.

Law No. 8 on Consumer Protection 1999 also prohibits traders from including basic clauses the position or form of which cannot be easily seen or cannot be clearly read, or the expression of which is difficult to understand. Any basic clauses included in a document or agreement in contravention with provisions contained in Article 18 shall be declared null and void. The 1999 Law goes even further with its sanctions on traders violating Article 18. Besides civil sanctions (*sanksi perdata*), Article 62 of the 1999 Law provides for criminal sanctions; "Business entities violating the provisions as intended in ... Article 18 shall be sentenced with imprisonment for not more than five years or fine for a maximum amount of Rp.2,000,000,000.00 (two billion rupiah)." In addition to the penalty imposed by Article 62, Article 63 provides the following additional punishments:

- (a) Confiscation of certain goods;
- (b) Announcement of the judge stipulation;
- (c) Payment of compensation;

- (d) Order for the halt of certain activities causing detriment for consumers;
- (e) Obligation to withdraw goods from circulation; or
- (f) Revocation of business licence.

THE THAI EXPERIENCE

The growth and sophistication of Thai business communities are relatively recent phenomena. The Thai courts of justice have increasingly had to deal with complex commercial, corporate, intellectual property, maritime, privatisation, banking, financial, securities, environmental, tax, and trade issues. The Constitution of the Kingdom of Thailand in essence protects the right and freedom of the people. It considers the opinion of the people as important, while it protects the right of the people as consumers for the first time in the section on the rights and freedoms of Thai people. It includes promoting formation of independent consumer organizations to give opinions in enacting laws, rules and regulations, and to give opinion on prescribing measures to protect consumers as appearing in section 57 of the Constitution. The Constitution also prescribes the state to promote the free market system based on the marketing mechanism to supervise fair competition, protect the consumers and prevent monopoly, and cut short directly and indirectly (Prapit Yodsuwan, 2005). The Thai legal system is a civil law system. Many of its fundamental legal principles have their origins in the codified systems of continental Europe, particularly France and Germany, as well as common law countries and traditional Thai law. Thailand also does not recognize the common law principles of binding judicial precedent. However, certain persuasive decisions of the Supreme Court are published in the Supreme Court Law Reports.

Consumer protection legislation in Thailand is sparse. The chief modern consumer protection legislation is the Consumer Protection Act of 1979 comprising 64 sections. It is one of the earliest consumer laws to be enacted in the Asia Pacific region. It came into effect on 4 May

1979 and amended in 1998. The Consumer Protection Act of 1979 is the general law that supports the basic rights of consumers in general. In cases where no specific law exists, it shall be applicable. The Consumer Protection Act of 1979 adopts a completely different approach (Sakina & Rahmah, 2006). Section 4 of the 1979 Act prescribes the right of consumers in five aspects:

- (a) The right to receive information, including description that is correct and sufficient in relation to goods or services.
- (b) The right to have independence to choose goods and services.
- (c) The right to safety from using the goods or services.
- (d) The right to receive fairness in signing a contract.
- (e) The right to be considered and compensated for damage.

In relation to standard form contract (Azimon & Sakina, 2008), Thailand has no specific provisions in any regulations pertaining to its practice. However, the analysis of its legislation shows that it gives emphasis on the issue of unfair contract terms, which is also the main characteristic of the formation of standard form contract. In other words, Thailand has treated the standard form contract as a dual issue which falls under consumer law and contract law. As a remedial measure, Thailand has adopted respectively the laws on the unfair contract terms in Unfair Contract Terms Act 1997, B.E. 2540 and the Consumer Protection Act 1979, B.E. 2541.

The Unfair Contract Terms Act 1997 (TUCTA) has been enacted to uphold legal principles in relation to juristic acts and those contracts which are based on the principle of sacredness of declaration of intention. It consists of 15 sections with its main justification to combat unfairness in their society. Since the law of contract in Thailand is based on the principle of 'autonomy of will' and 'freedom of contract', the objective of this Act is to protect

the contracting parties from any deviation from these two principles. The standard form contract has been defined under section 3 of this Act as:

A written contract in which essential terms have been prescribed in advance, regardless whether being executed in any form, and is used by either contracting party in his business operation.

Section 4 further provides:

The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.

In determining what unfair terms are, section 4 of the Act provides a list of nine unfair terms which cause unreasonable advantages over the other party:

- (a) Terms excluding or restriction liability arising from breach of contract;
- (b) Terms rendering the other party to be liable or to bear more burden than that prescribed by law;
- (c) Terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party is not in breach of the contract in the essential part;
- (d) Terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;

- (e) Terms granting the right to a party to contract to claim or compel the other party to bear more burden than that existed at the time of making the contract;
- (f) Terms in a contract of sale with right of redemption whereby the buyer fixes the redeemed price higher than the selling price plus the rate of interest exceeding fifteen percent per year;
- (g) Terms in a hire-purchase contract which prescribe excessive hire-purchasing prices or impose unreasonable burdens on the part of the hire-purchaser;
- (h) Terms in a credit card contract which compel the consumer to pay interest, penalty, expenses or any other benefits excessively, in the case of default of payment or in the case related thereto; and
- (i) Terms prescribing a method of calculation of compound interest that causes the consumer to bear excessive burdens.

It is undeniable that all the above terms are common terms which are often being used in the standard form contracts in consumer transaction. Hence, it clearly strengthens the perception that standard form contract is to be known as the type of contract which consists of unfair terms.

On the other hand, the Consumer Protection Act 1979 was adopted with the view of guaranteeing fairness for the parties in the conclusion of a contract, where it has been provided that specific types of contract shall be examined by a governmental agency called 'The Committee on Contracts' whose members are nominated by the Consumer Protection Board. In determining the types of businesses which are subject to their supervision, the widespread of standard form contract has been identified under section 35 of the Act as a business that brings problems to consumers, thus its practice has been treated as a business that requires special attention of the Committee (Thirawat, 2000). Section 35 Part 2 *bis* provides that, in any business in connection with the sale of any goods or the provision of any services, if such contract

of sale or contract of service is required by law or tradition to be made in writing, the Committee on Contract shall have the power to declare such business a contract-controlled business.

A contract between a businessman and the consumers in the contract-controlled business shall be of the following descriptions:

- (a) it shall contain the necessary contract terms without which the consumers would be unreasonably disadvantageous;
- (b) it shall not contain the contract terms which are unfair to the consumers.

Provided that, it shall be in accordance with the rules, conditions and particulars prescribed by the Committee on Contract, and for the benefit of the consumers as a whole, the Committee on Contract may require a businessman to prepare a contract in accordance with the form prescribed by the Committee on Contract. In addition, section 35 quarter provides that failure to comply with such requirement as provided by the Committee shall have the following effect on the contract:

When the Committee on Contract prescribes that any contract of a contract-controlled business shall not contain any contract term under section 35 bis, if such contract contains such contract term, it shall be deemed that such contract term does not exist.

A businessman who fails to comply with the requirement set by the Committee shall, according to section 57, be liable to the following criminal penalty:

Any businessman who fails to deliver the contract containing the contract terms or containing contract terms in the correct form in accordance with section 35 bis ... shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one hundred thousand Baht or to both.

Thus, the enactment of the above two legislations gives a clear picture that although the objectives of these two Acts are identical, nonetheless, the mechanisms for the protection in these two Acts are different. The Unfair Contract Terms Act 1997 aims at the determination of the characteristics and legal consequences of unfair contract terms, which would be beneficial to the consumer in the case where the conflict is brought before the court of law, whereas the Consumer Protection Act 1979 creates one governmental organ which is administrative in nature, with its function to detect and identify the existence of the unfair contract terms.

CONCLUSION: A COMPARATIVE ANALYSIS

The rise of standard form contracts and the use of unfair terms to deprive consumers from their rights have indeed inspired the law in Malaysia, Indonesia and Thailand to react against the increasing decline of individual's capacity to make free and rational choice (Shaik Mohd Noor Alam, 1994). The legal development in this area illustrates the role of contract law and can thus be best summed up as follows (Zweigert & Kotz, 1987): "...the modern task of contract law is to develop criteria and procedures through which contractual fairness can be assured." The control of substantive unfairness through the regime of contract law and consumer law of these selected south-eastern Asian countries reflect substantially their varied, though not dissimilar colonial experiences and the way in which the law reform in each country is taking form. The response to the challenge of unfair terms is not the concern of the common law alone. Both in the common law and the civil law systems, the legislatures have evolved various techniques of control to ensure the epidemic brought by the use of unfair terms is contained and controlled. The statutory control of unfair terms in the selected southeast Asian countries above has taken many forms, from specific legislation on unfair terms, such as in the Thailand Unfair Contract Terms Act 1997, to provisions in other specific legislations, such

TABLE 1
Overview of the legislations in Malaysia, Indonesia and Thailand on unfair terms: The pattern of control

	Malaysia	Indonesia	Thailand	
Type of legislation: Specific legislation	X	X	✓	Unfair Contract Terms Act 1997
Type of legislation: Specific provisions in other legislations	✓	✓	✓	Consumer Protection Act 1979
Nature of provision on unfair terms	Consumer Protection Act 1999	Law No. 8 on Consumer Protection 1999	<u>TUCTA</u> Lists down 9 unfair terms which cause unreasonable advantage over the other party	<u>CPA</u> Declares standard form contracts as contract controlled business – subject to the control of the Committee on Contract
Sanctions	Civil & Criminal	Civil & Criminal	<u>TUCTA</u> Civil	<u>CPA</u> Civil & Criminal

as the Malaysian Consumer Protection Act 1999 and the Indonesian legislation, Law No. 8 on Consumer Protection 1999 and the Consumer Protection Act 1979 of Thailand. The table below is an overview of the relevant legislations on unfair terms in the three selected southeast Asian countries.

In recent years, consumers have grown more conscious of their rights and tend to resort more often to legal remedies provided by the consumer protection laws. Consumerism thus has again arisen in view of the new market condition in the world economy that warrants a fresh examination of the economic power of sellers in relation to buyers. In the past, in many Asian nations, consumers' interests were suppressed under the goal of long-term economic development. With the advancement of technology and changes in the trading world, market should not be allowed to neglect consumers' interests. The

concern for better consumer protection has been expressed not only in Malaysia but in many other countries, such as Indonesia and Thailand. The legal regimes of Malaysia, Indonesia and Thailand as demonstrated above have come to recognise unfair terms as a threat to consumers and to ethical trading environment, and thus, the necessary protection by way of legislation has been accordingly provided.

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Consumer Right to Safe Product: The Application of Strict Criminal Liability in Product Safety Legislations in Malaysia

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ABSTRACT

Consumer right to safety is one of the earliest rights that has been recognised by the late President John F Kennedy in 1962, when he presented a speech to the American Congress. Later, this right had been recognised by the International Consumer Unions (presently known as the Consumers International). Presently, the consumer right to safety is one of the basic rights of the consumers that has been recognised universally, together with other basic rights, namely, the right to basic needs, the right to information, the right to choice, the right to redress, the right to be heard, the right to consumer education and the right to live in a clean environment. The objective of this article is to analyse the application of criminal liability in product safety legislations. This article will adopt the content analysis method by analysing the provisions of certain legislations to see the extent of the application of criminal liability in those adopted legislations. The findings of the research show that all of the studied legislations have adopted the strict criminal liability. The strict criminal liability offence is widely used as a means of deterring traders and producers from engaging in certain types of trading abuse which operate to the detriment of consumers. It is believed that the strict criminal liability can protect the consumers from unsafe products and uphold the consumer right to safe products.

Keywords: Consumer, consumer rights, product safety, strict criminal liability

INTRODUCTION

The consumer right to safety in relation to products means that the products they purchase must be safe for their intended use, must include thorough and explicit directions for proper use, and must be tested by the manufacturer to ensure product quality and reliability. The consumers must be protected from products that could endanger them in any manner. Product safety must be one of the priority areas that should be attended by every country (Rahmah, 2000).

President John F Kennedy considered unsafe products as a threat not only to the consumers' safety and health, but also a threat to the nation's harmony. This concern was manifested in his special message speech to the US Congress on protecting the consumers' interest on 15 March 1962:

If a consumer is offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if

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a consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened and national interest suffers.

Product safety issues have been addressed by various organisations at international and national levels. Since 1930's, the consumer movements at international level have been addressing these issues through their product testing to identify the dangers associated with the products. According to F. Josie (unpublished), at this stage, product testing has been done on breakfast cereals, soap, tooth brush and milk. Product safety issues have also become the attention of the Organisation for Economics, Cooperation and Development (OECD) since its inception in 1960. Their efforts in product safety were manifested in the establishment of Consumer Policy Committee to facilitate

information exchange in product safety, and in 1972, OECD formed the Working Party on Product Safety. The United Nations also plays a vital role in promoting product safety. In 1982, it passed a resolution on the Protection against Products Harmful to Health and the Environment, followed by its Guidelines for Consumer Protection in 1985. Furthermore, various networks have also been established internationally to tackle the product safety issues, such as, Codex Alimentarius Commission, Pesticides Action Network (PAN) and Health Action International (HAI). The significant contribution of the United Nations can be seen in its issue of the Consolidated List of Products Whose Consumption and/or Sale Have Been Banned, Withdrawn, Severely Restricted or Not Approved by Governments. This list was part of the United Nations' effort to disseminate information at the international level relating

TABLE 1
List of parent legislations on product safety

No.	Legislation	Objective
1.	Poison Act 1952	To control the importation, possession, manufacturing, storage, transportation and use of poison.
2.	Sale of Drugs Act 1952	To control and make regulations on the importation, exportation, production, sale and use of opium and other dangerous drugs.
3.	Medicine (Advertisement and Sales) Act 1956	To prohibit certain advertisement relating to medical matters and to regulate the sale of substances recommended as a medicine.
4.	Trade Descriptions Act 2011	To promote good trade practices by prohibiting false trade descriptions and false or misleading statements, conduct and practices in relation to the supply of goods and services and to provide for matters connected therewith or incidental thereto.
5.	Pesticides Act 1974	To control the importation, production, sale and storage of pesticides through registration of import and export permits.
6.	Food Act 1985	To protect the public against health hazards and fraud in the preparation, sale and use of food, and for matters incidental thereto or connected therewith.
7.	Standards of Malaysia Act 1996	To formulate policies, programs, scheme, projects and activities on standardization.
8.	Consumer Protection Act 1999	To provide for consumer protection, the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims and for matters connected therewith.

to unsafe products to health and environment (Sothi, 1994).

At the national level, since 1970's, various consumer associations, such as the Consumer Association of Penang (CAP) and the Federation of Malaysian Consumer Associations (FOMCA), have initiated product testing on food, drinks, cosmetics, vehicles and other products. The results of the testing are disseminated to the public through the consumer bulletins (Mohd Hamdan, 1990). Besides the effort taken by the Malaysian consumer associations, the government has also taken legal measures to protect the consumers. Before 1999, there were seven parent legislations which regulated product safety in various goods, and these legislations are still in force. In 1999, Malaysia had enacted the Consumer Protection Act 1999, which brought significant changes to product safety. Table 1 shows the list of these legislations.

LITERATURE REVIEW

Laws have been used to protect consumers for centuries (Peter, 2004). These laws have drawn on a variety of legal norms, including criminal laws, torts and contracts to achieve their objectives. In relation to product safety, safety legal measures are seen as an important instrument to safeguard consumer safety from unsafe products. According to Miller and Brian (1985), a considerable number of statutes and regulations are concerned with consumer safety. Many are concerned with specific types of products, for example, food, drugs, medicines and poisons. Meanwhile, others are of general applications. Brian and Deborah (2000) analysed various goods safety legislations in the United Kingdom in relation to specific types of products, such as, the Pharmacy and Poisons Act 1933, Poisons Act 1972, Medicine Act 1968 and others. All these acts impose criminal law sanctions to safe guard consumer safety from unsafe products. Likewise, Christopher, Mark and Howard (1996) analysed product safety provisions in the United Kingdom

Consumer Protection Act 1987 and the General Product Safety Regulations 1994. Notably, the Consumer Protection Act 1987 and the General Product Safety Regulations 1994 apply the similar sanction, which has been adopted by the Pharmacy and Poisons Act 1933, Poisons Act 1972, Medicine Act 1968 and other acts. In addition, Geraint and Thomas (1997) in their book also paid a particular attention to General Product Safety Regulations 1994.

Conversely, David and John (1997) divided their discussion on product safety into two parts, namely, product safety under the civil law and product safety under the criminal law. Product safety under the civil law gives the right to the consumer to bring a personal action against the wrongdoer when the consumer suffers physical harm to his person or his property. This personal action is called product liability action. Product liability is generally the liability of persons for damages caused by defective products (Curzon, 1998). The physical harm is compensated through the operation of the law of tort, an action under the consumer protection legislation or an action for breach of contract (David & John, 1997). On the other hand, product safety under the criminal law, which is the focus of this paper, involves the intervention of the government or state to enforce the product safety legislations.

Meanwhile, Wu Min Aun (2000) analysed the product safety provisions in the Malaysian Consumer Protection Act 1999. Part III of the Consumer Protection Act 1999 deals with products or goods safety.¹ Part III is of general applications, in which it applies to all products except for health care goods and food. The study on product safety legislations in Malaysia is needed in order to see the legal measures taken by the government through the criminal law instrument under various legislations.

RESEARCH METHODOLOGY

The research method used in this study is the content analysis. According to Valerine (1995), content analysis is a research method which is

¹ Part III of the Consumer Protection Act 1999 also deals with services safety.

adopted to analyse legal provisions, ministries' decisions, academic books, contracts and decided cases. This method is chosen because the objective of this research is to examine the provisions of the product safety legislations to see the application of strict criminal liability in product safety legislations in Malaysia. This research is pure legal research. Mahdi Zaharaa (1998) also agreed that legal research is done to review and improve the concepts, theories, principles and applications of the law. Notably, legal research refers to any systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them (Anwarul Yaqin, 2007). Having mentioned that, the legal research of this article is a study of legal rules, decided cases and the underlying concepts pertaining to product safety legislations. According to Anwarul Yaqin, a term of legal rules refers to rules recognised and enforceable under any legal system, or rules declared under any constitutional document, or statutory provisions framed by law-making bodies or authorities, or subsidiary legislation framed by administrative bodies or authorities. Further, Anwarul Yaqin explained that the term concepts, theories or doctrines are ordinarily used to refer to ideas, notions, perceptions or abstract principles that represent a particular view or explain the nature, purpose or function of law.

THE APPLICATION OF STRICT CRIMINAL LIABILITY

As mentioned above, the Malaysian government has taken a legal measure to protect the consumers from unsafe products through various parent legislations as shown in Table 1. In all of these legislations, the legal measure taken is the application of criminal liability on those who contravene the provisions of the laws. This approach has a significant advantage for the consumers, which states that the expensive

and time-consuming process of regulating the rogue is entrusted to public officials, who in recent legislation usually have a duty to enforce its provisions (Robert & Geoffrey, 2004). Criminal law is widely used as a means of deterring traders and producers from engaging in certain types of trading abuse, which operates to the detriment of consumers (David & John, 1997). In other words, the criminal law is used as a means of protecting the consumers' interest. The principal means of control is strict criminal liability, which is employed as a means of encouraging the business community to achieve high standards of trading conduct (David & John, 1997). Strict criminal liability offence requires no blameworthiness on the part of the accused (Russell, 2001). The prosecution is relieved from the responsibility of proving that the alleged offence has the necessary *mens rea* (which means the state of mind) as to one of the elements in criminal law offence. What the prosecution needs to prove is *actus reus*, which means the guilty act or forbidden conduct. The normal criminal offences require the proof of *actus reus* (the forbidden conduct) and *mens rea* (the state of mind).

The idea of strict liability took hold in the nineteenth century with the development of social legislation regulating certain activities affecting the public's health, safety or welfare, such as food and drugs, liquor and health, as well as safety in factories and other places of work. It is largely confined to statutory offences and is possible where statutory definition of an offence fails to include and express *mens rea* or negligent requirement (Russell, 2001).

Strict criminal liability is used as an instrument by governments to protect consumers against the strength of producers (Sornarajah, 1985). Besides that, it is also used to enforce statutory standards (Michael, 1996) and able to prevent the offender and other people from committing the same offence. Yong Pung How J. in the case of *MC Strata Title No 641 v Public Prosecutor*² had made the following statement

² [1993] 2 SLR 650.

in relation to the creation and objective of strict criminal liability:

The creation of strict liability offences would be vital in promoting the objects of the statute and encouraging greater vigilance to prevent the commission of the offences.

The justification for imposing strict criminal liability can also be seen in the judgment of Lord Diplock in the case of *Tesco Supermarket Ltd v Natrass*³, whereby Lord Diplock had said that:

Consumer protection is achieved only if the occurrence of the prohibited acts or omissions is prevented. It is the deterrent effect of penal provisions which protects the consumer from the loss he would sustain if the offence were committed...The loss to the consumer is the same whether the acts or omissions, which result in his being given inaccurate or inadequate information, are intended to mislead him, or are due to carelessness or inadvertence. So is the corresponding gain to the other party to the business transaction with the consumer...Where, in the way that the business is now conducted, they are likely to be acts or omissions of employees of that party and subject to his orders, the most effective method of deterrence is to prove upon the employer the responsibility of doing everything which lies within his power to prevent his employees from doing anything which will result in the commission of an offence. This I apprehend is the rationale and moral justification for creating in the field of consumer protection...offences of 'strict liability'.

Based on the opinions of the above writers, strict criminal liability is imposed on activities affecting the public's health, safety or welfare. Since public's health, safety or welfare is very important for the stability of a country, it is submitted that the use of strict criminal liability is justified and must be supported. The use of strict criminal liability to protect the public's health and safety can be seen in the case of *Hobbs v Winchester Corp.*⁴ In *Hobbs*, the Court had to consider section 117 of the Public Health Act 1875, which provides that where any meat unfit for the food of man was exposed for sale, the person to whom the meat belonged or in whose possession, it shall be liable to a penalty. The question that arose for consideration was whether the offence under section 117 was complete by the mere fact of exposing for sale and selling meat unfit for human consumption or whether it was necessary to prove in addition that the butcher knew it was unfit. Cozens-Hardy MR in his judgment said that:

In my opinion the offence was complete when the unsound meat was exposed for sale and sold, and I think it is not relevant for the butcher to say 'I did not know and my men did not know and neither I nor they with such knowledge as we had having regard to our positions in life could have ascertained that the meat was unsound, although experts have subsequently given evidence which has satisfied the arbitrator that such was the case.

Cozens-Hardy MR held that a person in possession of meat intended for human food is liable to conviction whether he knew or did not know that the meat was unfit for human food. In rejecting the argument of the accused that as the disease could not reasonably be discovered except by an expert, strict liability should not be imposed, Kennedy L J further said:

³ [1972] AC 153.

⁴ [1910] 2 KB 471.

...To say that the difficulty of discovering the disease is sufficient ground for enabling the seller to excuse himself on the plea that he cannot be reasonably expected to have the requisite technical knowledge or to keep an analyst on his premises, is simply to say that the public are to be left unprotected and must submit to take risk of purchasing an article of food which may turn out to be dangerous to life and health.

In *Public Prosecutor v Teo Kwang Kiang*,⁵ the High Court of Singapore agreed that the imposition of strict liability was necessary for the protection of the public. The respondent in this case was charged with an offence under section 40(1) of the Singapore Environmental Public Health Act 1987 for having in possession snow peas (a type of vegetable) which were unfit for human consumption. The prosecuting officer argued that section 40(1) of the Act is an absolute liability provision and the words importing *mens rea* are not present in section 40(1). The vegetables were in his possession, and therefore, he was guilty of an offence under the Act. Section 40(1) of the Environmental Public Health Act 1987 reads:

No person shall, without lawful excuse, have in his possession any article of food intended for human consumption which is unsound or unfit for human consumption.

Furthermore, S. Rajendran J., who delivered the judgment of the Court, agreed with the contention of the prosecutor. According to the learned judge, since the respondent had the snow peas in his possession, he had imported them for the purpose of human consumption and the snow peas had a very high quantity of carbon disulphide in them that they were unfit

for human consumption, the respondent was guilty of the offence charged. The decision in *Public Prosecutor v Teo Kwang Kiang* shows the willingness of the Court to impose strict criminal liability when the public's health or safety is at stake.

There is an argument which says that whenever a statute is silent as to *mens rea*, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*, and this was decided in the case of *Sweet v Parsley*.⁶ House of Lords in *Sweet v Parsley* further said:

The fact that other sections of the Act expressly required mens rea, for example, because they contain the word "knowingly", is not in itself sufficiently to justify a decision that a section which is silent as to mens rea creates a strict liability offence.

Later in 1985, the case of *Gammon (Hong Kong) Ltd v Attorney-General*⁷ states that the presumption that *mens rea* is required for criminal offence can be rebutted if the words of a statute suggest that strict liability is intended. In *Gammon*, it was stated that the presumption that *mens rea* is required was less strong for regulatory offences than truly criminal offences. *Gammon* is an example of a regulatory offence. The defendants in *Gammon* were involved in building works in Hong Kong. Part of the building they were constructing fell down, and it was found that the collapse had occurred because the builders had failed to follow the original plans exactly. The Hong Kong building regulations prohibited deviation of any substantial way from such plan, and thus, the defendants were charged with breaching the regulations and were convicted in the lower court. On appeal, they argued that they were not liable because they did not know that the

⁵ [1992] 1 CLJ 318.

⁶ [1969] 1 All ER 347.

⁷ [1985] AC 1.

changes they made were substantial ones. Nevertheless, the Privy Council held that the relevant regulations created offences of strict liability and the conviction was upheld.

The reason why the House of Lords was reluctant to treat the offence in *Sweet v Parsley* as strict liability offence was because, the offence in *Sweet v Parsley* was regarded as being a ‘true crime’, and not merely a breach of regulatory provisions. In *Sweet v Parsley* case, Ms Sweet, who was a teacher, took a sublease of a farmhouse outside Oxford. She rented the house to the tenants and rarely spent any time there. Unknown to her, the tenants were smoking cannabis on the premise. When they were caught, she was found guilty of being concerned in the management of the premise, which was being used for the purpose of smoking cannabis, contrary to the Dangerous Drugs Act 1965. Ms Sweet appealed on the ground that she knew nothing about what the tenants were doing, and could not reasonably have been expected to have known. Lord Reid in this case acknowledged that strict liability is appropriate for regulatory offences or quasi-crimes, which are not criminal in any real sense. However, their Lordships regarded the offence, which Ms Sweet was being charged, as a true crime - the stigma had, for example, caused Ms Sweet to lose her job. Their Lordships held that it was not a strict liability offence, and since Ms Sweet did not have the necessary *mens rea*, her conviction was overturned.

The reluctance of the courts to treat an offence as strict liability offence when a statute is silent as to *mens rea* can further be seen in the case of *B (a minor) v DPP*.⁸ In this case, a 15-year-old boy had sex with a 13-year-old girl. The boy was charged with inciting a child under the age of 14 to commit an act of gross indecency. Both the trial judge and the Court of Appeal ruled that this was a strict liability offence and that there was therefore no defence available that the boy believed the girl to be over 14. The House of Lords confirmed that

there was a presumption that *mens rea* was required, and ruled that the relevant offence was not actually one of strict liability. The House stated that in order to rebut the presumption that the offence required *mens rea*, there needed to be a ‘compellingly clear implication’ that the Parliament intended the offence to be one of strict liability. Since the offence carried a serious social stigma and a heavy sentence, the House of Lords decided that the Parliament did not have this intention.

In Malaysia, the product safety legislations deal with regulatory offences. A regulatory offence is one in which no moral issue is involved, and usually (though not always) one for which the maximum penalty is small (Catherine & Frances: 2008). According to Cobuild Dictionary (1997), the term ‘moral’ refers to principles and beliefs concerning right and wrong behaviours. In addition, the product safety legislations in Malaysia are enacted to protect the public’s health and safety. All the product safety legislations discuss below aim at protecting consumers from unsafe products. It is submitted that since the offences in the legislations are regulatory offences aiming at protecting the public’s interest, the strict criminal liability must be imposed when the words of the provisions are silent as to *mens rea*.

Sale of Drugs Act 1952

The Sale of Drugs Act 1952 is under the jurisdiction of the Ministry of Health. This Act protects consumers from adulterated drugs, false or misleading statements on drugs and others. Section 2 of the Sale of Drugs Act 1952 defines drug as:

any substance, product or article intended to be used or capable, or purported or claimed to be capable, of being used on humans or any animals, whether internally or externally, for a medicinal purpose.

⁸ [2000] AC 428.

According to this section, drugs intended to be regulated under this Act are drugs used for medicinal purposes on humans and animals. The Sale of Drugs Act 1952 allows the public to have any drug analysed. This can be done through any medical officer or inspector appointed under section 3 of the Act. Section 6 of the Act provides that:

Any person, other than the seller, may, on payment of the prescribed fee together with the cost of the sample, require any officer of inspector to purchase a sample of any drug and submit the same for analysis.

The application of strict criminal liability is found in section 10 of the Act. Section 10 stipulates that:

- (i) any person commits an offence who sells -
- any adulterated drug without fully informing the purchaser at the time of the sale of the nature of the adulteration;
 - any drug in any package which bears or has attached thereto any false or misleading statement, word, brand, label or mark purporting to indicate the nature, quality, strength, purity, composition, weight, origin, age or proportion of the article contained in the package or of any ingredient thereof;
 - any drug containing any substance addition of which is prohibited;
 - any drug containing a greater proportion of any substance than is permitted;
 - any drug for internal use which contains methyl alcohol, isopropyl alcohol or denatured alcohol; or
 - any drug which is not of the nature or not of the substance or not of the quality of the drug demanded by the purchaser to the prejudice of the purchaser.

The provision in section 10(1)(a) is quite misleading. The provision will have the

implication that adulterated drug can be sold if the seller informs the purchaser at the time of the sale of the nature of the adulteration. Anything which is adulterated is dangerous and must be prevented from selling. It is submitted that this provision needs to be reviewed.

The section creates a regulatory offence, in which no moral issue is involved. The section makes it an offence if anybody sells adulterated drug, or drug which contains prohibited substance, or drug which is prejudiced to the purchaser. The offence is committed by the act of selling the prohibited drug. It is submitted that, to presume that the offence requires *mens rea* as decided in the case of *Sweet v Parsley* is not appropriate because it does not involve a moral issue

Medicines (Advertisement and Sale) Act 1956

The Medicines (Advertisement and Sale) Act 1956 regulates advertisements and sales relating to medicines, which is under the purview of the Ministry of Health. The Act regulates medicinal advertisements by prohibiting certain advertisements and imposing the requirement that all advertisements relating to medicines must obtain the approval from the Medicine Advertisements Board as stipulated in section 4B of the Act. The imposition of this requirement is to ensure that there is no false or misleading information in the advertisements and also to safeguard the safety of the consumers.

Section 3(1)(a) of the Medicines (Advertisement and Sale) Act 1956 prohibits advertisements relating to certain diseases specified in the Schedule to the Act. The Act has listed twenty diseases whereby the advertisements relating to these diseases are prohibited. Some of these diseases are defects of the kidney, defects of the heart, diabetes, asthma, and tuberculosis. Despite the fact that the advertisements relating to these diseases are prohibited, nevertheless, we can still see many medicines which claim that they can cure these diseases. To substantiate these claims, they produce testimonials from people who have used the medicines. This normally occurs in

traditional medicines. There is a difficulty to charge them under this Act because the Act does not cover advertisements in relation to traditional medicines. Nevertheless, the Ministry of Health is now in the process of coming up with an act to regulate these traditional medicines.

The Act also prohibits advertisements relating to medicines for the purpose of practising contraception among human beings, improving the condition or function of the human kidney or heart, or improving the sexual function or sexual performance of human beings, as stipulated in section 3(1)(b) & (c). Besides that, according to section 4 of the Act, advertisements relating to any medicines that can procure miscarriages among women are also prohibited. Thus, any person who contravenes all these prohibitions is committing an offence under section 5 of the Medicines (Advertisement and Sale) Act 1956.

Again, section 5 is silent as to the element of *mens rea*. Is it justified to presume that *mens rea* is needed? If one looks at the objective of the Act, which is to prohibit certain advertisements relating to medical matters and to regulate the sale of substances recommended as a medicine, the Act is merely creating regulatory offences. Therefore, it is submitted that the offences created under section 5 are strict liability offences.

Trade Descriptions Act 2011

The Trade Descriptions Act 2011 is a new Act which replaces the Trade Description Act 1972. It is under the jurisdiction of the Ministry of Domestic Trade, Co-operatives and Consumerism and is more comprehensive than the 1972 Act.

Trade descriptions are defined in section 6(1) of the Act. This Act is used, amongst others, to monitor false trade descriptions to products by making it an offence in section 5(1) of the Act to apply false trade descriptions to any goods or products. Through this mechanism, the consumers are protected from imitation products,

which may cause dangers to them. In relation to product monitoring, a power is given to the Assistant Controller of Trade Descriptions in section 30 of the Act. This monitoring power is related to the control of false trade descriptions to goods or products. Goods in the context of this Act include all kinds of moveable property regardless whether they are food, health care, pharmaceuticals and others.

The Trade Descriptions Act 2011 is also the manifestation of the application of strict criminal liability. In section 5(1), it provides that any person who does any of the following commits an offence:

- applies a false trade description to any goods; or
- supplies or offers to supply any goods to which a false trade description is applied, or
- exposes for supply or has in his possession, custody or control for supply any goods to which a false trade description is applied.

In the case of *Ang Seng Ho v Public Prosecutor*,⁹ it was held that the offence in section 3 (under the Trade Descriptions Act 1972, which has no significant difference from section 5(1) of the 2011 Act, except that section 5(1) of the 2011 includes one more offence, that is the offence of exposing for supply or has in his possession, custody or control for the supply of any goods to which a false trade description is applied) was a strict liability offence. In this case, the appellant was charged under section 3(1)(b) of the Trade Descriptions Act 1972 for supplying groundnuts, which falsely bore the brand name of Thumb Brand Ngan Yin Groundnut Factory. The appellant contented that he had no knowledge that the groundnuts were an imitation and relied on the defence in section 24(1) of the same Act, which allowed the defence of mistake or the reliance of information supplied to the accused person or the act or default of another person or an accident or some other cause beyond the accused's control.

⁹ [1991] 2 CLJ Rep 265.

Section 24(3) provides that the accused must prove that he did not know and could not with reasonable diligence have ascertained that the good did not conform to the description or that the description had been applied to the good. James Foong CJ held that under section 24 of the Trade Descriptions Act 1972, the word used therein 'is for the person charged to prove' the relevant stated defences. This implies that the offences under the Act are strict liability. It is for the accused person to prove his mental state at the time of the offence in order to avail himself of one of the defences.

In the case of *PP v Intrakota Consolidated Bhd*,¹⁰ the High Court ruled that the existence of due diligence defence dispelled the suggestion that the offence was a strict liability. The respondent in this case was charged with an offence under section 22(1) of the Environmental Quality Act 1974 for the emission of excess smoke. The section was silent as to the requirement of *mens rea*. However, the defence in section 43(2) of the Act provided for due diligence. Contrary to what had been decided by James Foong C J, Abdul Wahab Patai J. decided that the offence was not a strict liability offence due to the existence of this defence.

It is in the opinion of the writer that the decision arrived by James Foong C J should be the correct decision. The existence of statutory defences, particularly the due diligence defence, do not alter the nature of strict liability offence. These statutory defences are to help the innocent offender to escape liability if he can show that one of the statutory defences provided for applies to him (David & John: 1997). What the prosecution needs to prove is the commission of the offence, and then it is the duty of the person charged to prove the defences if he wants to rely on any of the defences. If he fails to prove any of the defences, then the offence is committed.

Pesticides Act 1974

The Pesticides Act 1974 is under the purview of the Ministry of Agriculture and Agro-based

Industry. Section 2 of the Pesticides Act 1974 defines pesticides as follows:

- any substance that contains an active ingredient; or
- any preparation, mixture or material that contains any one or more of the active ingredients as one of its constituents.

However, this does not include contaminated food or any article listed in the Second Schedule.

Section 7 of the Act makes it mandatory to any person who desires to import or manufacture a pesticide to apply to the Pesticide Board to have the pesticide registered. One of the conditions to enable the pesticide to be registered is specified in section 8(1)(c) of the Act. It stipulates that the applicant must satisfy the Pesticides Board that the pesticide, if used or handled according to the instructions contained in its proposed label, would be efficacious and safe to human beings and animals, or constitutes a risk to human beings and animals of such a minimal extent or degree as to be outweighed by the necessity or advantages of using the pesticide.

Pesticides are normally used in food, particularly, vegetables and fruits. Therefore, in order to protect consumers from food contaminated with pesticides, section 21(1) of the Act empowers the Ministry concerned, after consulting the Pesticides Board and the Ministry responsible for health services, to make regulations to prohibit:-

the addition to or the use or presence in food or any specified kind thereof, or the treatment of food or any specified kind thereof, or with any specified pesticide or more than the specified quantity, proportion, strength, or concentration thereof.

Contaminated food is defined in section 2 of the Pesticides Act 1974 to mean:-

¹⁰ [1999] 4 CLJ 714.

food in which there is present a pesticide, or a quantity, proportion, strength, or concentration of a pesticide, in contravention of regulations made under section 21; and a reference to the use or presence of a pesticide in food includes a reference to its use or presence on food.

Section 24 of the Pesticides Act 1974 gives the right to food analysis to the public. This can be done in two methods. The first method is provided in section 24(1), which provides:

A person who has bought any food shall, on payment of the prescribed fees, be entitled to have a sample of the food analysed by an analyst in order to determine whether the food is contaminated, and to receive from him a certificate of analysis.

Under this provision, the buyer of food may give the sample of the food to the food analyst together with the prescribed fees to have the food analysed to determine whether the food is contaminated. The other method is specified in section 24(2) of the Act, which states:

A person, other than the seller of the food, may, on payment of the prescribed fees and the cost of the sample, require an authorized officer to purchase a sample of any food and submit it for analysis by an analyst in order to determine whether the food is contaminated.

In the second method, the applicant needs to pay the prescribed fees and the cost for the food sample to the authorised officer. The authorised officer will arrange for the food analysis by giving the sample to an analyst.

Besides the right given to the public to have the food analysed, the power of entry, inspection and seizure is given to the authorised officer. Such power is codified in section 22 of the

Pesticides Act 1974. Section 22 codifies that an authorised officer may:-

- at all reasonable times enter into and inspect any place where he has reason to believe that there is any food intended for sale;
- inspect any food, wherever found, that he has reason to believe to be intended for sale;
- seize, detain, or remove any such food that is or appears or is believed to be contaminated food, and any mark, seal, or otherwise secure the food in order to affect seizure, detention, or removal thereof.

The application of strict criminal liability can be found in section 25 of the Pesticides Act 1974, whereby it provides that a person who sells any contaminated food commits an offence. It is sufficient for the offence to be committed by the act of selling contaminated food only. Whether the accused has the knowledge or not, is irrelevant.

Food Act 1983 and Food Regulations 1985

Food Act 1983 is the primary Act which regulates food. This Act is supported by the Food Regulations 1985. Food Regulations 1985 prescribes compositional standards, standards for additives and nutrient supplement, standards for food packages and standards for labelling of particular food. All these standards are mandatory standards which must be complied with by the food manufacturers. Both of these legislations are under the jurisdiction of the Ministry of Health. In addition, food is defined under section 2 of the Food Act 1983 to include:

Every article manufactured, sold or represented for use as food or drink for human consumption or which enters into or is used in the composition, preparation and preservation of any food or drink and includes confectionary, chewing substances and any ingredient of such food, drink, confectionery or chewing substances.

Hence, from the definition of food above, it gathers that food includes anything manufactured, sold or presented for use as food or drink for human consumption and any ingredients used in any food or drink including confectionery and chewing substances. However, live animals, which also can be used as human consumption, are not considered as food under section 2 of the Food Act 1983. This was held in *Chuang Hock Meng @ Chung Hock Meng v Pegawai Kesihatan Daerah Hulu Langat Kajang, Selangor Darul Ehsan & Anor*.¹¹ It was decided that live pigs which had been seised could not be accepted as an article that could be used in the composition, preparation or preservation of any food as defined under section 2 of the Act.

In order to ensure that only safe food is supplied to the consumers, the Food Act 1983 has created various criminal offences. The offences are as follows:

- selling food containing substances injurious to health, as stipulated in section 13;
- selling food unfit for human consumption, as stipulated in section 13A;
- selling adulterated food, as stipulated in section 13B;
- selling food not of the nature, substance or quality demanded, as stipulated in section 14;
- selling food whose label does not comply with the prescribed standard, as stipulated in section 15; and
- selling food which has a false label, as stipulated in section 16.

The wordings in sections 13, 13A, 13B, 14, 15 and 16 are silent as to *mens rea*. The question here is - do all these sections create strict liability offences? According to Barry (2000), modern food legislation has been of strict liability since its inception generally. To relieve the harshness

of strict liability offences, the Parliament has customarily added provisions which enable the liability to be passed on the person truly responsible for the contravention and afford honest traders statutory defences (Barry: 2000).

In the Food Act 1983, the defence of 'all reasonable steps' is provided in section 23 of the Act. In the case of *Public Prosecutor v Pengurus, Rich Food Products Sdn. Bhd.*,¹² the respondent was charged under section 11(1)(b) of the Sale of Food and Drug Ordinance 1952, which is equivalent to section 15 of the Food Act 1983. The respondent was relying on a defence in section 21 of the Sale of Food and Drug Act 1952, which is equivalent to section 23 of the Food Act 1983. The defence in section 21 of the Sale of Food and Drug Act 1952 stated that:

...it shall be no defence that the defendant did not act wilfully unless he also proves that he took all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance.

Mohd Yusoff Muhamed J. held that with this defence, the offence in section 11(1)(b) of the Sale of Food and Drug Act 1952 was not a strict liability offence. The writer would like to differ from the decision of the Learned Judge. The defence in section 21 did not alter the burden of the prosecution in proving the offence in section 11(1)(b) of the Sale of Food and Drug Act 1952. The provisions in section 11(1)(b) is silent as to *mens rea*. Therefore, the prosecution only had to prove the *actus reus*. If the defendant or accused would like to rely on section 21 of the Sale of Food and Drug Act 1952, the defendant had to prove that he did not act wilfully by proving to the court that he had taken all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance. It is for the defendant to prove the state of his mind, not the prosecution.

¹¹ [2002] 4 MLJ 27.

¹² [1981] CLJ Rep 257.

Standards of Malaysia Act 1996

This Act is under the jurisdiction of the Ministry of Science, Technology and Innovation (MOSTI). It regulates the Department of Standards Malaysia in exercising its function as the standard development agency. 'Standard' is defined in section 2 of the Act as:

a document approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory; and which may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Although the Department of Standards is entrusted with standard development, in carrying out this function, it has appointed the Standard of Industrial Research Institute of Malaysia (SIRIM) for standard development activities. All standard development activities are done by SIRIM.

Section 15 of the Standards of Malaysia Act 1996 empowers the Ministry of Science, Technology and Innovation to declare any specification, which has been adopted with or without modification to be a standard specification or a provisional standard specification. However, this provision does not make this standard as a mandatory to be complied with by manufacturers. The standards will only become a mandatory when they are prescribed as mandatory by the relevant Ministry in regulations. In 2009, the Ministry of Domestic Trade, Cooperatives and Consumerism had enacted two regulations to impose safety standards on toys. The regulations are the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2009 and the Consumer Protection (Safety Standards for Toys) Regulations 2009. In 2010, the Consumer Protection (Certificate

of Approval and Conformity Mark of Safety Standards) Regulations 2009 was replaced by the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2010. The Consumer Protection (Safety Standards for Toys) Regulations 2009 was also amended in 2010 to include the standard for safety of electric toys. In addition, there are other regulations, orders and rules, which have imposed standards on various goods before the enforcement of the Consumer Protection Act 1999, such as the Electrical Supply Regulations 1990 and the Electrical Regulations 1994 which impose standards on electrical goods, the Motor Vehicles (Safety Belt) Rules 1978 which imposes standards on safety belts, the Motorcycles Order (Safety Helmet) Rules 1973 which imposes standards on safety helmets, and the Trade Descriptions (Marking of Non-Pressure Kerosene Stove) Order 1991 which imposes standards on kerosene stoves.

The strict criminal liability offences created under section 18 of the Standards of Malaysia Act 1996 are geared towards ensuring no false representation in relation to accreditation, standard specification and standard conformity. These false representations may be done on commodities, processes, practices or services. Notably, the word 'commodity' is defined in section 2 of the Act to mean any article, product or thing that is a subject of trade or commerce.

Consumer Protection Act 1999

The Consumer Protection Act 1999 came into force on 15 November 1999 and under the jurisdiction of the Ministry of Domestic Trade, Co-operatives and Consumerism. In relation to products/goods safety, it is codified in Part III of the Act. Section 19(6) of the Act limits the application of Part III, which does not apply to healthcare goods and food. Nevertheless, it applies to imported goods as provided in section 24 of the Consumer Protection Act 1999.

The Act has brought certain important changes in product safety, such as power vested to the Ministry of Domestic Trade, Co-operatives and Consumerism to monitor product safety

and imposition of safety standards for products or goods. In relation to the monitoring power vested to the Ministry, the monitoring is done at two stages, namely, at pre-marketing stage and at marketing stage. Monitoring at pre-marketing stage can be seen in section 19(1), which empowers the Ministry to prescribe safety standards for goods or class of goods. According to Wu Min Aun, the purpose of prescribing safety standards is to prevent risks of injury (Wu Min Aun: 2000). On the other hand, monitoring at marketing stage is seen in section 23(1), which empowers the Ministry to declare unsafe goods as prohibited goods. The power of the Ministry to prescribe safety standards for products or goods will be able to overcome many unsafe consumer goods in the market. It is the hope of the consumers that the Ministry will utilize this power as many consumer products in the market do not have safety standards. However, only in 2009, the Ministry of Domestic Trade, Co-operatives and Consumerism utilised the power given in section 19(1) by prescribing safety standards for toys. Two regulations were enacted to enforce the standards, namely, the Consumer Protection (Safety Standards for Toys) Regulations 2009 which contains the list of safety standards for toys, and the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2009 which was later replaced by the Consumer Protection (Certificate of Approval and Conformity Mark of Safety Standards) Regulations 2010.

In order to help the businesses that supply toys in Malaysia to comply with the legislations and requirements imposed by the Ministry of Domestic Trade, Co-operatives and Consumerism, the Ministry concerned has issued the Guideline on Mandatory Standards for Toys 2010. This Guideline will assist the industry to understand the main features of the legislations and the requirements in order to conform to the prescribed safety standards.

Based on these two regulations, any person or business that supplies, or offers to or advertises for supply toys must ensure that:

- the toys comply with the prescribed safety standards;
- the Certificate of Conformance (COC) is issued by the product owner;
- a copy of the COC is to be kept for record and enforcement purposes;
- the toys are marked or affixed with the conformity mark (MC) together with the registration number determined by the Ministry of Trade, Co-operatives and Consumerism;
- the toys are marked and affixed with the name and address of the manufacturer, importer or distributor; and
- the toys must be accompanied by warnings and information on precautions where necessary. These must be either in the Malay language or/and the English language. As an addition, other languages may also be used.

When there is a safety standard determined by the Ministry of Domestic Trade, Co-operatives and Consumerism, section 20 provides that no person shall supply, or offer to or advertise for supply any goods which do not comply with the safety standards determined under section 19(1). In the situation where no safety standard has been determined, section 19(4) provides that the person supplies or offers to supply the goods shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer, due regard being had to the nature of the goods concerned. According to Wu Min Aun, this provision can act as a safety net to catch goods which are not safe (Wu Min Aun: 2000).¹³ On the other hand, section 21 imposes general safety requirement for goods. It provides that, in addition and without prejudice to section 20,

¹³ Wu Min Aun, *Consumer Protection Act 1999: Supply of Goods and Services*, Pearson Education Malaysia Sdn Bhd, 2000, p 32.

no person shall supply, or offer to or advertise for supply any goods which are not reasonably safe having regard to all the circumstances, including:-

- the manner in which, and the purpose for which, the goods are being or will be marketed;
- the get-up of the goods;
- the use of any mark in relation to the goods; and
- the instructions or warnings in respect of the keeping, use or consumption of the goods.

This general safety requirement will impose on the supplier a duty to trade safely. It does not impose a duty to supply goods which are absolutely safe as the cost of achieving this will be very costly and this will make consumer goods to be so expensive that they fall out of the reach of poorer consumers.

The penalty for contravening the provisions in Part III is provided in Part IV of the Consumer Protection Act 1999, particularly section 25. Section 25 provides that any person who contravenes Part II and III commits an offence. The section is silent as to *mens rea*. The writer would like to suggest that there is no necessity to presume *mens rea* in section 25 because this section is creating a regulatory offence. Although section 22 allows the person charged to put up a defence of no knowledge and had no reasonable ground to believe that the goods or services failed to comply with the requirement of section 20 or 21, the duty to prove the state of knowledge in section 22 is burdened on the person charged, not on the prosecution. The duty of the prosecution is to prove the commission of the crime by way of contravening any provisions in Part III without the necessity to prove the state of mind of the person charged. It is submitted that the existence of the defence of no knowledge does not alter the nature of strict liability offence in section 25.

CONCLUSION

Criminal law performs a number of important functions in society, but chief among these is that of protecting the consumer from harm. The above discussion reveals that all the studied legislations employ criminal liability offences. However, the question that arises is that - do all the studied legislations impose a strict liability offence? This question needs to be addressed because the relevant provisions are silent as to *mens rea*. Although it is difficult to decide whether the statutory provisions impose strict criminal liability, the decided cases show that the courts are willing to impose a strict criminal liability when the provisions create regulatory offences. The defendants in regulatory offences usually, although not necessarily, be those acting in the course of a trade or business. Such defendants may be particularly suitable candidates for the imposition of strict criminal liability. They are suitable candidates because they are very often well placed to pay the penalty, which usually be a fine; they participate in a potentially hazardous activity by choice; and they take the benefit of that activity, and ought therefore to bear the loss when mistakes are made. In Malaysia, product safety legislations regulate offences that affect the public's health and safety. The use of criminal law is believed to be one of the methods that can control the offences of product safety. The offences created by the relevant provisions are not 'true crime' and they do not involve moral issues, though this statement on moral issues is not always right when we define crime as morally wrong. The words moral issues must be given strict interpretation, which involves bad behaviour. Therefore, the writer would like to suggest that strict criminal liability is imposed in product safety legislations when the relevant provisions are silent as to *mens rea*. It is further submitted that the creation of strict criminal liability offences will be able to protect consumers from unsafe products.

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The Current Practices of Islamic Build Operate Transfer (BOT) Financing Contracts: A Legal Analysis

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ABSTRACT

Build Operate Transfer (BOT) is a kind of legal mechanism of privatisation. It is a business venture between the government and the concessionaire, with the ownership of the project asset transferred to the government at the end of the concession period. In Malaysia, a decade after the beginning of privatisation was marked by the emergence of capital market which consisted of conventional and Islamic capital market. Both Islamic and conventional capital markets facilitate the privatisations and infrastructure projects by the issuance of bonds, equity financing securities and Islamic securities. Islamic BOT financing is a new type of contract in contemporary Islamic law, and it is resulted from the modern infrastructure development needs. Although the financing of BOT is new to the Islamic law, the specific contracts used in the structure are common to the Islamic principles of *muamalat* (i.e. Islamic transactions) like sale, partnership and lease contract. The objective of this work was to study the current practices of the Islamic BOT financing contracts in Malaysia and other countries. The study adopted an analytical approach by assessing the strengths and weaknesses of the financing contracts via the sale, partnership, and lease contract. Finally, the findings showed that sale-based financing is more popular to the Project Company of BOT in Malaysia due to the fixed return and deferred payment mechanism. On the other hand, the *mudharabah* and *musharakah* contract provides an alternative to the project since both structures are in the form of business venture and lease-based financing which exploit the beneficial interest of an asset.

Keywords: Islamic build operate transfer (BOT) financing, build operate transfer (BOT), Islamic contract, Islamic securities, Islamic financing

BACKGROUND

Build Operate Transfer (BOT) is a kind of legal mechanism of privatisation (UNIDO, 1996). It is a structure that utilizes the private investment in undertaking the public sectors infrastructure projects, apart from being a complicated process with multiple parties and contracts. In more specific, BOT is a business venture between the

government and the concessionaire, with the ownership of the project asset transferred to the government at the end of the concession period.

The privatisation of road projects in Malaysia via Build Operate Transfer (BOT) mechanism began in 1984, whereby the Federal Roads (Private Investment Management) Act was enacted to allow the privatisation of

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road constructions and management. For this purpose, the BOT mechanism was adopted because it is a “win-win situation” in which the private entity may compensate the financing via toll collection and the completed project will be transferred back to the Government at the end of the concession period.

Table 1 shows the total number of projects according to sectors, privatisation mechanism adopted, and investment. BOT is considered as one of the categories of Greenfield project. A Greenfield project refers to a private entity or a public-private joint venture which builds and operates a new facility for the period specified in the project contract. The facility may be returned to the public sector at the end of the concession period. Other categories of the Greenfield project include build, lease, and transfer (BLT), build, operate, and transfer (BOT) and build, own, and operate (BOO). On the other hand,

concession is a technique whereby a private entity takes over the management of a state-owned enterprise for a given period, during which it also assumes significant investment risk. It consists of modes such as rehabilitate, operate, and transfer (ROT), rehabilitate, lease or rent, and transfer (RLT), build, rehabilitate, operate, and transfer (BROT). Table 1 illustrates that 57 out of 96 projects opted for Greenfield mechanism in all the sectors. Two sectors with high utilization of the Greenfield technique are energy and transportation.

Table 2 highlights the total investment of the projects according to sectors. Energy and transportation sectors were high investment projects compared to others during the period. Due to the high investment nature, both projects were suitable for BOT mechanism, whereby the Government awarded the concession to the private entity to build and operate the facilities.

TABLE 1
Total number of project and privatisation mechanism in Malaysia from 1990 to 2008

Sector	Concession	Divestiture	Greenfield project	Management and lease contract	Total
Energy	0	4	22	0	26
Telecom	0	1	6	0	7
Transport	18	1	27	1	47
Water and sewerage	11	1	2	2	16
Total	29	7	57	3	96

Source: Private Participation in Infrastructure Projects Database of the World Bank, <<http://ppi.worldbank.org>>, retrieved on 20/11/2009.

TABLE 2
Total investment in projects according to type and primary sector (US \$ million) in Malaysia from 1990 to 2008

Sector	Concession	Divestiture	Greenfield project	Management and lease contract	Total
Energy	0	3,805	10,508	0	14,313
Telecom	0	2,469	7,127	0	9,596
Transport	3,626	130	12,796	0	16,552
Water and sewerage	9,422	16	706	0	10,144
Total	13,048	6,420	31,136	0	50,605

Source: Private Participation in Infrastructure Projects Database of the World Bank, <<http://ppi.worldbank.org>>, retrieved on 20/11/2009.

In the course of operation, the private entity may recoup the expenditure incurred by collecting tolls or fees from the end users. After the expiration of the concession period, the project will be returned back to the Government.

A decade after the beginning of privatisation was marked by the emergence of the capital market which consisted of conventional and Islamic capital market (Ruzian & Norilawati, 2009). Both the capital markets facilitate privatisation and infrastructure projects by the issuance of bonds, equity financing securities and Islamic securities. The Islamic capital market products provide long-term fund raising and investment.

DEFINITION OF THE ISLAMIC BOT FINANCING CONTRACT

Islamic BOT financing is a new type of contract in contemporary Islamic law (Counsel of International Islamic Fiqh Academy, 2009). It resulted from the needs for modern infrastructure development. The contractual structures of BOT financing include concession, construction, operation, and management. Although the financing of BOT is new to Islamic law, the specific contracts used in the structure are common to the Islamic principles of *muamalat* (Islamic transactions).

In determining the *Shariah* compliance of Islamic BOT financing contract, the contractual framework must satisfy the elements of a valid contract, including the offeror and offeree, the pillars of *ijab* (offer) and *qabul* (acceptance), the subject matter of the contract and consideration (Mohd Daud Bakar & Engku Rabiah Adawiah, 2008). Once *ijab* and *qabul* are performed, the contracting parties are bound by the contract.

A legitimate contract in *Shariah* needs three essential conditions. Firstly, the object of the contract is *m'Él mutaqawwam* (property that is permissible in Islam), which must also be within the means to possess (*hiyazah*) during the contract, except in certain exceptional circumstances. Therefore, it is not allowed to sell the property that is not yet acquired (Article 127, The Mejlle, 2001). An example for this

would be selling fish in the sea. In addition, the object must be precisely determined in terms of its essence, quality, and value. The object must be free from any encumbrances, like the property is not in pledge and free from any oppression, fraud, and misrepresentation (Muhammad Ayub, 2007).

Secondly, the contract must not contain any components of *riba* (interest), *gharar* (uncertainty) and *maysir* (gambling). In the context of financial transaction, *riba* technically refers to the "premium" that the borrower is obliged to pay to the lender, together with the principal amount, as a requirement for the loan or for an extension in the duration of the loan (Zamir Iqbal & Abbas Mirakhor, 2007). The researchers outlined four characteristics of the prohibited interest rate, which include a positive and fixed *ex-ante*, the premium is tied to the time period and amount of the loan, its payment is guaranteed in spite of the outcome, or the objectives for which the principal was borrowed, and the state apparatus sanctions and enforces its collection.

Thirdly, the object should exist at the time of contract for possession (*milkiyyah*). The subject matter of the contract is deliverable at the time of the conclusion of the contract. This is evidenced by the *hadith* which states that the Holy Prophet (SAW) was reported to have said that, "He who buys foodstuff should not sell it until he has taken possession of it" (Zamir Iqbal & Abbas Mirakhor, 2007). It is reported that the companion Hakim ibn Hizam had bought some commodities during the reign of Umar ibn al-Khattab and intended to sell them to others. Umar ordered him not to sell the commodities before taking their possession. Zayd ibn Thabit, Abdullah ibn Umar and Abdullah ibnu Abbas held the same view as that of Umar. However, the contract is allowed despite the fact that the subject matter of the contract does not exist at the time of contract, in exception to the contract of *salam* (deferred contract) and *istisna'* (manufacturing contract).

In addition, the contracts shall satisfy the *maqasid al shariah* (i.e. objectives of the shariah) by fulfilling the needs of the community

in providing utilities and welfare for individuals and the community. This is not the requirement for the validity of a contract but rather a compliment to the execution of a valid contract. To illustrate the point, among the benefits of BOT to the community are the constructions of bridges, highways, hospitals, and schools. A BOT structure reduces the financial burden on the state, and the state can theoretically concentrate on poverty eradication programmes. BOT projects increase the capital development in legitimate ways by providing civil projects to the private and public sectors. In a way, it provides the necessary expertise and qualifies the local communities in construction works and maintenance services to allow them to be independent in their future works.

TYPES OF ISLAMIC BOT FINANCING CONTRACT

In the early development of Islamic capital market, Islamic securities with sale based features were widely issued in the Malaysian capital market. Both BOT projects and sale based features of the Islamic securities shared the same character of long term financing, fixed return and staggered payment. The Islamic Securities Guideline in 2004 has changed the landscape of the *Sukuk* market in Malaysia, with many kinds of *sukuk* based on sale, equity, partnership and lease emerged. Some examples of the *Sukuk* issued to finance BOT projects are *Sukuk Istisna'*, *Murabahah*, *Ijarah* and *Musharakah*.

THE SALE BASED FINANCING IN BOT PROJECT

The financing of BOT is normally achieved in a form of syndicated financing, joined by a number of banks and financial institutions. These syndicated financing is also made securitizable for the consumption of a wider base of investors, institutional or otherwise. Studies on the Islamic project financing in Malaysia have shown the tendency of the banks and financial institutions involved to prefer the sale-based

mode of financing over other mode of financing (Engku Rabiah Adawiah, 2003). This is due to the general rule that the sale-based mode of financing can contractually guarantee a fixed flow of income to the financiers and investors. Other modes of financing, particularly the equity-based financing, are perceived as having or imposing a higher risk portfolio due to its inability to contractually guarantee neither profit nor capital.

The Islamic sale-based *Sukuk* is applied in financing the BOT project in the form of *al bay' bithaman ajil* (the sale of deferred payment), *murabahah* (the sale by mark up) and *istisna'* (the manufacturing contracts). This is due to the nature of the BOT projects that require sizeable funding and long concession periods. Hence, divisible and tradable financial instruments are needed. Since the financing is *shariah* compliant, it must observe the prohibitions and hindrance of valid Islamic contracts.

Bay' Bithaman Ajil Islamic Debt Securities (BaIDS)

The Islamic Securities Guidelines 2004 are defined *bay' bithaman ajil* (BBA) (sale of deferred payment) as:

A contract that refers to the sale and purchase transactions for the financing of an asset on a deferred and an instalment basis with a pre-agreed payment period. The sale price will include a profit margin.

The above definition shows three important elements of BBA; namely, the sale and purchase transaction, deferred payment in the form of instalments with a pre-agreed payment period, and the sale price inclusive of profit margin.

In practice, the mechanisms for BaIDS issuance are two layered. First, the creation of indebtedness in the form of contemporaneous buying and selling with deferred payment between the issuer and the financiers. Second, the issuer's debt arising out of the previous transactions will be securitized via the issuance

of primary and secondary notes for BaIDS. The primary note (PN) represents the capital, while the secondary notes (SN) are the profit component. In qualifying the PN and SN to be tradable, the debt must be supported by an underlying asset (Saiful Azhar Rosly, 2008). In relation to BOT projects, the underlying asset is the concession right and revenue stream of the project.

Financing of BOT projects through issuance of BaIDS involves the following processes. The issuer will first identify the asset to be used in the financing. The asset must be *Shariah* compliant and free from any encumbrances for a valid sale. In the context of the BOT project, the asset is in the form of concession right. The Resolution of the *Shariah* Advisory Council of the Securities Commission has decided that “all contracts awarded by the government, i.e. concession, construction, supply and services contracts, are accepted as approved underlying assets for structuring Islamic securities. The same principle can also be applied to contracts awarded by state governments, government agencies and government related companies.” The decision of the SAC was said to be based on the analogy with the concept of *iqta'* (government award), which was an approved practice in Islamic law.

The issuer then sells the asset to the primary subscribers at a price which is comparable to the issuer’s financing needs. The BaIDS is normally sold by way of private placement with a known or identified buyer (subscriber). The asset is then sold to the primary subscriber for cash proceeds (purchase price). Immediately thereafter, the primary subscribers sell the asset back to the issuer, on deferred payment basis

(BBA) with a mark up. The deferred price (or sale price) is a debt owed by the issuer to the primary subscribers to evidence the debt owed in the deferred sale price (BBA). The issuer issues BaIDS to the financiers to evidence the debt obligation created in the second sale and purchase contract. These BaIDS are also known as *shahadah al dayn* (debt certificate), and are tradable at the secondary market. The primary subscriber may then trade the BaIDS on the secondary market based on the permission of *bay' al dayn* (debt trading) (Securities Commission, 2006). The financiers will then pay the proceeds of the sale of bonds to the issuer, as the payment of the financiers’ purchase price in the first asset purchase agreement. The issuer pays the debt obligation arising in the second asset sale agreement (comprising of the purchase price and the financiers’ mark-up) on an instalment basis over an agreed period, which is normally long-term in nature (beyond one year).

Table 3 shows that the issuance of BaIDS involved in the development of airport and highways via BOT financing. Many of the highway projects opted for the issuance of BaIDS due to its long-term financing and guaranteed fixed of income to the financier and the investors.

Murabahah Notes Issuance Facility (MUNIF)/ Islamic Medium Term Notes MTN

The Islamic Securities Guideline 2004 explained *murabahah* (sale with mark up) as a contract that refers to the sale and purchase transaction for the financing of an asset, whereby the cost and profit margin (mark-up) are made known and agreed

TABLE 3
Lists of BOT Projects and Issuance of BaIDS

Project	Amount
Kuala Lumpur International Airport (KLIA)	RM2.2 Billion BaIDS
Cheras–Kajang Highway	RM210.0 Million BaIDS
Shah Alam Expressway	RM800.0 Million BaIDS
KL-Putrajaya Highway	RM380.0 Million BBA Medium Term Notes (BBA MTN)
New Pantai Expressway	RM740.0 Million BaIDS
Western KL Traffic Dispersal Scheme	RM510.0 Million BaIDS

by all parties involved. The settlement for the purchase can be either on a deferred lump sum basis or on an instalment basis, which is specified in the agreement.

The above definition explains that *murabahah* is a kind of sale and purchase of an asset with profit and deferred in payment either lump sum or by instalments. The differences between *murabahah* and BBA are the cost and mark up price must be made known to the involved parties. This is because *murabahah* is a category of *bay' al amanah* (trust sale).

In terms of *modus operandi*, both BBA and *murabahah* securities share similar features. The only difference is in the term of tenor and mode of payment of financing. The industry applies BBA financing for long-term financing with instalments payments, while *murabahah* financing is used for medium- and short-term financing needs with short- or medium-term maturity with bullet or lump sum payment. The classification is purely based on industry driven and not due to any *Shariah* requirement. Both the products are popular due to their ability to contractually guarantee a fixed flow of return to the financier, by virtue of the debt obligation created by the deferred payment mode, plus the mark-up. The risks to the financiers are also practically low because of the immediate sequence of the purchase and sale contracts entered into by the parties. Since the financiers own the property very shortly during the transaction, the risks attributed to ownership of the property are practically almost non-existent.

The issuance process of MUNIF resembles BBA structure with a few modifications. The transaction begins with the issuer identifying an asset to be sold to the primary subscriber. The identified asset is then tendered by the issuer to a group of tender panel members (TPM). The aim of the tendering process is to allow for a best purchase price for the tendered asset. The tender sale is based on the *Shariah* principle of *bay' muzayadah*. According to the Resolutions of the Securities Commission *Shariah* Advisory Council, *bay' muzayadah* is the offering of goods in a market by a seller with a number of interested buyers who compete to offer the

highest price. The sale is permissible based on *athar* of the Companions of the Prophet and the opinions of the past jurists.

The tendering process is either with or without underwriting. If the tender is underwritten, the underwriter will buy the asset at the underwriting price, if there is no other higher bidder. The role of the underwriter is to secure a minimum price for the asset, particularly when the issuer is not confident of getting the targeted price during the tendering process.

The successful tender panel member will buy the asset from the issuer for the agreed purchase price. Immediately thereafter, the buyer will sell the asset back to the issuer for a sale price that is an informed mark up (*murabahah*) and on a deferred payment basis (*Bai Bithaman Ajil*, BBA) at an agreed maturity date. The issuer will then issue the *murabahah* notes (MUNIF) as an evidence of the marked up and deferred sale price. This creates a debt obligation (indebtedness) between the issuer and the successful tender panel cum primary subscriber. These notes are tradable at the secondary market based on debt trading.

Another type of *murabahah* security is the Islamic commercial paper (CP) and or Islamic medium term notes (MTN). The MCP includes short-term issuance with maturity ranging from 14 days to 12 months. It is structured with multiple draw-downs within the agreed 'ceiling' of financing amount that can be 'revolving'. For instance, the maximum financing amount for the MCP is RM200 million. The issuer may issue smaller amounts in a number of draw-downs as long as the total does not exceed the ceiling of RM200 million. The available financing amount will be adjusted accordingly upon the maturity and payment of the debts owed to offer the revolving feature to the MCP structure.

The tendering process is conducted at every draw-down in the MCP programme. The successful tender panel member (investor) will then buy the asset at the agreed purchase price. Cash payment shall be made to the issuer for the asset purchase price. Immediately thereafter, the underlying asset is resold to the issuer by the tender panel member cum investor at a mark-up

price. The MCPs are then issued to the investor to prove the obligation to pay the sale price based on the agreed tenure between 14 days to 12 months. The issuer will arrange payments for the asset sale price within the deferred period as stated in the MCPs.

The tender process and the issuance of the MCPs are completed through Fully Automated System for Tendering (FAST), which is electronically operated by Bank Negara Malaysia. The transactions are facilitated by Facility Agent with appointed trustee acting for the benefit of the MCP holders based on the terms of the Trust Deed of the MCPs.

Table 4 illustrates that there are two highways via BOT financing which have issued MUNIF. Both the projects have issued BaIDS for their long-term financing and MUNIF for short-term financing.

Sukuk Istisna' in BOT Project

Istisna' is defined in the Islamic Securities Guidelines 2004 as a purchase contract of an asset whereby a buyer will place an order to purchase the asset which will be delivered in the future. In other words, the buyer will require a seller or a contractor to deliver or construct the asset that will be completed in the future according to the specifications given in the sale and purchase contract. Both parties of the contract will decide on the sale and purchase prices as they wish and the settlement can be delayed or arranged based on the schedule of the work completed.

The definition describes that *istisna'* is a classification of purchase order contract. In this contract, the buyer ordered the seller to manufacture or to construct an asset according to the specification agreed in the sale and purchase

agreement. The price of the ordered asset will be decided by the parties to the contract. The payment can be made during the contract or delayed or arranged according to the schedule of the work progress.

Bay'al istisna' is a sale based on an order to construct or to manufacture an asset according to the specifications agreed on and the materials provided by the contractor/manufacturer (Nazih Hammad). *Bay'al istisna'* is an exception to the general *Shariah* principles that the subject matter of the contract must exist at the time of the formation of the contract. The majority of the jurists, such as the Hanafis, Shafis and Malikis, allowed the sale of non-existent assets due to the *hajat* (need) of the people for such forward and manufacture contracts.

In practice, *sukuk istisna'* represents two situations; namely, *sukuk* that represents the *istisna'* sale price and *sukuk* that represents the *istisna'* asset. The *sukuk istisna'* issued in Malaysia represents the deferred sale prices. In other words, they are debt-based *sukuk*. In term of the transaction structure, there is no basic transaction structure for the *sukuk istisna'*. This is due to the fact that *sukuk istisna'* in Malaysia has evolved from one model to the another based on the market familiarisation and experimentation with the concept and features of *istisna'* arrangement.

**LEBUHRAYA KAJANG-SEREMBAN
(LEKAS) RM1,453.0 MILLION
SUKUK ISTISNA'**

The LEKAS project has secured a tranche of RM1,453.0 million *sukuk istisna'*. In this transaction, the issuer is LEKAS Sdn. Bhd., while the primary subscribers are Am investment Bank for Senior *istisna'* and Bank Pembangunan

TABLE 4
Lists of the BOT projects and Issuance of MUNIF

Project	Amount
Shah Alam Expressway	RM100.0 Million MUNIF/IMTNs
KL-Putrajaya Highway	RM80.0 Million <i>Murabahah</i> Commercial Paper (MCP)

Malaysia Berhad (BPMB) for Junior *istisna'* that entered into parallel *istisna'* arrangement. Firstly, the issuer enters into a Sale Agreement with the primary subscribers, whereby the latter agreed to construct and deliver the identified assets to the former, in consideration of the *istisna'* sale price. The *istisna'* sale price was inclusive of profits to the primary subscribers, cum seller, and would be paid on deferred payment terms according to an agreed payment schedule. The *sukuk istisna'* was issued to the primary subscribers so as to prove the issuer's obligation for the deferred *istisna'* sale price. The *suku istisna'* structure consisted of senior and junior *sukuk*.

Then, the issuer entered into *istisna'* Purchase Agreement with the primary subscribers, where the former agreed to construct and to deliver the identified assets to the latter in consideration of the *istisna'* purchase price. The *istisna'* purchase price would form the *sukuk* issuance proceeds. The identified assets in both of the *istisna'* agreements were the Kajang-Seremban Highway to be construed pursuant to the relevant concession agreements.

THE PARTNERSHIP-BASED FINANCING OF BOT PROJECTS

The partnership-based financing of the BOT projects utilized two main contracts, namely, the *murabahah* (profit sharing contract) and the *musharakah* (partnership contract).

Sukuk Mudarabah

The Islamic Securities Guidelines 2004 considered *mudarabah* as a contract which is made between two parties to finance a business venture. The parties are a *rabb al mal* or an investor who solely provides the capital and a *mudarib* or an entrepreneur who solely manages the project. If the venture is profitable, the profit will be distributed based on pre-agreed ratio. In the event of a business loss, the loss shall be borne solely by the provider of the capital.

The Islamic Securities Guideline provides a detailed explanation on the issuance process of

sukuk mudarabah. The contract of *mudarabah* is a joint venture which involves *rabb al mal* (investor) and *mudarib* (an entrepreneur) who will manage the project. The profit of the business venture will be distributed according to the pre-agreed ratio. The loss shall be borne solely by the capital provider. Nevertheless, if the loss is due to the *mudarib's* negligence, the *mudarib* shall be liable for the amount of the *mudrabah* capital.

In the transaction structure, the issuer will first call for the investors to participate in the *mudarabah* contract. The issuer will act as the manager or *mudarib*, and the investors will be the capital provider or the *rabb al mal*. The *mudrabah sukuk* is issued by the issuer to prove the proportionate capital contribution by the investors (*rabb al mal*) to the *mudrabah* and their subsequent rights in the *mudarabah* project or the investment activities.

The issuer, as a *mudarib*, will then invest the *mudarabah* capital into an agreed project. Normally, the *mudarabah* project has already identified project cash flow, and this allows the issuer to indicate an expected rate of profit to the investors upon initial issuance of the *sukuk mudarabah*. The expected rate of profit should be calculated based on a pre-agreed profit sharing ratio that is tentatively applied to the projected return of the project.

Once the project starts to generate profit, the issuer will apply the profit sharing ratio and pay the profit share of the investors as a periodic coupon distribution, which is normally at the expected profit rate. However, if the project suffers a loss, it will be borne by the investors, except when the loss is caused by the negligence of the mismanagement of the *mudarib*.

Sukuk mudarabah are conceptually equity-based and not debt instruments. The *mudarabah sukuk* represents the *sukuk* holder's proportionate rights over the *mudarabah* project and the revenue. Accordingly, the secondary trading of the *mudarabah sukuk* on the secondary market is not generally a sale of debt (unless it can be shown that the *mudarabah* project has been liquidated and its entire assets are in the form of cash or receivables).

It is important to note that guarantee is not permissible to the capital or the profit in a *sukuk mudarabah* transaction. This is due to the fact that the *mudarib* is considered as the manager and *amin* (trustee) of the *mudarabah* fund and its project. Therefore, the *mudarib* is not to be made responsible for losses, unless it is due to negligence, mismanagement and dishonesty that have led to losses. However, an independent third party is permissible to give guarantee to preserve the *mudarabah* capital. The Lebuhraya Kemuning–Shah Alam (LKSA) has secured a tranche of RM 415.0 Million *sukuk Mudarabah*. LKSA links the existing Shah Alam Expressway's (KESAS) Kemuning interchange to Shah Alam in the State of Selangor. This is pursuant to a 40 year Concession Agreement (CA) between PLSA and the Government of Malaysia, dated 27 November 2006. Projek Lintasan Shah Alam Sdn. Bhd. (PLSA) is a company that was incorporated to undertake the design, construction management, operation, and maintenance of the PLSA.

Sukuk Musharakah

The Islamic Securities Guidelines 2004 defined *musharakah* as a partnership arrangement between two or more parties to finance a business venture, whereby all parties contribute capital that can be either in the form of cash or in kind for the purpose of financing the business venture. Any profit that is derived from the venture will be distributed based on a pre-agreed profit-sharing ratio but a loss will be shared on the basis of equity participation.

The definition clearly shows that *musharakah* is a kind of partnership between two or more parties. It is a business venture which requires all the parties to contribute their capital, which is either in cash or in kind. The profit that derived from the business partnership is divided based on a pre-agreed profit sharing ratio. However, the loss will be divided based on equity contribution of the parties.

Maju Expressway Sdn. Bhd. (MESB) has issued Islamic medium term notes (IMTNs) issuance programme under the principle of

Musharakah. The *Sukuk Musharakah* financing is RM550 million. Under the *Musharakah* structure, the investors shall form a *Musharakah* among themselves to invest in a venture, which is the *Musharakah* Asset, under the Concession Agreement granted by the Government of Malaysia to MESB pursuant to the Concession Agreement (collectively, the Trust Asset). The rights of the *Musharakah* Assets under the venture are subject to the assignment of the Concession as security for the existing financing facilities of MESB. MESB shall make a declaration of trust over the *Musharakah* Assets for the benefit of the Investors. MESB will then issue trust certificates (the IMTNs) to the investors. The IMTNs shall entitle the investors to the undivided proportionate share of beneficial ownership in the venture. In addition, the investors will also be entitled to the income that will be generated from the Trust Asset throughout the tenure of the *Musharakah* and/or proceeds from the sale of the Trust Assets in proportion to the nominal value in the venture and the rights of the investors against the issuer under the Purchase Undertaking.

The strengths of the project are satisfactory traffic growth since operation commencement supported by improved public awareness on highway, back-loaded debt service structure, and available cash that provides cushion for revenue shortfalls in the early years, moderate reliance on traffic growth to maintain future compliance with minimum FSCR, as well as moderate government support for the concession evidenced by grants and termination payments payable by the government in the event of termination of concession. The challenges faced by the project are optimistic bias in toll road traffic forecast, and event risk arising from renegotiation of the concession agreement (MARCB, 2010).

Accordingly, Konsortium Lebuhraya Utara–Timur (KL) (KESTURI) has issued RM820 Million IMTNs in nominal value under the Shariah principle of *Musharakah*. The investors of each tranche of IMTN (*Musharakah* Partners) shall form a *Musharakah* amongst themselves,

and shall enter into a venture (Venture) as a part of the financing arrangement.

The strengths of the project are the high proportion of commuter traffic on expressway which is less sensitive to economic conditions, strategically linked to a network of major roadways, and back-ended amortisation schedule of the notes that accommodates slower traffic ramp-up. Meanwhile, the challenges of the project are lower than the forecast traffic flow and public resistance to toll hikes (MARCB, 2010).

Majlis Ugama Islam Singapura (MUIS) SD35m Sukuk Musharakah is another interesting instance of *sukuk musharakah*. In this transaction, MUIS acted as the issuer. MUIS wanted to raise money to invest in a prime property (office and shopping complex) as parts of its *waqf* development project. Most of the capital was contributed by the investors. MUIS's capital contribution came from the *waqf* fund that it was administering. MUIS issued the *musharakah sukuk* to the investors to evidence their proportionate capital contributions to the *musharakah* and any subsequent asset/s acquired by it. The *musharakah* capital was used to acquire a prime property in Singapore. The property was then leased out for 5 years. To enhance the structure, the lease rental was guaranteed by a third party. The lease rental payments would be shared between MUIS and the investors at the ratio of 26.5:73.5 that was translated into 3.5% rate of return to the investors. MUIS, on behalf of the *waqf*, would gradually buy out the investor's share in the *musharakah* by redeeming the *sukuk* according to the agreed schedule. The source of the payment for the redemption came from the *waqf* income which was from the share of the rental as well as other sources. At the end of the *sukuk* tenure, the *waqf* would own the property in the name of MUIS as the *waqf* administrator. In the MUIS transaction, the *musharakah* venture was backed by acquisition of real estate that generated lease rental income for the investors. The real estate was later fully acquired by the issuer through the *sukuk* redemption.

THE LEASE-BASED FINANCING OF BOT PROJECT

Ijarah is defined in the Islamic Securities Guidelines 2004 as a *manfa'ah* (usufruct) type of contract, whereby a lessor (owner) leases out an asset or an equipment to its client at an agreed rental fee and a pre-determined lease period upon the *aqad* (contract). The ownership of the leased equipment remains in the hands of the lessor.

Leased-based financing features contract of usufruct between the lessor (the owners) and the lessee (the client). The owner leased out an asset or an equipment to its client based on an agreed rental fee. The period of lease was pre-determined upon the contract signed. However, the ownership of the leased asset remains with the owner.

Lebuhraya Kemuning-Shah Alam RM 330 million *Sukuk Ijarah* is a good example of the BOT project which utilises the Islamic financing principles from the formation of the partnership until the operation of the completed project. In operating the toll-road business, Projek Lintasan Shah Alam Sdn. Bhd. (PLSA) as the *mudarib* has invited other investors, namely the *Sukuk Ijarah* holders (the lessors) to participate in the construction and development of the LKSA (the Project).

Due to its significance as point of reference, the BOT and privatization case of Zam Zam Tower in Mecca is cited here in addition to the preceding Malaysian cases. *Sukuk Intifa'* is a certificate or a deed that entitles its holder the right to utilize a specific real estate property for a specific duration of time per year over a determined number of years. This right is wholly owned by the *Sukuk* holder who is entitled to sell, grant, inherit or invest the *sukuk*.

Zam Zam Tower *Sukuk Intifa'* involved the development of one of the apartment towers near the Grand Mosque in Makkah. In this transaction, a construction and real estate company by the name of Munshaat had been awarded with a 24 year lease to construct one of the six towers (Zam Zam Tower) on the *waqf* land adjacent to the Grand Mosque in Makkah. The *sukuk* issuance was for the purpose of financing the construction cost of the said tower.

In this transaction, the developer, Munshaat, was granted with a 24 year lease over the *waqf* land. The sukuk issuance was to finance the construction which was achieved via the '*ijarah mawsufah fi dhimmah*' (forward lease' contract). Under the forward lease, Munshaat leased the asset under the construction to the *sukuk* holders for 22 years, who paid the lease rental in advance in one lump sum. The *sukuk* holders would enjoy the *intifa'* (usufruct) of the asset after its construction based on time-sharing slots due to the restriction on the ownership of non-Saudis of real property rights in Makkah. The time sharing rights under the forward lease were evidenced by the issuance of *sukuk intifa'*. The advance lease rental (*sukuk* proceed) was used by Munshaat to pay for the 24 year lease rental on the *waqf*, as well as the construction costs of the Zam Zam Tower.

The interesting part of *sukuk intifa'* is the recognition of a new asset class upon which the *sukuk* are based. This new asset class is in the category of *manfa'ah* (usufruct). The *sukuk* holder holds the right to benefit or *haq al intifa'* (enjoyment) in the form of time-sharing in the use of a common property. These *sukuk* are fully negotiable, which means they can be sold, leased, lent, given, bequeathed, exchanged, and delayed subject to certain conditions. The investors participate by purchasing the *sukuk* and paying their value in advance, plus the payment of annual charges for maintenance and managerial services.

THE STRENGTHS AND WEAKNESSES OF THE ISLAMIC BOT FINANCING CONTRACTS

The Sale-based Financing Has a Fixed Return with a Deferred Payment Mechanism

The sale-based financing in the BOT project has utilised the Islamic principles of *bay' bithaman ajil*, *murabahah* and *istisna'*. The BaIDs, MUNIF/CP and Sukuk *istisna'* share the financing structure of *bay' al inah* (sales of buy back) with the features of sale price with a mark up and a deferred payment. Sale-based *sukuk* is more popular to the Project Company

of BOT due to its fixed return and deferred payment mechanism. BaIDs are issued to meet the long-term nature of the BOT projects which last from 20 to 60 years of concession. In contrast, MUNIF/CP is issued to meet the short-term financing which is between 12 months to 15 years.

The preceding instances showed that all the sale-based *sukuk* are issued to finance public facilities like airport and highways. At the same time, BOT projects depend on the revenue stream for the repayment of its expenditure during the construction and other commitments. The fixed return feature of the sale-based *sukuk* influences the toll collection mechanism which will indirectly burden the end users. It is submitted that partnership mechanism is encouraged to overcome the said constraints.

Although sale-based financing has benefited the BOT projects and the Malaysian Islamic capital market, it faces many constraints like the use of controversial principles. The adoption of *Bay' Inah* structures in the sale-based *sukuk* and the application of *bay' al dayn* in trading the *sukuk* in the secondary market are unacceptable to the global market. As a result, the *sukuk* is not competitive in the global world.

The Partnership-based Financing Are Equity Financing and Business Venture Between Parties

Sukuk Mudarabah and *Musharakah* are equity based. Both *sukuk* involve business venture between the parties. The *Mudarabah* Venture involves a business venture between the *rabb al mal* (investors) and *mudarib* (entrepreneur). Accordingly, *Mudarakah* Venture is a business venture among the investors and may include more than two parties. The LKSA has utilised the *Mudarabah* Venture to finance the construction of its highway. It is submitted that the *Mudarabah* structure is suitable for BOT projects. PLSA as the Project Company cum *Mudarib* contribute their expertise in completing the project. The investors cum *rabb al mal* cum *sukuk* holders provide the capital for the construction of the project. The profits are distributed according to

the agreed profit ratio between the parties. The investors in the *Mudarabah* Venture will bear the loss in the event of a business loss. Nevertheless, the *mudarib* shall be liable if the loss is due to the *mudarib* negligence.

As indicated the *Musharakah* Venture involves the partnership among the investors. The advantage of the *Musharakah* Venture is that the loss of the Venture shall be borne among the investors in proportion of their respective interests in the *sukuk* and limited to each holder's respective capital contribution under the *Musharakah* capital.

It is submitted that both the structures are suitable to finance the BOT projects due to their nature of business venture. Accordingly, their profit sharing and distribution of loss mechanism ensure the smooth running of a particular project.

The Lease-based Sukuk Utilized the Beneficial Interest of an Asset

The lease-based *sukuk* is essentially unique due to the nature of the lease that exploits the beneficial interest of an asset. Hence, even if the project is still under construction, the beneficial right is utilised using the forward lease principle. In the LKSA project, for instance, PLSA as the *Mudarib* in LKSA project has invited investors, namely the *Sukuk Ijarah* holders (the Lessors), to participate in the construction and development of the LKSA project. The periodic rental is paid to the Lessors beginning from the construction stage based on the principle of *Ijarah Mawsufah fi Zimmah* (Forward Lease) and is considered as a partial payment/forward lease on the aggregate rental under the *Ijarah* Agreement. Accordingly, future rental payments under the agreed rental schedule will be reduced. It is observed that the principle of forward lease should be adopted in the BOT project. The mechanism can avoid the increase of toll fees to the end users and accordingly reduce the fees until it reaches a nominal value. The second interesting *sukuk ijarah* is *sukuk intifa'*, which is based on time sharing. The issuance of the *sukuk* has benefited from the principle of forward lease. The *sukuk*

has also identified a new class of asset, namely time-sharing, in the use of a common property.

CONCLUSION

It has been demonstrated that financing BOT projects using Islamic principle is quite widely in practiced albeit in its various forms. The purpose of using the Islamic principles is that the Islamic financing structure is certain and transparent. The analysis on the Islamic BOT financing contracts revealed that sale-based financing is more popular to the Project Company of BOT in Malaysia due to its fixed return and deferred payment mechanism. Nevertheless, the sale-based financing still faces various constraints like using controversial principles of *Bay' Inah* structures in the sale-based *sukuk* and the application of *bay' al dayn* in trading the *sukuk* in the secondary market. Both the principles are not acceptable in the global market. As a result, the *sukuk* are not competitive in the global world. On the other hand, the *mudarabah* and *musharakah* contracts provide alternatives to the project Company since both the structures are in the form of business venture. Accordingly, their profit sharing and distribution of loss mechanism ensure the smooth running of a particular project. Finally, the lease-based financing exploits the beneficial interest of an asset. Hence, even if the project is still under construction, the beneficial right is utilised using the forward lease principle.

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Corporate Social Responsibility to Employees: Considering Common Law Vis-à-vis Islamic Law Principles

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ABSTRACT

Corporate Social Responsibility (CSR) is a Western concept. It basically advocates that the corporation, a juridical person, has a great impact on modern society, whereby it engages itself in economic activities, makes profits and contributes to national economy by paying taxes, employing human persons, and meeting people's needs by producing products and providing services. On top of everything, however, its prime objective is to earn profits for the shareholders. Scholars argue that along with this objective, the corporation owes responsibilities to other stakeholders, such as the creditors, employees, consumers, environment and the community as a whole. In other words, profits should not be its sole target; it should take care of the interests of other stakeholders. Islamic scholars have found the concept coincides well with *Shari'ah* in general, as it holds some reservations with respect to particular issues. This paper considers CSR owed to employees from a comparative view point, i.e. common law versus Islamic law.

Keywords: Corporate personality, corporate social responsibility, CSR, employers' obligations, Islamic law, and *Maslahah* (public interest)

INTRODUCTION

In the present world, corporations have emerged, both nationally and internationally, as humongous economic powers. There are many multinational corporations (MNCs) whose annual income surpasses the combined gross domestic products (GDP) of a significant number of less developed countries (LDCs) (Bantekas, 2004). Corporate affairs, therefore, matter for the society. They (corporations) may not pay the employees and workers well, or provide them with a good working environment. They may manufacture products which are unwholesome and thus, are not good for the consumers. Moreover, they may pollute the environment in the process of manufacturing their products,

which, in turn, may injure the people and other beings. In this vein, corporations, in one way or other, affect the interests of various stakeholders. As such, they are not merely economic entities that are devoted to the shareholders' interest of maximisation of profits. Rather, they are social organisations which owe responsibilities to all stakeholders and the society as a whole (CSR) (Sheikh, 1996).

How does Islam perceive the concept of CSR? Does the Islamic conception agree well with the traditional view? This article is an attempt to answer these questions, with a particular reference to employees, one of the important stakeholders. The reason behind this undertaking is to dispel the common misunderstanding that the Islamic law is

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antagonistic to the traditional laws. Both the Islamic law and the common law are two old legal systems with rich heritages. A comparison between them should be interesting to comparative lawyers and also to common readers.

The article starts with an overview of the theoretical perspectives of the West and Islam. In this respect, Dusuki's (2008) comparative research, i.e. "What does Islam Say about Corporate Social Responsibility?" has been of much assistance. In the same line of Dusuki, the present work briefly discusses different Western theories of CSR. With regards to the Islamic perspective, however, it differs from Dusuki's in approach. In particular, it considers the issue from *maslahah* (public interest) perspective. *Maslahah* is a subsidiary source of the Islamic jurisprudence which was developed by Imam Malik, the founder of the Maliki School of Law. Before embarking on discussing CSR, the article considers if corporate personality itself is Islamic or not. This query is important because Muslims, in general, and many scholars, in particular, are not interested in CSR. To them, the very concept of corporation is not Islamic (Zinkin & Williams, 2005). In fact, the concept of corporate personality is debatable. There are two schools of thought; one accepts it as Islamic and the other does not. The present authors argue that the corporation, from the *maslahah* viewpoint, is an Islamic concept and, hence, is CSR. This is followed by a theoretical discourse on *maslahah* and CSR. After that, the article compares the common law provisions of corporate obligations to employees with the Islamic law principles. Finally, the concluding section sums up the findings of the research.

THE CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY (CSR)

The Western scholars consider the concept of CSR from a number of theoretical perspectives. The firm theorists (classical theory) believe that people engage in business for their self-interest of profits. Adam Smith calls this an "invisible hand" (1776). Many of Smith's

followers maintain that profit maximization is the only corporate social responsibility. Milton Friedman is probably the most prominent of them. According to him, in a free-enterprise and private-property system, 'there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits' (Friedman, 1970). Beyond this, there is no other social responsibility for corporations because they are soulless artificial persons. Of course, individual members of the society, such as corporate executives, can have social responsibilities in the sense of spending their own money for the cause or benefits of his family, friends, club or society. They can do these in their personal or private capacity. Nevertheless, the corporate executives cannot spend the money of the stockholders for social services because being their agents, the former's responsibility is to make profits and profits only, and of course, staying within the bounds of law, social ethics and rules of game, i.e. the rules of open and free competition and without deception or fraud. However, with a partial change of his position later, Friedman acknowledges CSR as a corporate duty provided the CSR activities have bearing on the promotion of the company's financial interest, and '(w)ithout reciprocal interest, corporate responsibilities is not a sustainable idea' (cited in Sheikh, 1996).

In an almost similar tone to the firm theory, the advocates of the strategic CSR (a.k.a. instrumental theory) argue that there is no philanthropic responsibility for public corporations unless they receive financial benefits in return of their services to the society. Otherwise, that will affect the interests of the shareholders for whom the corporation should care in intimate relationships. However, philanthropic activities are appropriate for private firms and individuals (Lantos, 2001, 2002).

On contrary to the firm theory and the strategic theory, the managerialists (stakeholder theory) hold the view that a company owes responsibility to the society, albeit its main objective is to maximise profits. They also visualise that corporations are an economic

power competing with the modern State; in future, they are likely to even supersede it even (Berle & Means, 1932, as cited in Mizruchi, 2004). To them, the corporation is not merely a private business entity, but a social organisation that is responsible to a set of claimants including the shareholders, workers, consumers and the State. Its managers are in charge of rendering obligations to these claimants (Berle & Means, 1932 as cited in Sheikh, 1996). E. Merrick Dodd, the founder of this school, bases his argument on the managers' trusteeship relationship with the company. He also believes that the managers are not the trustees of the shareholders only; rather, they are the trustees of other stakeholders and the society as a whole (Dodd, 1932). For the first time, the American case of *AP Smith Mfg v. Barlow* (1953) seems to have endorsed Dodd's theory by upholding a company's proposed donations to the Princeton University as a part of its wider obligations to the society. Jacobs J. says that "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."

Like the managerialists, the proponents of social contract theory perceive that the corporation is tied to a relationship with the society, but in a different way through an implied contract as it exists between the citizens and the State. They further posit that the social contract binds the corporation and the society in a reciprocal bond of rights and responsibilities. The corporation needs resources from the society to subsist and prosper. At the same time, the society needs assistance from the corporation to solve its problems. The corporation should respond to the social needs as a duty of gratitude (Lantos, 2001). In return, corporations should participate in social service activities alongside other social institutions like family, educational and religious institutions (Lantos, 2001). Thus, corporations should not act only in commercial interest, but rather to fulfil the expectations of the society (Moir, 2001). If, however, it fails to meet the expectations, it will lose its image in the society. In that case, it will be difficult for it to survive. The concern for its survival creates

pressures on the corporation to carry out services to the society. This is known as the legitimacy theory (Dusuki, 2008).

The theories discussed above explain together the justifications of the West for corporations to be engaged in CSR activities. In short, they advocate that "firms engage in CSR to secure their 'license to operate' (legitimacy), whereby the firms are required to meet the interest and demand of the multiple stakeholder groups and honour both the explicit and implicit contracts with various constituents", which will bring them reputation and in turn viability and profitability in the market (Dusuki, 2008).

In order to attain the theoretical goals, CSR has been given legal recognition both nationally and internationally. For example, the English Companies Act 2006 has provided for the protection of stakeholders. Section 172 of the Act requires the directors, while working for the benefits of the shareholders, to have regard, amongst other matters, to the interest of the company's employees, the business relationships with suppliers, customers and others, and the company's operational impact on the community and environment. At the international plain, the Organization for Economic Co-operation and Development (OECD) is the most notable organisation that has adopted CSR Guidelines for multi-national enterprises (MNEs). Part II of the OECD Guidelines outlines that "Enterprises (MNEs) should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders." Following this, they specify a number of matters for the (MNEs) to take care of while operating in host countries. In particular, it asks the MNEs, among others, to:

1. Contribute to the economic, social and environmental progress with a view to achieve sustainable development.
2. Respect the human rights of those affected by their activities, in line with the host government's international obligations and commitments.
3. Encourage human capital formation, in particular, by creating employment

- opportunities and facilitating training opportunities for employees.
4. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.
 5. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
 6. Refrain from discriminatory or disciplinary action against employees who make *bona fide* reports to management or, as appropriate, to the competent public authorities on practices that contravene the law, the *Guidelines* or the enterprise's policies.

Thus, CSR is an established concept worldwide. Today, corporations are not only responsible to their shareholders; their responsibilities extend to others - "Stakeholders" - who include employees, customers, investors, suppliers, environment and the society as a whole (Bantekas, 2004).

CSR FROM THE ISLAMIC PERSPECTIVE

Is "corporation" an Islamic concept? The answer to this question is a precursor to CSR. There are two contending views on this issue. One school of *Ulama* (Islamic scholars) that includes, among others, Mufti Muhammad Taqi Usmani of Pakistan, holds the view that corporation is a juridical person. In the absence of any clear provision in the Qur'an or *Sunnah*, Mufti Usmani compares (analogical deduction called *qiyas*) company with a *waqf* (public endowment). The basic characteristic of a *waqf* is that people dedicate some properties for religious or charitable purpose divesting their ownership in them. Allah becomes the owner of the property. The beneficiaries of the *waqf* enjoy

the benefits which it has been created for. The *waqf* emerges as an entity that is separate from the donors. This institution, which is similar to a corporation, can make contracts, buy and sell properties and, sue and be sued (Usmani, 1999). The other school, namely the Mujlisul Ulama of South Africa, refutes the opinion and the arguments of Mufti Usmani in their book entitled, "*The Concept of Limited Liability-Untenable in the Shari'ah.*" Mujlisul Ulama maintains that Islam does not know any fictitious person; it recognises only natural persons. This is a classical view of the Islamic jurists. To this school, no one can be a person in law who does not have the capacity (*dhimmah*) to acquire rights and execute duties. It is the 'balance-sheet of a person showing his assets and liabilities, in terms of his rights and obligations' (Nyazee, 2002). It is true that in the strict sense, non-natural beings are not recognised as persons. In considering the necessity of the present day society, however, the State may introduce the concept of a juridical person (Nyazee, 2002). Corporations are a commonplace phenomenon in the present world. In the day-to-day life, they are conducting so many types of things, which need no mentioning. Similar to human persons, they hold properties, manufacture things, provide services, employ people, pay taxes to the government, sue others and are also sued by others. In other words, they hold various rights and obligations, which are the jurisprudential criteria for attributing legal personality to a being. Considering this fact, there can be no denial of juridical personality of corporations in Islam (Zahid, 2011).

As discussed above, a corporation can hold rights and obligations because it is a legal person. In other words, rights and obligations are the corollaries of corporate personality. In this sense, the phenomenon of CSR is one of those corollaries. Thus, one author attempted to establish CSR under international law "in the context of an emerging international legal personality for MNEs" (Bantekas, 2004). Now, the Islamic perception of CSR is being proffered in the following.

The Qur'an or *Sunnah* (doings, sayings and approvals of Prophet Muhammad) does not

specifically set out any provisions concerning CSR. It does not, however, mean that Islam does not have anything to do about it. The Qur'an is a "detailed account of everything" (Qur'an, 12: 111). It means the Qur'an has covered all matters of legislation, either by laying down specific provisions or by setting out general principles of law. Specific provisions are not many in the Qur'an. It (the Qur'an) has left a vast area open for human legislation by providing general guiding principles. For example, the Qur'an has legislated in detail on inheritance which is a phenomenon present in every time and society of human civilization. These provisions shall never change over time. There are, however, matters which may change over time and may call for new legislation, given the time, people and place. Regarding such matters, the Qur'an and *Sunnah* have laid down general principles of jurisprudence, which enable the Islamic lawmakers to adopt suitable laws to cater for the needs of the society. One of these general principles is *maslahah* (public interest), which was developed by Imam Malik, the founder of the Maliki School of Islamic jurisprudence. This principle advocates for legislation in the interest of the society where clear provisions of the Qur'an and *Sunnah* are absent. The authority for this principle lies the following Qur'anic verses, "Allah wants ease and comfort and not hardship" (2: 185); "God never intends to impose hardship upon you" (5: 6); "We have sent you (O Prophet Muhammad) but as a mercy for all creatures" (21: 107). Further support comes from the Prophet's saying, "No harm shall be inflicted or reciprocated in Islam" (Bin Hanbal). The whole message given in these words of Allah and His Messenger is that if something is good for the society, it may be adopted and legislated upon by the State, unless that is clearly forbidden by the Qur'an, or *Sunnah* or *Ijma'* (consensus of jurists). For example, for the survival and healthy development of human life, environmental and ecological protection is essential. In the absence of any direct legal provisions in the Qur'an or *Sunnah*, the government may pass laws in this regard. The sole purpose behind this approach of lawmaking

is to bring about benefit to and to prevent harm from people's lives.

Maslaha is of three categories, namely, *daririyat* (essentials), *haziyat* (needs), and *tahsiniyat* (embellishments). "Essentials" include five major interests, namely, religion, life, human intellect, family lineage and material wealth (Kamali, 2008). These are the most important types of *maslaha*. An Islamic State is obliged to preserve and protect these interests. "Preservation" is a positive step and "protection" is a negative step by the State. For example, for the well-being of the society, the State must provide a secure environment in which economic activities may take place. This will create material wealth and development for the people living in that State. Thus, the establishment of business organisations like corporations may be considered as "essential" for the public's interest. This is the "preservation" aspect of essentials. If the law related to the establishment and operation of company is violated, the State must punish the culprits so that the public interest of wealth creation is not hampered. This is the "protection" aspect of essentials.

The second category of *maslaha* (needs) include concessions granted to essentials so that the essentials remain in existence. For example, in order for wealth to circulate from the people's savings to company's business, the State may require large companies to have their securities to be listed on a stock exchange and traded in the secondary market. However, small companies cannot meet the requirements of listing. For this reason, they should not be prevented from trading because that will hinder the wealth creation process, which is one of the main public interests under the *Shari'ah*. According to the second category of *maslaha*, namely "needs," such small companies will be granted concession from listing and will be allowed to trade their securities in the "over the counter" market.

The third category of *Maslahah*, "embellishments," is subsidiary, but at the same time complementary, to "essentials." The accomplishment of the former helps the latter. For example, the State may encourage big companies to make (optional) charity to the

poor (which is an embellishment) so that they (the poor) may engage in business activities, maybe at a minimum level. This will solve unemployment problem, at least to some extent, and will help the economic development of the State. Thus, the three tiers of *maslahah* go hand in hand and together they may solve many problems to which the primary sources of *Shari'ah* do not have any direct answers, provided that they fulfil the following conditions:

1. There must be a need to secure a benefit or to prevent a harm of the people in general;
2. There must be no clear *hukm* (provision) in the Qur'an, *Sunnah* or *ijma'* (consensus of Islamic jurists in general), with regard to the act of securing the benefit or preventing the harm;
3. It must be essential to serve a *maslahah* (public interest), such as protection of religion, life, intellect, family lineage, and property;
4. The *maslahah* sought shall not conflict with any *Shari'ah* principle, such as any law legalizing interest (*riba*);
5. The *maslahah* shall be rational and acceptable to the people of sound mind;
6. This method shall not apply to the matters of worship (*ibadat*) (Kamali, 2003; Qadri, 1963).

As said earlier, the primary sources of *Shari'ah* are silent about CSR. In considering their role in various spheres of the modern society, such as investment, production, employment, wealth creation and national and international finance, corporations should be acknowledged to have CSR under the Islamic *Shari'ah* from the *maslahah* viewpoint. The sources of the Islamic law, even the primary sources alone, provide for social responsibility and social justice for human persons, both individual and collective. Those responsibilities may be extended to corporations by analogy. Corporations should be treated as social institutions, and as such are responsible, in addition to making profits, to take

care of the interests of the creditors, suppliers, employees, consumers and the society as a whole. In addition, they should also repay their loans scrupulously as Allah requires fulfilment of obligations (Qur'an, 5: 1). Prophet also underlines the matter when he says, in effect, that martyrdom washes off sins except the liability of loan (Muslim). Islam does not, however, tolerate interest-based transactions because through such transactions, the loaner makes economic gains without any risk, regardless of whether the loanee makes profits or losses (Qur'an, 2: 275). This is an economic injustice that Islam wants to stop (Usmani, 2001). This is why the Prophet made the following statement, "May Allah send down His curse on the one who devours *riba* and the one who pays it and on the two witnesses and on the person writing it" (Bin Hanbal). Second, corporations are responsible to the consumers by producing and supplying permissible and good things (*halalan toyyibah*) because such things only Islam allows for consumption; "O mankind! Eat of what is lawful and good on the earth..." (Qur'an, 2: 168). Thus, the production, marketing or selling of pork, wine/intoxicants, pornography, etc. are prohibited. To quote the Prophet, "Allah and His Messenger made illegal the trade of alcoholic liquors, dead animals, pigs, and idols" (Al-Bukhari). Corporations must also be fair in giving full measure and right weight; "And give full measure when you measure, and weigh with a just balance; this is better and fairer for your end" (Qur'an, 17: 35). Their failure in this respect renders them liable for fraud; "Woe to those who deal in fraud. Those who, when they have to receive by measure from men, exact full measure. But when they have to give measure or weight to men, give less than due. Do they not think that they will be called to account?" (Qur'an, 83: 1-4). Though these verses are concerned about weight and measure, they cover all aspects of duty to be just and fair to others (Shafi, 1998). Honest and fair trading is highly rewarded in Islam; "the honest, trustworthy merchant will be with the Prophets, siddeeqs (true believers) and martyrs (in Paradise) (Ibn Majah). Third, they must be just to their employees in terms

of payment and other facilities. The Prophet Muhammad says, “Allah has placed them (employees) under you. They are your brothers. So, anyone of you has someone under him, he should feed him out of what he himself eats, clothes him like he himself puts on, and if that be the case, let him not put much burden that he is not able to bear, then lend your help to him” (Al-Bukhari). In the present context, this *hadith* implies that the corporations are responsible to pay the employees in such a way that they can have enough food, shelter, clothing and medication to support their lives (Zahid, 2010). They should not force them (workers) to work beyond their capability. They must not discriminate between them on any ground like language, colour, race, etc., because these have been created by Allah for identification purpose and not for discrimination (Qur’an, 49: 13; 30: 22). In addition, corporations should take care of the environment while conducting business activities as it (environment) is essential for human survival. The purpose of the creation of humankind is the worship of Allah (Qur’an, 51: 56). So, a healthy environment must be maintained so that men can live a sound life and worship their Lord. For this reason, Islam encourages for the preservation of the environment and ecology. The Prophet says, “If the Judgment Day comes when one of you is holding a seedling in his hand, if you are able to plant it before the Day arrives, do so” (Al-Bukhari, 1997). In other words, the Prophet encourages people to foster a green world. “The earth is our first mother. Therefore, it has certain rights over us. One of these rights is making it come alive with green vegetation and other plant life” (Alhilaly, cited in Smith). Animal world is also to be cared for because the members of that world are creations of Allah like humans. The Qur’an says, “there is not an animal in the earth, nor a creature flying on two wings, but they are nations like you” (Qur’an, 6:38). Thus, the Prophet advised, “show mercy and you will be shown mercy” (Al-Bukhari, 1997). At another place he says, “there is a reward in (doing good to) every moist organ (i.e. in every living thing)” (Al-Bukhari, 1997). The rationale behind is that

caring for the living world contributes to the celebration of the praise of Allah (Ahmad, 1999); “the Seven Heavens and Earth and all beings therein celebrate His praise, and there is not a thing but hymns His praise” (Qur’an, 17: 44).

In addition to the specific obligations, the corporations’ overall responsibilities to the society in the form of making charity and all other social welfare works may be gathered from the Qur’an and *Sunnah*. The Qur’an enjoins the believing Muslims that “ye strive (your utmost) in the Cause of Allah, with your property and your persons; that will be best for you, if ye but knew” (Qur’an, 61: 10-11). Here, the call for striving definitely includes the service to the mankind. In this connection, Prophet Muhammad says, “the best of people are those that bring most benefit to the rest of mankind” (Al-Daraqutni, *as cited in* Niamatullah). He encourages helping the poor and destitute; “the one who looks after and works for a widow and for a poor person, is like a warrior fighting for Allah’s cause or like a person who fasts during the day and performs prayers all night” (Al-Bukhari). He further says, “Allah loves to see the results of His beneficence to His servants” (Qutb, 2000). This means that people (including corporations) should not hoard up their wealth (beneficence of Allah) and create economic hardship in the society. “Hardship and poverty constitute the greatest possible denial of the beneficence of Allah, and He disapproves such a denial” (Qutb, 2000). As such, corporations should contribute to social welfare by way of financial contributions and charity to the poor and various social institutions like schools, orphanages, and hospitals. They must not be niggardly or wasteful as both are forbidden by *Shari’ah* (Qur’an, 17: 31). In the same way, Allah and His Messenger prohibit infliction of any harm. Thus, the Qur’an says, “O you believe! Eat not up your property amongst yourselves in vanities; let there be amongst you traffic and trade by mutual goodwill nor kill (or destroy) yourselves; for Allah has been Most Merciful to you” (Qur’an, 4: 29). The Prophet said, “the Muslim is he/she from whose hand and tongue the people are safe” (Al-Tirmizi).

To sum up, the corporation may be recognised as a legal person under the Islamic jurisprudence from the *maslahah* perspective. CSR is a corollary of that personality and should be accepted as an Islamic concept. In this respect, the Islamic CSR is similar to its western counterpart. There is, however, one most important difference between them. The former requires corporations to carry out CSR activities for the pleasure of Allah, while the latter advocates for pursuing it for worldly gains, such as promoting company's market. Nonetheless, this does not mean that Islam denies company's economic pursuits. When a corporation is engaged in CSR activities, it may receive a good name in the society and its products may, as a natural consequence, get a broad market. This is fine as long as the CSR programme is rendered selflessly; the economic gains, if any, cannot be expected in return overtly or covertly. In other words, even if there is any financial loss following CSR activities, the corporation is not exempted from CSR obligations. The following Qur'anic verse is apt to quote in this connection:

It is not righteousness that you turn your faces towards East or West; but it is Righteousness - to believe in Allaah and the Last Day and the Angels, and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarers, for those who ask; and for the freeing of captives; to be steadfast in prayer, and practice regular charity; to fulfil the contracts which you make; and to be firm and patient in pain and adversity and throughout all period of panic. Such are the people of truth, God-consciousness (Qur'an, 2:177).

Thus CSR, like any other good deeds in Islam, must be for the pleasure of Allah. If it is for show or for reciprocal interest, it is not acceptable. This is so because Islamic CSR is based on the monotheistic faith, which encompasses every aspect of life of a Muslim.

This is a system of God-consciousness (*Taqwa*). It requires human actions to be motivated with the satisfaction of Allah, not merely for materialistic calculation of gain or loss (Zahid, 2010; Dusuki, 2008).

CSR TO EMPLOYEES UNDER COMMON LAW AND ISLAM: A COMPARISON

In this Section, the principles of common law related to obligations owed to employees, one of the important CSR beneficiaries, would be compared with their Islamic counterparts. Before embarking upon the discussion, a pertinent question should be answered - is CSR a legal concept or ethical? CSR is primarily thought to be an ethical phenomenon. It is not automatically binding on corporations. It is a voluntary matter for them. Over the time, however, this concept has gained popularity in different countries. For example, a survey conducted in Ireland showed that in the assessment of corporate activities, people consider three things the most; namely, their service (81%), their honesty and openness (69%), and product quality (66%) (<http://www.bitc.ie>). As a result, business organisations are taking it seriously and are adopting CSR policies. TOYOTA, for instance, has set out its "CSR Policy: Contribution towards Sustainable Development," which includes its commitments to various beneficiaries, such as customers, shareholders, employees and environment. The objective of the Policy is "to contribute to harmonious and sustainable development of society and the earth through all business activities that we carry out in each country and region, based on our Guiding Principles" (<http://www.toyota-global.com>). Alongside the corporate policies, State governments (such as, the UK, as noticed above) are passing laws to enforce CSR obligations. At the same time, international organisations like the OECD, as mentioned earlier, are also adopting CSR standards (soft laws) for multinational companies. Thus, companies are increasingly becoming bound by laws related to CSR. For example, TOYOTA's CSR Policy states

that “we comply with local, national and international laws and regulations, as well as the spirit thereof and we conduct our business with honesty and integrity.” It proves the fact that CSR is not merely an ethical concept. Instead, it goes beyond and assumes the status of a legal concept. This is so because corporate voluntary actions are not always enough to protect the interests of the CSR beneficiaries. They should go hand-in-hand: “(B)oth voluntary and mandatory rules are necessary and may co-exist to regulate specific matters depending on the different areas or objectives” (Mullerat, 2005). As such, there must be legal means to protect CSR beneficiaries. These legal means may be of different forms, namely, statutes, NGO Guidelines (soft law), contracts, judicial decisions and interpretations, etc.

English law courts have developed rules and principles through the interpretation of statutes and contracts of employment. In the following, those rules and principles are compared with the principles of the Islamic law to judge their comparative merits.

Obligation to Provide Work

After an employment contract is accomplished, is the employer bound to provide the employee work to do while he/she is paying the agreed salary/wages? This question arose in a number of common law cases. The judges came up with almost similar judgments that in general, so long the employer pays the employee, he/she is not bound to assign him/her work. He/she is, however, bound to give the employee work, if it is of some special type. For example, in the case of an actor, it is important for him to demonstrate his ability in public. So, he should be given contracted work (*Turner v. Sawdon & Company* [1901] 2 KB 653). Similarly, workers who receive wages from commission for their work will lose reputation and publicity if they are not given work (*Marbe v. George Edwardes (Daly's Theatre) Ltd* (1928)). The position of a skilled worker is alike as he/she does not want money only, and he/she wants to contribute to the public, improve his/her skill and have job

satisfaction from the work done (*Langston v. Amalgamated Union of Engineering Workers* (No.2) [1974] ICR 510).

Allah commands Muslims to fulfil their contracts (Qur'an, 5: 1). The fulfillment of employment contract should primarily mean to give work to the employees. Earning livelihood by work is a matter of dignity, which is a special honour Allah has bestowed on every human person. The Qur'an says, “Now, indeed, We have conferred dignity on the children of Adam...” (Qur'an, 17: 70). Paying the employee without letting him/her work is like giving social assistance to unemployed people or giving alms to the poor. It is a humiliation of human dignity. Besides, if the employees are not engaged in work, they may involve themselves in anti-social activities like gambling. Their skills are wasted. The society is deprived of their contributions. Thus, from the Islamic point of view, employees must be given work as agreed in the contract regardless of the category (skilled or unskilled) of work.

Obligation to Put Employees in a Right Job or Situation

It is the responsibility of employers not to put employees in a job or a situation which is against the law. It is thus illegal to employ someone to drive a truck that is not insured (*Gregory v. Ford & Ors.* [1951] 1 All ER 121). If, however, both the employer and employee know that the work itself is unlawful, both are liable (*Tomlinson v. Dick Evans* [1978] ICR 639; *Davidson v. Pillai* [1979] IRLR 275).

In the same vein, under the Islamic law, an employer is liable if he/she engages an employee in a work that is not permitted by *Shari'ah*, such as manufacturing wine, because the object of the contract is illegal (Mansuri, 2006; <http://www.biicl.org>).

Obligation Not to Put the Employee in a Dangerous Work

It is an implied term of an employment contract that the employer shall not require employees

to carry out dangerous work or ask employees to work in a dangerous place, especially in modern industry that uses a variety of machines, chemical substances and exposes workers to various hazards. This is a non-delegable duty of the employer. Thus, in *Wilson's & Clyde Coal Co. v. English* [1937] 3 All ER 628, the employer was found liable for the unsafe system of work in the mine, even though he has delegated that duty to his agent. Of course, in *Bouzourou v The Ottoman Bank* [1930] AC 30, the Judge held that the threat of harm must be immediate.

Human life is precious in the sight of the Creator as He has created men and *jinn* only for His worship (Qur'an, 51: 56). Taking life, except for justice, has therefore been prohibited in Islam (Qur'an, 6: 151; 5: 32). Based on this principle, it may be argued that putting employees or workers in a dangerous or life-threatening situation is not allowed in Islam. Rather, according to a *Hadith* of the Prophet, workers are like brothers of the employer. The latter should not even burden the former with work that the former cannot do. The latter is ordered to help the former in the work (Al-Bukhari). By tying employer and employee in a brotherly relation the *Hadith* indicates that the employer should provide a work environment, which is safe, healthy and enjoyable, to the employees (Zahid, 2010).

Obligation to Pay

The duty to pay wages is an implied term of a service contract, although nowadays it has been enacted in the statutes within a stipulated time/period of time, such as in Malaysia the *Employment Act 1955* requires wages to be paid not later than the seventh day of the ensuing month.

On the other hand, the Prophet of Islam orders Muslims to "feed him (employee) out of what he himself eats, clothes him (employee) like he himself puts on" (Al-Bukhari). If the instruction in this *Hadith* is taken literally, it would be difficult to implement particularly in the corporate world. No employer, specifically when it is a big corporation, may share the same

foods and clothes with the employees. Rather, it would be correct to take a pragmatic meaning of the *Hadith* that the employer should pay the employees in such a way that the needs of the latter are fulfilled according to their social status in the same way as their own. In other words, the salary scale should be determined in such a way that employees can meet their needs. In this respect, the Prophet also instructs his followers to fix the wages of a worker before employing him/her (Chaudhry, from <http://www.muslimtents.com>). He orders Muslim employers to make immediate payment of the wages by saying, "pay the labourer his wages before his sweat dries" (Ibn Majah). Thus, the common law or statutory law requirement may be said to be at par with this provision.

Mutual Confidence and Trust

It is required of an employer that he/she must not "without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" (Clyde & Co, 2007). This duty is equally applicable to an employee as well. *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 is the first case that recognizes this duty. In this case, the plaintiff Scally had sued his employer for breach of contract in failing to adequately inform him about the availability of a contingent right, introduced by a statute, which enabled him to purchase added years of pensionable service at advantages rates. The Court held that it was not "merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefits." In another landmark case, *Malik v BCCI* [1998] AC 20, Malik and Mahmud worked for the BCCI. BCCI went insolvent due to massive fraud, connection with terrorists, money-laundering, extortion and a raft of other criminal activities on a global scale. Malik and Mahmud had both

lost their jobs, and they tried to seek employment elsewhere but failed. They sued the company for their loss of job prospects, alleging that their failure to secure new jobs was due to the reputational damage they had suffered from working with BCCI. Nobody, they claimed, wanted to hire people from a company that had been involved in massive fraud operations. This raised the question of what duty the company had owed to its employees that had been broken. Although there was no express term in their contracts, Malik and Mahmud argued there was an implied term in their employment contract. The House of Lords unanimously held that the term of mutual trust and confidence would be implied into the contract as a necessary incident of the employment relation.

In this context, Prophet Muhammad says, among others, "Beware, everyone of you is a shepherd and everyone is answerable with regard to his flock" (Muslim). According to this *Hadith*, the employer may be taken as a "shepherd" (master) and the employee as the "flock" (subordinate). By the employment contract, they enter into a relationship owing a trust to each other. Hence, the employer should not do anything that may hamper the rights or privileges of the employee. At the same time, the employee should carry out his/her responsibility properly so that the employer does not suffer any loss or injury. Everyone is under the constant surveillance of Allah, with the responsibility of fulfilling the trust which each of them has taken upon himself/herself. Thus, a mutual confidence and trust-based relation between the employer and employee under common law is in consonance with the Islamic counterpart.

CONCLUSION

Basically, CSR is all about corporate responsibility to the stakeholders, such as creditors, employees, consumers, etc, beyond mere maximization of profits. It is a secular concept, but it still blends with the Islamic *Shari'ah* in general. In particular, the common law obligations of the employer are very similar to the Islamic law principles. The one main

difference between them, however, is that common law does not require the employer to provide work to the employees in all cases. Only in special type of employment, such as skilled worker cases, it enjoins providing work, lest the society will be deprived of their contributions. Islam does not accept this partial view. Instead, Islam provides that for the welfare of the society, every employee or worker should be provided with a job to do. Mere payment of salary/wages without assigning any work may create social problems like gambling. Plus, the society will be devoid of their services. Besides, an overall divergence between the common law and the Islamic law is traced in the fact that common law looks at the issues from temporal view, whereas Islam takes it as a holistic view - temporal and perpetual (afterlife). Thus, common law maintains that the employer and employee are bound to a relationship of mutual confidence and trust for the mundane benefit of the employee and vice versa. On the other hand, Islam believes in the same principles, but its vision goes beyond worldly convenience. By providing for accountability to Allah, it ties the matter to the life hereafter as well as the temporal life (Zahid, 2009, 2010).

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International Parental Child Abduction in Malaysia: Foreign Custody Orders and Related Laws for Incoming Abductions

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ABSTRACT

A marriage that fails leaves behind a trail, a scar difficult to heal. More often than not, children from that marriage suffer the most and become victims of the tug of war between the parents. This fight between spouses gets even worse if the parent abducted his or her own child. When this happens, the left-behind parent will be without remedy, especially if the child is abducted across national boundaries. Even when a custody order is granted from court, the order is only valid within the respective country and not outside its jurisdiction. Therefore, the issue of recognition of foreign custody order is important when addressing international parental child abduction. This is because the non-recognition of foreign custody order could lead to international parental child abduction and forum shopping to find a jurisdiction that would favour the parent who had abducted the child. International parental child abduction is not a new phenomenon and in Malaysia, the case of Raja Bahrin, which happened about twenty years ago, is a brutal reminder of this phenomenon. Thus, this article examines the Malaysians laws relating to international parental child abduction and whether these laws are adequate enough to curb the problem of international parental child abduction.

Keywords: International parental child abduction, recognition of foreign custody orders, foreign custody orders, parental child abduction in Malaysia

INTRODUCTION

Parental child abduction is phenomenal (Buck, 2000), but it is not unusual for international parental child abduction to happen nowadays with the ease of transportation from one place to another worldwide (Smith, 2010). The risk of abduction may increase in connection with custody disputes (Stark, 2005), and non-finality of custody orders obtained from a foreign country which creates uncertainty will contribute to the risk of abduction (Wu, 1995). There are two situations of international parental child abduction: the incoming abduction of children from abroad to Malaysia and the outgoing

abduction, i.e. abduction of children from Malaysia to a foreign country.

The case of *State Central Authority v Ayob* (1997) 21 Fam LR 567 illustrates the difficulty faced by a left-behind parent if a child is abducted to Malaysia. In the case of *Loh v Kalliou*, [2007] FamCA 444, the court in Australia refused to allow a child to be taken back to Malaysia by a Malaysian mother for a holiday. The situations mentioned in *State Central Authority v Ayob* and *Loh v Kalliou* are clear examples demonstrating the difficulty of a left-behind parent when a child is abducted to Malaysia and the anxiety of a parent for a child to travel to Malaysia and never returned.

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The only international instrument for international parental child abduction applicable to the whole world is the 1980 Hague Convention on the Civil Aspects of International Child Abduction (1980 Child Abduction Convention) of which Malaysia is not yet a member. If a child is abducted to Malaysia, the provisions under the 1980 Child Abduction Convention are not applicable. This means the domestic laws of Malaysia will govern parental child abduction.

The central rationale of the 1980 Child Abduction Convention is that it is the originating court that should have jurisdiction to determine custody disputes. The 1980 Child Abduction Convention specifically aims at remedying wrongful removals and not the merits of a custody claim. Its objective is the swift return of children (except in rare circumstances) to their country of "habitual residence" where a court of proper jurisdiction will determine the custody issues. For example, the 1980 Child Abduction Convention provides reciprocal arrangements to ensure prompt return of children under rightful custody to the child's habitual residence.

OBJECTIVE

This article examines the related laws applicable for incoming child abduction to Malaysia. In this context, incoming abduction arises in a situation where a child is wrongfully removed or retained away from his or her country of habitual residence to another jurisdiction by a parent without the knowledge and consent of the left-behind parent. This article also seeks to find whether the current laws in Malaysia are adequate enough to handle incoming abductions.

FOREIGN CUSTODY ORDERS IN MALAYSIA: THE COMMON LAW RULES

As shall be seen, one factor for parental child abduction is the common law rules which disregard foreign custody orders and thus create the risks of parental child abduction. In other words, this encourages one parent who is unhappy with a custody decision to seek another

jurisdiction with the hope of obtaining a more favourable custody order (Tan, 1995). Such practice is known as forum shopping (Bell, 2003). There is no doubt the existence of other factors for international parental child abduction to happen. Non-recognition of foreign custody orders is not the sole factor for parental child abductions. Other reasons include the lack of confidence to the court system (Lyon, 1993), religious factor (Raja Bahrin & Wickham, 1997), bitterness of the custody dispute that causes abduction (Dyer, 2000) and often occurs when parents separate or begin divorce proceedings.

RECOGNITION OF ORDERS IN MALAYSIA

A foreign judgment needs to be recognized in order to be enforceable. Recognition of foreign judgments refers to the procedure, whereby a foreign judgment is accepted as a local judgment and has a legal binding effect. The purpose is usually to enforce the foreign judgment to compel compliance to the other party with that particular judgment. A party may seek recognition of a foreign judgment without the intention of seeking its enforcement. For example, the judgment may be presented in a second jurisdiction as a defence to an action, or the party may be seeking a declaratory judgment in the second court.

According to Clarkson and Hill (2006), the question to be asked therefore is not whether foreign judgment should be recognized and enforced but which judgment should be recognized and enforced. The authors quote Slate in *Adams v Cape Industries plc* [1990] Ch 433, that the law is based on "an acknowledgment that the society of the nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may directly enforced in countries where the defendant or his assets are to be found."

Generally, the basis for recognition and enforcement of foreign judgments is either the theory of obligation or comity/reciprocity. The

theory of obligation is that if the original court has jurisdiction in the actions duly determined, the judgment should prima facie be regarded as creating an obligation between the parties in the foreign proceedings and so be recognized and enforceable (Clarkson & Hill, 2006). This basis of recognition and enforcement of foreign judgments was encapsulated by Blackburn in the case of *Schibsby v Westenholz* (1870) L.R. 6 Q.B 155 on page 159, as follows:

“The judgment of the court of competent jurisdiction over the defendant imposes duty or obligation on him to pay the sum for which judgment is given, which the courts are bound to enforce.”

At common law, a judgment in *personam* from a foreign court will be entitled to recognition and enforcement if it is regarded as creating a debt between the parties, the debtor’s liability arising on an implied promise to pay the amount of the foreign judgment, and the judgment must be final and conclusive for a definite sum of money being a judgment from a court of competent jurisdiction which is consistent with public policy of the local court and ‘not tainted with collusion or fraud’ (Platto, 1989).

Judgments in *rem* “may affect the position of third parties” including the parties in the proceedings. They involve mostly “the issue of status and arise in the context of family proceedings.” The conditions for recognition of judgments in *rem* are that the judgment is from a court of competent jurisdiction, final and conclusive and on the merits (Clarkson & Hill, 2006).

According to Clarkson and Hill (2006), “the idea of reciprocity is where the courts in X should recognise and enforce the judgments of country Y, if mutatis mutandis the courts of country Y recognise and enforce the judgments of country.” On the other hand, the theory of reciprocity requires reciprocal treatments for mutual enforcements between countries to recognize the judgments from their respective

courts. In *Indyka v Indyka* [1967] 2 All ER 689, the court said that “reciprocity appears to mean - if you will recognise that we have this jurisdiction, we will recognise that you have a similar jurisdiction.” As an example, within the European Union, reciprocity is the basis of recognition of foreign commercial judgments under the Brussels I Regulation and foreign family judgments (divorces and parental responsibilities orders) under the Brussels II Regulation (Clarkson & Hill, 2006).

Foreign judgments have no direct operation in Malaysia but may be enforceable under statutes (Khaira, 2007), or as a debt under the common law. Certain foreign judgments that are recognized and enforceable under the legislation of Malaysia include judgments in commercial matters, maintenance orders, arbitral awards, probate and letters of administration issued by the Courts of Probate in the Commonwealth and also insolvency matters with Singapore.

The main legislation for the recognition of foreign judgments in Malaysia is the Reciprocal Enforcement of Judgments Act 1958 (Revised 1972) (Act 99). Act 99 makes provision for the registration and enforcement of judgments of foreign superior courts, where a reciprocal agreement has been entered into between a foreign country and Malaysia. In addition, Act 99 also provides for recognition of foreign judgments from a reciprocating country by way of registration before it can be enforceable. The High Court Rules 1980 provides the procedures for registration of foreign judgments within the ambit of Act 99. Foreign judgments from a superior court shall apply under the Act if the judgments are final and conclusive, monetary in nature and from a country or territory in the First Schedule of the Act. Any foreign judgment coming under Act 99 shall be registered unless it has been wholly satisfied, or it could not be enforced by execution in the country of the original Court. The countries in the First Schedule include the United Kingdom, Singapore, New Zealand and India. If a judgment does not originate from a country declared in the First Schedule, the common law rules apply.

THE COMMON LAW RULES ON FOREIGN CUSTODY ORDERS

In terms of recognition and enforcement of foreign custody orders, the common law rules apply as there is no legislation for reciprocal provision related to foreign custody orders in Malaysia. The basic position at common law is that custody orders are not final and conclusive [*McKee v McKee* (1951) AC 352]. The circumstances of parents and children can alter (and often do), and as such, the orders are always open to revision. The best interest of the child is always the paramount consideration. This, of course, gives rise to the central problem that a parent who is unhappy with a decision of the court may abduct the child to another country in the hope of obtaining a more favourable decision. In short, the non-finality of custody orders can encourage forum shopping.

In Malaysia, Section 47 of the Law Reform (Marriage And Divorce) Act 1976 (Act 164) provides that in all matrimonial matters “the court shall...act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.” In particular, Section 27 of the Civil Law Act 1956 (Revised 1972) (Act 67) provides that “in all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of the Act, regard being had to the religions and customs of the parties concerned, unless other provision is or shall be made by any written law.” The point is that though reference may be made to the law in England, religious and customs of the parties concerned must be taken into consideration.

The common law rules of private international law provide that the welfare of the child is to be the paramount consideration in any proceedings concerning children. Malaysian courts have the discretion to re-open custody disputes on the basis that it is for the best interests of the child as the paramount consideration, as decided by the apex court of Malaysia in

Mahabir Prasad v Mahabir Prasad [1981] CLJ 124, [1981] 2 MLJ 326.

In the international arena, the ‘best interest of the child’ is also the concern of the main international instrument on children widely ratified; the United Nations Convention on the Rights of the Child (UNCRC) 1989 provides that “in all matters concerning children, the best interests of the child shall be a primary consideration.” The courts in many jurisdictions are bound by statute to apply the best interests of the child test in matters related to children. This is no exception to Malaysia. Among the statutes are the Child Act 2001 (Act 611), Guardianship of Infants Act 1961 (Revised 1988) (Act 351), Law Reform (Marriage and Divorce) Act 1976 (Act 164), and Islamic Family Law (Federal Territory) 1984 (Act 303). Section 88(2) of Act 164 (Civil) and Section 86 (2) of Act 303 (*Syariah*) make it mandatory for the courts to consider the welfare of the child as being paramount, and subject thereto, the wishes of the parents and of the child. This principle has consistently been applied in Malaysia as have been demonstrated by the judicial pronouncements in many cases.

The law on foreign custody orders in Malaysia is based on the common law rules in *McKee v McKee* (1951) AC 352 that were followed in Malaysia in *Mahabir Prasad v Mahabir Prasad* (*Mahabir Prasad*) [1981] CLJ 124, [1982] 1 MLJ 189, [1981] 2 MLJ 326. In *Mahabir Prasad*, the Federal Court of Malaysia decided that a Malaysian court does have jurisdiction to decide cases involving foreign custody even when a foreign court has granted a custody order. The court was of the view that although regard may be made to a foreign custody order, “the matter is never *res judicata*. A custody order is not final and conclusive” as the best interest of the child is of paramount consideration.

In *Mahabir Prasad*, the father, who was a Malaysian citizen, had married an Indian national. From the marriage, they had two infant daughters and stayed in Malaysia. Upon breakdown of the marriage, the mother returned to India, while the children were with their

father in Malaysia. The mother then applied for dissolution of the marriage and custody of the infants, which was awarded to the mother by the court in India. The parties had previously entered into a deed of separation by which the custody of the infants was given to the father. The father then applied for custody of the infants at the High Court at Kuala Lumpur but was unsuccessful. The Judge in the High Court held that the father was *estopped* from making the application as the decision of the court in India was conclusive as against him, and there was no evidence to show any change of circumstances to justify a re-consideration of the custody order granted by the Indian Court. The father then appealed to the Federal Court of Malaysia. The Federal Court decided that, though regard may be made to foreign custody order, the order is not final and conclusive, as the paramount consideration is the best interest of the child.

The Federal Court in *Mahabir Prasad* reversed the High Court's decision and referred with approval the decision of the Privy Council in *McKee*. *McKee* decided that in the questions of custody, the welfare and happiness of children are the paramount considerations to which even foreign custody order from a court of competent jurisdiction yield. In *McKee*, the Privy Council held that though proper weight is to be given to the foreign order, it depended on the circumstances of each case. This means the existence of a foreign court order is merely an element to be considered to the issue of custody because 'the best interests of the child' prevail.

Raja Azlan Shah in *Mahabir Prasad* said:

"It is the law of this country and as it is the law of India that the welfare and happiness of the infant must be the paramount consideration in child custody adjudication. Consequently, although our courts must take into consideration the order of a foreign court of competent jurisdiction, we are not bound to give effect to it if this would not be for the infant's benefit. We cannot regard that order as rendering it in any way improper or contrary to

the comity of nations if the courts in this country consider what is in his best interest."

The Court further held that "a custody order cannot from its nature be final or irreversible. It is only of persuasive authority." The court held that a change of circumstances could justify a reassessment of the matter.

Based on this decision, the case was remitted and fixed for a rehearing on the issue of custody of the children at the High Court. However, after time-consuming and costly litigation, the rehearing was decided in favour of the mother on the basis that it was in the best interest and welfare of the children to live with their mother in India. The father appealed but the appeal was dismissed in the Federal Court.

This litigation demonstrates the central weakness in the law established by *McKee* (Beumont & McEleavy, 1999). If both the originating country (India) and the receiving country (Malaysia) apply 'the best interests of the child test', it is likely that the receiving country will endorse the original decision. The result will then be a pointless, lengthy and expensive litigation, and for the child, a traumatic experience. Thus, it is suggested that since both countries, namely, Malaysia and India, apply the best interest test in their custody cases, a custody order from any one country, Malaysia or India, should be well accepted and recognized unless a change in circumstances.

However, it must be recognized that circumstances for children and their parents can change after a custody order, which is why custody orders in most countries are never final. This is also the rationale in *McKee* that though proper weight is to be given to a foreign order, it is dependent upon the circumstances of each case which may change and differ from the time when the foreign order was obtained. The real issue, when there has been such a change of circumstances, is whether the courts of the originating or the receiving country are more appropriate to revisit the custody order and to decide whether the original court order be reopened for scrutiny.

Apart from tedious litigation, the common law rules on foreign custody orders could defeat the purpose of comity between nations and respect of the laws and sovereignty of other countries' culture and values (Ong, 2007). The rule that foreign custody orders can be disregarded, on the basis of 'the best interests of the child,' has created uncertainty and encouraged forum shopping. This can lead to serious implications of parental child abduction. According to Tan (1993), the principle in *Mahabir Prasad* by following *McKee* 'serves to promote kidnapping by a parent who is unhappy with the way one court has adjudged the merits of custody.' This indirectly condones parental child abduction. As such, it is suggested that a global solution is needed to overcome the problem of international parental child abduction in Malaysia in this regard.

While the decision in *Mahabir Prasad* remains good law, there have been important developments in the law relating to recognition of custody orders from a foreign jurisdiction through the introduction of the doctrine of *forum non conveniens* in custody disputes in Malaysia (Muhamad Said & Suhor, 2009).

SOME RELATED PROVISIONS ON CHILD ABDUCTION IN MALAYSIA WITHIN THE DOMESTIC CONTEXT

The legal provisions on child abductions in Malaysia are scattered in the Child Act 2001 (Act 611) and the Penal Code of Malaysia (Revised 1997) (Act 574). The provisions are mainly concerned with trafficking of children or abduction for illegal purposes. Accordingly, it is a crime to abduct or kidnap a child from her or his lawful custodian.

Abduction and kidnapping are two serious offences under the criminal law of Malaysia. The main statute for criminal law in Malaysia is the Penal Code of Malaysia (Revised 1997) (Act 574). The offence of abduction or kidnapping upon conviction, carries the maximum imprisonment of 7 years and liable to fine. The term 'abduction' under the criminal law of

Malaysia means when a person by force compels or by deceitful means induces a person to go from any place. This article, however, refers to parental child abduction as kidnapping from lawful guardianship under Section 361, which is more relevant. The Penal Code differentiates between abduction and kidnapping. Kidnapping is provided for under Section 359. There are two kinds of kidnapping, namely, kidnapping from Malaysia (Section 360) and kidnapping from lawful guardianship (Section 361). Kidnapping from Malaysia includes kidnapping from a person who is legally authorized to consent on behalf of the kidnapped person.

For the purposes of this article and in light of the 1980 Child Abduction Convention, the term that will be used is abduction, which means the wrongful removal or retention of a child from the child's country of residence to another jurisdiction by a parent without the consent or knowledge of the other parent.

Abduction from lawful guardianship or lawful custodianship is subjected to the law of child abduction in the courts of Malaysia. To establish a case of abduction from a lawful guardian or custodian, the law requires that the custody of the child has been conferred by virtue of any written law or by an order of a Court, including a *Syariah* Court Order. "Lawful guardian" includes any person who is lawfully entrusted with the care or the custody of such minor or other person. In the case of *Syed Abu Tahir a/l Mohamed Ismail v Public Prosecutor* [1988] 3 MLJ 485, Zakaria Yatim J held that "in considering the expression 'lawful guardian' in Section 361 of the Penal Code, the court must give it a meaning which accords not only with Section 5 of the Guardianship of Infants Act, but also with the explanation to Section 361 of Act 574. The words 'lawfully entrusted', which appear in the explanation, must be construed liberally. It is not intended that the entrustment should be made in a formal manner. It can be done orally and is not even necessary that there should be direct evidence available about the entrustment as such. From the course of conduct and from the other surrounding circumstances,

it would be open to the court to infer lawful entrustment in favour of the person in whose custody the minor is living and who is taking her care in all reasonable ways. In this sense, parental child abduction would unlikely be applicable as the abductor is also a person having legal rights over the child.

Part VIII of Act 611 deals with trafficking and abduction of children. Meanwhile, Section 52 of Act 611 creates the offence of taking in or sending out a child whether within or outside Malaysia without any appropriate consent of the person having lawful custody, including the *Syariah* Court Orders.

Any parent or guardian who does not have the lawful custody of a child and takes or sends out a child, whether within or outside Malaysia, without the consent of the person who has the lawful custody of the child commits an offence and shall on conviction be liable to a fine not exceeding ten thousand Ringgit or to an imprisonment for a term not exceeding five years or to both.

The court may make a recovery order upon application by or on behalf of the person having a lawful custody to direct any other person who is in a position to do so to produce the child on request to any authorized person or authorize the removal of the child by any authorized person or require any person who has information as to the child's whereabouts to disclose that information to the authorized person or authorize any police officer to enter into any premises specified in the order and search for the child, using reasonable force if necessary. However, this provision is only applicable if the child is within the jurisdiction. If the child is out of jurisdiction, extradition of the person who is in position to produce the child could be an option, but it may not ensure the return of the child (Lowe *et al.*, 2004).

Section 48 of Act 611 deals with unlawful transfer of possession, custody or control of a child by a person for any valuable consideration, and such a person shall on conviction be liable to a fine not exceeding ten thousand Ringgit or to an imprisonment for a term not exceeding

five years or to both. This is unlikely to be a provision applicable to parental child abduction.

The court is also given power, under Section 101 of Act 164 and section 105 of Act 303, to issue an injunction to restrain the taking of a child who is under the lawful custody of a person out of Malaysia, failure of which shall be punishable and subject to contempt of court. This shows that the act of taking away a child from his or her lawful custody is a very serious offence. The provision allows a father or a mother or any interested person to apply for an injunction to restrain the child from being taken away from Malaysia or permission to take the child away from Malaysia. This application must be made to court and subjected to situations where there are pending matrimonial proceedings, where there is an agreement or an order of the court. In *Sokdave Singh a/l Ajit Singh v Sukvender Kaur a/p Daljit Singh*, the application by the father to restrain the child from being taken out of Malaysia was dismissed as the court was of the opinion that there was no likelihood of risk for the child to be abducted abroad. The father in this case was assuming that the child might be taken out from Malaysia to follow his mother if she was offered work outside Malaysia. This means the court requires strong evidence if one parent needs to apply under this provision. This imposes a difficult situation for a parent from abroad in incoming abduction cases who has successfully obtained custody from Malaysia to take a child away from Malaysia to her/his country of residence if it is objected by the other parent. This would then be a futile effort as the custody order is just a paper judgment and does not guarantee the return of the child to a country of residence.

It is interesting to note Section 83 of Act 303 provides for how a right of custody is lost. In that provision, the right of custody to the mother is lost if she changes her residence to prevent access to the father, except if taken to her place of birth. This provision allows a divorced mother to take her child to her place of birth. It has not been tested in court whether this could also apply to cases where the mother

is from abroad. Alas, the provision to prevent removal of the child from Malaysia seems to be in conflict with Section 83.

An application for *habeas corpus* could also be made if a custody order has been granted to a parent but the other parent has abducted the children. This provision requires a validly enforceable custody order to be applicable. Non-compliance with custody orders is also a contempt of court.

In the *Syariah* context, the *Syariah* court does not have a jurisdiction to create criminal offences, which comes within the jurisdiction of the Federation. The Federal Constitution of Malaysia only empowers the State Legislature to create offences against the precepts of Islam and the prosecutions of these offences are to be held in the *Syariah* courts. The criminal jurisdiction of the *Syariah* courts, as conferred by the Federal law, is to be found in Section 2 of the *Syariah* Courts (Criminal Jurisdiction) Act 1965 (Act 355).

Looking from a broader view, although there is no provision related to offences for parental child abduction, there is a possibility that the *Syariah* Court may legislate offences related to parental child abduction in the *Syariah* Courts. This is based on some recent decisions in the Civil Court that Act 355 should be construed by applying the “subject matter approach” in criminal matters, as decided in the cases of *The Islamic Council of Penang & Butterworth v Shaik Zolkaffily* [2003] 4 AMR 501, *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara & Anor* [1992] 2 MLJ 241 and *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793. The contention is because parental child abduction involves the elements of wrongful removal or retention by one parent from a legal custodian cum parent which custody was derived from matrimonial proceedings.

All these laws are applicable in the Malaysian context and require lawful custody to establish the offence of child abduction. According to Lowe (2004), extra caution is needed when parental child abduction is regarded as a criminal offence as ‘courts often

show a marked reluctance to return the abductor to face criminal charges.’ According to Kirby (2010), further consideration is needed to categorize parental child abduction as a criminal offence, apart from the psychological impact to the abducted child. The reason being that the abductor is the child’s own parent.

However as discussed above, obtaining a custody order does not secure the return of the abducted child as there is a restriction to prevent taking or relocating a child away from Malaysia, which leaves a parent who was given custody to be in an awkward and difficult situation.

PROCEDURES FOR THE RETURN OF A CHILD IN INCOMING ABDUCTION

For cases of incoming abduction to Malaysia, the left-behind parent can depend on three avenues, namely, informal diplomatic channels and assistance from the Ministry of Foreign Affairs with the cooperation from the police and immigration, re-abduction through the use of personal resources and finally, submission to the jurisdiction of the courts of Malaysia. The first could be an endless effort, the second is too dangerous, and the last is costly and time consuming. As of now, Malaysia has no reciprocal arrangement on child abduction issues thus far.

There is also no specific procedure for the return of an abducted child. Furthermore, Malaysia does not have an agency like the Central Authority, which was created under the 1980 Child Abduction Convention, to handle abduction cases. If assistance is required from the Malaysian authorities by individuals, the Ministry of Foreign Affairs of Malaysia and the foreign country will arrange it through diplomatic channels.

CONCLUSION

Parental child abduction does not necessarily occur in cases related to foreign custody orders as the sole factor. Parental child abduction could happen even when there is no custody order. However, non-finality in the foreign

custody orders creates the risk of parental child abduction, as decided in *McKee* followed in *Mahabir Prasad*. In cases where children are involved, the best interests of the child have always been the paramount considerations. This is also the position in Malaysia, in which the provision is incorporated in the statutes.

Based on the above examination of the Malaysian laws, it is obvious that these laws are rather inadequate to resolve the issue of international parental child abduction; as to where it stands today, it does not have any international cooperation or reciprocal arrangement with any country in terms of international parental child abduction.

Hence, it is vital to have a systematic and structured legal framework to curb international parental child abduction in the context of Malaysia. As such, there is a need for a global solution which could promote and enhance international cooperations on the issue and ensure prompt return of abducted children to their familiar surroundings.

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***Forum Non Conveniens* in the *Syariah* Court of Malaysia**

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ABSTRACT

Syariah Court is territorial in nature. Matters that are heard in the *Syariah* Court are mostly matrimonial-related issues, albeit there are also property issues that have nothing to do with matrimonial claims for example *hibah*, *waqaf* and *faraid*. Incoming international parental child abduction is not considered within the *Syariah* Court purview. Nevertheless, there is a provision in the Islamic family law for instance under section 105 of the Islamic Family Law (Federal Territory) Act 1984 (Act 303) which gives power to the *Syariah* Court to restrain the taking of a child who is under the lawful custody of a person out of Malaysia, failure of which shall be punishable and subject to contempt of court but this provision would not be applicable to children abducted from abroad to Malaysia by their own parent (incoming abduction). Since parental child abduction is initiated from disputes arising out of matrimonial matters, it is suggested that the *Syariah* Court be at liberty to hear matters related to international parental child abduction. This paper examines the application of *forum non conveniens* in disputes concerning the international parental child abduction if occurs within the *Syariah* Court's jurisdiction. This paper proposed that the *Syariah* Court should take a step forward to adopt the doctrine of *forum non conveniens* in deciding child custody disputes that involve foreign elements.

Keywords: International Parental Child Abduction, *Syariah* Court, Malaysia, *Forum Non- Conveniens*, Foreign Custody Order

INTRODUCTION

Malaysia has two parallel legal systems to govern matrimonial matters, namely, the Civil and the *Syariah* Courts. Generally, jurisdiction on child custody applications for civil marriages lies within the Civil High Courts and for Muslims within the *Syariah* Courts. The *Syariah* Court is territorial in nature as its jurisdiction is within the powers of the states, not the Federal Government. As a result, the *Syariah* Court decision in one state is not enforceable in another unless an application for a reciprocal order is made to the court. This has caused problem to the enforcement of custody orders obtained from the *Syariah* Court. In lieu of this, the government has set up the Family Support Division to help

enforce *Syariah* Court orders and judgments related to family matters including maintenance and child custody at any proceeding stages. The Division was launched on the 30th October 2008 by the then Minister in the Prime Minister's Department, Datuk Seri Dr Ahmad Zahid Hamidi who said that Malaysia was the first Islamic country to make such a move. *Syariah* Court has also initiated alternative dispute resolution (ADR) by introducing '*sulh*' (mediation) for matrimonial disputes including custody (Abdul Hak, 2008). The provisions on *sulh* can be found in the *Syariah* Court Civil Procedure for example the Federal Territories *Syariah* Court Civil Procedure (*Sulh*) Rules 2004. However, as mediation is voluntary, parties may forward actions further to court for determination.

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Mediation particularly involving the international parental child abduction cases should be encouraged. However if the disputes could not be resolved and proceeded in court, the jurisdiction of the court may be challenged by one party, refusing jurisdiction of the court thus '*forum non conveniens*' may apply if the court accepted the argument tendered on such ground.

'*Forum Non Conveniens*' is a doctrine where the basic principle states that it is applicable if 'the court is satisfied that there is some other forum, having competent jurisdiction, which is the appropriate forum for the trial of the action...' (*Spiliada Maritime Corporation v Cansulex Limited* [1987] AC 460, per Lord Goff of Chieveley, 476). It is 'to identify the court in which the case can be most suitably tried for the interests of the parties and the ends of justice' (Clarkson & Hill, 2005). *Forum non conveniens* is derived from commercial disputes and equally applicable in family cases as held by the House of Lords in *De Dampierre v De Dampierre* [1987] 2 WLR 1006 and in Malaysia is applied in the case of *Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners)*, [2004] 2 CLJ 541. In *Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners)* the court held that Australia is the forum with the most real and substantial connections involving Australian citizens and an Australian child who has no real and substantial connection with Malaysia, and that accordingly the Australian court would be the more appropriate or natural forum to hear the matter, being distinctly more suitable for the ends of justice than the Malaysian court.

The determining factors for applying *forum non conveniens* 'is described as legion' (Lowe *et al.*, 2004) and includes 'the child's welfare, habitual residence of the child, efficiency, expedition and economy of the proceedings, availability and cost of legal representation and legal aid, availability of witnesses and cost of travel, ability of court to ascertain wishes and feelings of the child and independent reporting facilities' (Lowe *et al.*, 2004).

Essentially, the doctrine involves a two-stage test. The burden of proof is on the defendant to

show that there is another forum which is clearly or distinctly more appropriate. Regard must be had to the connecting factors which point to one forum that has the most real and substantial connections. If this is established, jurisdiction will stay or be declined unless (and this is the second stage) the plaintiff can demonstrate that justice could not be obtained in another jurisdiction (Clarkson & Hill, 2005).

OBJECTIVE

The objective of this study was to examine the application of the doctrine of *forum non conveniens* in the *Syariah* Court particularly in cases of incoming international parental child abductions to ensure swift return of the abducted children to the other foreign countries. Incoming abduction in this paper refers to the abduction of a child from abroad to Malaysia. For ease of reference, this article will look at the legal provisions applicable in the Federal Territories of Malaysia.

BEST INTERESTS OF THE CHILD IN THE SYARIAH COURT

In any matters pertaining to children, the best interests of the child is of paramount consideration. Best interests of the child is the doctrine used by most courts to determine a wide range of issues related to the general well-being of children and all aspects of his upbringing, religious, moral as well as physical, and is not to be measured in monetary terms (*In Re McGrath* [1893] 1 Ch 143 per Lindley LJ, 148). As to what is in the best interests of the child, Justice Lord Mac Dermott in *J & Anor. v. C & Ors* [1970] AC 668 at pages 710-711 held that:

We think that it connotes a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the children's welfare as that term

has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

In *Mahabir Prasad v Mahabir Prasad* [1982] 24 MLJ 283, the Federal Court held that the welfare of the child concerned as the first and paramount consideration. The court further held that in order to decide on the question of the welfare of an infant as of paramount importance it is necessary to take into account such matter as the conduct of the parties, their financial and social status, the sex and age of the child, his wishes as far as they can be ascertained depending on the age of the child, the confidential reports which a social welfare officer may put up and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. In short, there are various relevant factors taken into consideration before the court decides on any child-custody issue but most importantly the best interests of the child will be the paramount consideration.

According to Ahmad Ibrahim (1977), "Under the Mohammedan law certain rules have been laid down regarding the custody of infants...it would be seen that even under the Muslim Law the general principle that governs the custody of infants is the welfare of the infants." Thus, the principle of the best interests of the child is equally applicable in the *Syariah* Court.

The *Syariah* Court is also bound by statute to apply the best interests of the child in custody disputes (Mohd Zin, 2005). The family provisions pertaining to custody, applicable to Muslims as in the Federal Territories is the Islamic Family Law Act (Federal Territory) 1984 (Act 303) and the provision that *Syariah* Court must apply the best interests of the child is section 86 of Act 303. This provision is *pari materia* (similar) to the Law Reform (Marriage and Divorce) Act 1976 (Act 164) for custody applications in the Civil Courts. Notwithstanding the rebuttable presumption that a child is best to

be with the mother, the court nevertheless may at any time make an order of custody to a more qualified person with the objects which include child welfare. The court while having the power to decide the change of custody, shall regard the undesirability of disturbing the life of the child and where there are more than one child of the marriage, the court shall consider the welfare of the child independently. The court may also if necessary make an interim order to place the child in the custody of any person or institution or association enforceable until it makes an order of custody. The court may also impose conditions to the custody order which shall entitle the custodian to decide on matters related to the upbringing and education of the child. Accordingly an order for custody may include the child living place, education, temporary care and control of the child by those other than the person given the custody, provide for the child to visit a parent deprived of custody, access rights and prohibition to take the child out of Malaysia.

FOREIGN CUSTODY ORDER IN THE SYARIAH COURT

There is no specific statutory provision related to jurisdiction of the *Syariah* Courts in matters concerning Muslims from abroad for recognition of foreign custody orders except for section 108 of Act 303, which deals with recognition of marriages from abroad. There is also no express provision in the *Syariah* Court Civil Procedure (Federal Territories) Act 1998 (Act 585) related to foreign orders obtained from abroad and vice versa.

As there is no case-law or legal provision on recognition of foreign custody orders in the *Syariah* Court, the analogy that could be drawn is by looking at a closely related case of a custody dispute involving foreign elements. The only relevant reported case is the case of *Norlela Mohamad Habibullah v Yusuf Maldoner* [2004] 2 CLJ 541. In this case, the court decided that Muslims marriages in foreign countries that are not registered in Malaysia do not fall under the *Syariah* Court jurisdiction. The court in *Norlela* was of the view that there was no express

provision and relied on section 6(2)(b)(x) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505). In this case, the father, a foreigner, kidnapped the child and took her out of Malaysia. In a desperate effort, the mother applied for a custody order from the Civil High Court and obtained a custody order of the child. The father applied to set aside the order. The issue raised by the father was whether the Civil High Court had jurisdiction to hear the application for guardianship of the child since both parties professed the religion of Islam.

The court applied the 'remedy approach' and granted legal guardianship, custody, care and control of the child to the mother. The father was ordered to return the child to the mother. The court further said that since the *Syariah* Court does not have inherent jurisdiction on the issue, there was no specific section which the applicant could resort to in the *Syariah* Court to get the child back.

One of the reasons the court has decided that the *Syariah* Court will not have jurisdiction is because the issue is not merely on custody or guardianship, but also the abduction of the child from her residence, which may be one that 'hinged on criminal actions.' The court opined that the *Syariah* Court had no jurisdiction to hear a criminal matter of this sort. This contention is open for debate as to the nature of parental child abduction: is it a criminal offence or a civil liability? Looking at the Child Act and Penal Code of Malaysia, parental child abduction is also an offence chargeable in court. Therefore the judgment in *Norlela* does have some basis. The criminal jurisdiction of the *Syariah* Court is limited. A parental child abduction is a case related to custody which issues are within the jurisdiction of the *Syariah* Court.

The case of *Norlela* decided that jurisdiction in custody matters related to parental child abduction, lies within the Civil Court even when the parties were Muslims. The court in *Norlela* was of the view that there was no express provision in the *Syariah* legislation and relied on section 6(2)(b)(x) Act 505. On this point, it is submitted that the court was wrong to rely on that section as it was only a general

provision. A more related and specific provision is section 46(2) (b) (iii) of Act 505 on custody applications, read together with section 4 of Act 303 and not section 46(2) (b) (x) of Act 505. Section 46(2)(b)(x) of Act 505 states that the *Syariah* Court shall have jurisdiction in other matters conferred by any written law whereas section 46(2)(b)(iii) of Act 505 deals with guardianship or custody of infants.

One of the requirements to have a *locus* in the *Syariah* Court is that one of the parties must be a resident within the locality of that *Syariah* Court. If the applicant is a resident of Penang, within the meaning of the provision, only then the *Syariah* Court in Penang has the jurisdiction to determine the issue of custody. The word 'resident' is defined in section 2 of Act 303 as 'permanently or ordinarily living in a particular area'.

In *Azizah Bte Shaik Ismail & Anor v Fatimah Bte Shaik Ismail & Anor* [2004] 2 MLJ 529 and *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, the Federal Court held that the jurisdiction on custody disputes where both parties are Muslims lies within the *Syariah* Court even when there is no statutory provision based on Article 121(1A) of the Federal Constitution. These decisions of the Federal Court affirmed that the 'subject matter approach' is to be applied when questioning the conflict of jurisdiction between the *Syariah* Court and the Civil Court when there is no express statutory provision related to the jurisdiction of the *Syariah* Court. It was therefore established by the civil apex court that the *Syariah* Court shall have jurisdiction on any matters within its jurisdiction even when there is no express provision in the statute provided that the parties are Muslims.

Norlela has added confusion to the conflict issue in the *Syariah* Court jurisdiction. However, this could be resolved as the current approach adopted by the apex court in matters concerning jurisdiction of the *Syariah* Court is to apply the 'subject matter approach'. *Norlela* is only persuasive. The decision is not binding as the High Court is the court of first instance. Considering the decision in the apex court, it

is suggested that matters concerning the issue of custody including foreign custody orders are within the jurisdiction of the *Syariah* Courts provided the parties are Muslims. This means the general rule is that when the parties are Muslims, the *Syariah* Court shall have the jurisdiction but not if one of the parties is a non-Muslim, even if the subject matter falls within its jurisdiction as decided in the Federal Court decisions of *Azizah Bte Shaik Ismail & Anor v Fatimah Bte Shaik Ismail & Anor* [2004] 2 MLJ 529 and *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, as mentioned above.

Based on the above discussion and by acknowledging the fact that parental child abduction arises from a custody dispute, the *Syariah* Court should have jurisdiction if the 'subject matter' approach is to be followed to hear foreign custody applications where the parties are Muslims.

INTERNATIONAL PARENTAL CHILD ABDUCTION AND THE SYARIAH COURT

Having discussed the issue of which court shall have jurisdiction, it is therefore relevant to visualize how the *Syariah* Court would handle foreign custody orders and parental child abduction cases. Since *Syariah* Court is parallel to the civil Courts, its decisions are independent and the decisions of the Civil Court are not binding in the *Syariah* Courts. As such, the approach in the *Syariah* Court may be different from that adopted in the Civil Court as the issue is always about conformity of Islamic law.

As *Syariah* Court is territorial in nature, there is a provision in the states' legislation that the jurisdiction of the *Syariah* Court is only applicable to persons 'resident' in the respective state. For example Act 303 provides that the *Syariah* statute is applicable "to all Muslims living in the Federal Territory and to all Muslims resident in the Federal Territory who are living outside the Federal Territory." This means the *Syariah* Court will refuse jurisdiction on any dispute concerning a person not a resident

within its local jurisdiction. The 'resident' provision gives *Syariah* Court the power to refuse jurisdiction. One of the parents must be a resident within a particular state to enable jurisdiction in the custody dispute of that state. Habitual residence of the child or the question of the most real and substantial connections to the child is not the basis for refusal of jurisdiction as applied in the Civil Court. However the end result is similar to that of the Civil Courts as the *Syariah* courts will not determine the issue of custody for lack of jurisdiction.

There may be a possibility for the *Syariah* Courts to handle international parental child abduction cases in the future, based on various efforts including harmonization of the law and upgrading of infrastructure and resources. The question then arises whether the *Syariah* Court in Malaysia would apply *forum non conveniens* and order a swift return of the child. The answer to this question would well depend on which country the child would be returned to and how the courts of that country would apply the best interests of the child test.

Islamic law determines the best interests of a child rather differently from the non-Islamic Western countries. The differences include the upbringing of a child which is divided into 3 categories: the guardianship of the infant, the education and wealth of the child and the upbringing of the infant by the mother subject to some exceptions (Arshad, 2007). There are instances that custody is given to another qualified person as the welfare of the child is always the paramount consideration in child custody disputes in the *Syariah* Courts of Malaysia. In the cases of *Nooranita bt Kamaruddin v Faeiz b Yeop Ahmad*, [1990] 7 Jurnal Hukum (JH) (1) 52 and *Wan Abdul Aziz v Siti Aishah* [1975] 1 JH 47, [1977] 1 JH 50, the *Syariah* Court granted custody to the father. These exceptions were made with the best interests of the child in mind. In most Western countries there is no presumption as to custody based on the gender of the custodian and the age of the child. In predicting the response of the *Syariah* Courts, it might be helpful to consider a hypothetical case of an incoming abduction of

a child habitually resident in England. A strong factor that could persuade the *Syariah* Court to send the child back to England could be a determination of how the English courts would resolve custody disputes involving Muslims.

The general principles in the child law in the United Kingdom are provided under the Child Act 1989 (UK). The cardinal principle is that the child's welfare shall be the court's paramount consideration to determine any question related to the upbringing of the child. The checklist of what is 'welfare of the child' includes 'any characteristics of the child which the court considers relevant'. Accordingly, the child's background 'could include the religious upbringing of the child' (White *et al.*, 2008).

In the case of *B v El-B (Abduction: Syaria Law: Welfare of Child)* [2003] 1 FLR 811, FD: the court in England decided that *Syariah* law is not incompatible with the welfare of the child. The main issue in the case was whether the *Syariah* law on custody was to be respected by English courts in the international child abduction cases. The court decided that it would be wrong to suggest that the application of Muslim law was inappropriate as the parents were Muslims and this was the cultural background of the children. The case distinguished *Re JA (Child Abduction: Non-Convention Country)* [1998] 1 FLR 231 because in the later case the family had lived in England for a substantial period. The child in *Re JA (Child Abduction: Non-Convention Country)* had been living in England while in *B v El-B*, the children were previously living in Lebanon before being brought to England. In the case of *Re E (Abduction: Non-Convention Country)* [1999] 2 FLR 642, the Court of Appeal held that 'the application of Muslim law to Muslim family was appropriate and acceptable and a solution in accordance with local law was capable of being in the best interests of the child.' The case of *Re S (Change of Names) (Cultural Factor)* [2001] 3 FCR 648 further illustrates the willingness of the courts in England to accept Islamic law which, in this case, the court allowed both the application of the mother to bring up the child in the Muslim religion and the circumcision of her son under the Islamic law. The child in this case

was born to a Muslim mother and a Sikh father.

Prior to *B v El-B (Abduction: Syaria Law: Welfare of Child)*, in the case of *Osman v Elasha* [2000] Fam 62, Thorpe LJ commented that "the further development of international collaboration to combat child abduction may well depend upon the capacity of states to respect a variety of concepts of child welfare derived from differing cultures and traditions." This case shows how a court in England is receptive to other concepts of child welfare. All the cases discussed above recognized that Islamic law is not incompatible with the principles of the best interests of the child. However, the House of Lords in *Re J (A Child) (FC)* [2005] UKHL 40 preferred the case of *Re JA (Child Abduction: Non-Convention Country)* to that of *Osman v Elasha*.

It is interesting to note that in *Re J (A Child) (FC)* the English court agreed that "It would be wrong to say that the future of every child who is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not inevitably to be preferred to another. Indeed, we do not have any fixed concept of what will be in the best interests of the individual child." The court further stated that, "Our concept of child welfare is quite capable of taking cultural and religious factors into account in deciding how a child should be brought up. It also gives great weight to the child's need for a meaningful relationship with both his parents." Baroness Hale of Richmond further stated that 'where the connection of the child and all the family with the other country is so strong that any difference between the legal systems here and there should carry little weight'. This is a very promising judicial approach which shows that the court in England is not arrogant to accept differences in conflict of cultures and religion. This also enhanced the current suggestion to the possible application of religious law in the UK (Williams, 2008). Therefore, there is a need for 'greater knowledge and greater recognition of Islamic personal law' in the English courts (Morris, 2005).

APPLICATION OF THE DOCTRINE OF *FORUM NON CONVENIENS* IN THE *SYARIAH* COURT

Forum Non Conveniens refers to a discretionary power of the courts to refuse jurisdiction over matters where there is a more appropriate forum available to the parties (Muhamad Said and Suhor, 2009). It allows the court discretion to decline or stay jurisdiction when the forum selected by the plaintiff is clearly inappropriate (Hickling and Wu, 1994). In Malaysia, *Forum Non Conveniens* is accepted in a custody dispute in the case of *Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners)*, [2004] 2 CLJ 541, [2004] 2 MLJ 629. The doctrine is applicable especially when it involves foreign nationals who are not substantially connected to Malaysia.

If the *Syariah* Courts were to apply *forum non conveniens* in cases involving foreign elements, it would abdicate to determine custody disputes. This creates an issue if a child is to return to a non-Islamic country where the Islamic law is not applicable. The assurance given by the House of Lords in *Re J (A Child) (FC)* that the courts in England is capable of giving due consideration to the upbringing of the child by taking cultural and religious factors into account, should bestow confidence at the approach to be adopted in England, in future custody cases that relates to religion and culture and whether the courts in England would apply the best interests of the child from the *Syariah* perspective.

It is important to note that in terms of custody, the *Syariah* Courts of Malaysia, despite the presumption that mother is the best custodian for an infant child, have the statutory duty to apply the best interests of the child as the paramount consideration. This means that even though there is a rebuttable presumption that a mother is the best person as custodian of an infant child and the question of age and gender of the child are matters taken into consideration, the principle of the best interests of the child is always the paramount consideration.

The statutory provision to apply the best interests of the child as paramount consideration

in the *Syariah* Court regardless to the rights of the parents, indicates presumably that the *Syariah* Court will also decide to return an abducted child if it is in the best interests of that child. This includes the contention that it is for the best interests of the child to return to his or her familiar surroundings in cases involving parental child abduction and foreign nationals. In other words, a decision to return a child does not involve a judge in choosing between the different conceptions of a child's interests adhered to in different jurisdiction. Based on the above English cases, the *Syariah* Court should have confidence to accept other jurisdiction. Even though it may be the best available alternative, difficulties may exist for both systems if this is compromised.

While the adoption of this approach by the English courts makes it easier to return a child to England, other countries might not be so "enlightened" to do so as this is a matter of policy and discretion of the courts in each respective country. In this regard, there is a probability that the *Syariah* Courts may feel hesitant to order swift return of the child if it appears that the other country disregards the Islamic law. This requires the *Syariah* Court to hear the merits of the case and therefore defeat the purpose of a summary return of the abducted child. However, it is suggested that if a swift return of a child is in the best interests of him/her, the *Syariah* Court may give due consideration.

The difficulty to strike a balance of accepting differences between countries with *Syariah* based and non-Islamic countries requires much needed effort and understanding of these differences. The problem makes it more appealable to have a global solution. Perhaps, in the context of the *Syariah* Courts of Malaysia, a bilateral agreement could help overcome the ambiguous outcome of assumption whether or not the other courts would comply/conform to the Islamic law when the issue of the return of an abducted child arises for example the UK-Pakistan Judicial Protocol on Children Matters which was agreed between the United Kingdom and Pakistan on children matters.

CONCLUSION

Based on the above discussions, it is proposed that the *Syariah* Court considers adopting *forum non conveniens* in the incoming international parental child abduction cases as this is in the best interests of the child. The *Forum non conveniens* abdicates the court from deciding on issues related to custody disputes where the child has no real and substantial connection with Malaysia. By applying *forum non conveniens*, the court could ensure swift return of the abducted child to his/her normal surroundings (habitual residence), thus minimize the trauma of the child being in a strange land with strange people and facing the language barrier. Perhaps the suggestion in this article that the *Syariah* Court applies *forum non conveniens* in the incoming international parental child abduction would also encourage other countries as a reciprocal initiative between nations. This is to ensure swift return of the abducted children in cases involving Muslims children abducted from Malaysia to other foreign countries. It is acknowledged that there is difficulty when it comes to the implementation. However, for the best interests of the child, this seems to be the best available method thus far. This could also promote *Syariah* Courts in the international arena.

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A Reappraisal of the Legality and Viability of Sales and Partnership Concepts in Islamic Home Financing

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ABSTRACT

The Islamic financial system globally has witnessed a tremendous growth in terms of demand, acceptance and development. The variety of products offered is to meet the ever sophisticated consumers' demand and economic changes. For home financing, the application of sales concept under *al-Bay' Bithaman Ajil* (sale with deferred payment) contract is widely used in countries like Malaysia, Indonesia and Brunei even though most of the Middle East scholars have rejected it. Nevertheless, *al-Bay' Bithaman Ajil* contract is heavily criticised for its conceptual and practical problems particularly related to the inconsistencies of the sales concept used for financing purposes. On the other hand, *Musharakah Mutanaqisah* (diminishing partnership) contract is another innovation that offers a viable alternative which is based on partnership and leasing. The objective of this article is to analyse the strength and practical problems of *Musharakah Mutanaqisah* contract in Islamic home financing. The study revealed that the partnership foundation of *Musharakah Mutanaqisah* contract may add to the diversification of the Islamic financial products and attend more to the consumers' needs and interests globally. The strength of the concept lies on revenue sharing between the parties, namely the financier and the customer who proportionally share their profits and risks as agreed in the contract. However, practical problems may arise in determining rental rate and risks distributions which the financiers would adapt according to their interests. Ultimately, any Islamic financing packages may need to be made compatible with the prevailing practices of the conventional financing and conceptually, that may attract more controversies.

Keywords: *Musharakah Mutanaqisah, al-Bay' Bithaman Ajil, Islamic Finance*

INTRODUCTION

Islamic financing instruments need a pragmatic direction for expansion in tandem with the development of Islamic finance generally. Home ownership constitutes most of the financing needs for the obvious reason that home is a basic necessity for human life. Muslim customers especially would prefer that Islamic banking and finance observe the general rule in ensuring that there is no contravention of any *Shari'ah* principles in the transactions; for example, all

transactions must be free from the elements of usury, dubiousness and gambling.

At the beginning of its development, the notion or application of the sales concept dominated the basic features of Islamic financing generally. Recently, an innovative Islamic financial concept employing partnership contracts and leasing are explored and developed in order to provide more options to the customers. Many literatures suggest that *Musharakah Mutanaqisah* (a diminishing partnership) is a better option available for home financing

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compared to those applying the sales concept such as *al-Bay' Bithaman Ajil* (sale with deferred payment). Therefore, *Musharakah Mutanaqisah* instrument should be promoted as a viable alternative for Islamic home financing.

This paper concurs theoretically that *Musharakah Mutanaqisah* is to be recognised as a formidable mode of home financing, which is more consistent with the *Maqasid Shari'ah* (the general purposes of *Shari'ah*) (Meera & Abdul Razak, 2005). *Musharakah* (partnership) concept emphasises on the revenue sharing of profits and risks among the parties in the contract. However, this paper will highlight some of the practical problems revolving around the application of *Musharakah Mutanaqisah* especially related to the general tendency of the financiers in determining the rental rate and the risks distribution. A brief account of comparison with some other modes of financing especially related to sale in *al-Bay' Bithaman Ajil* and the concept of leasing in *Ijarah* will be made. This paper will specifically draw attention to the challenges how well the concepts may cope with the realities of business and commerce.

MURABAHAH CONCEPTS IN FINANCING TRANSACTIONS

There are many innovations in the field of Islamic financing which provide funding facilities for home buyers. The concept of *Murabahah*, a sale concept (also known as, cost-plus financing) is used widely in the Islamic modes of home financing. Under the *Murabahah* concept, payment is done based on the resale value made by the financier (the seller) including the profit margin agreed by both buyer (the customer) and seller. The purchase and selling price, the mode of payments and its tenure, other costs and the profit margin for the financier are stated at the time the agreement of sale is concluded. The sales concept of *Murabahah* in financing transactions is not against *Shari'ah* so far as it does not violate any basic principle laid down by the Holy Qur'an, the Sunnah or the consensus of the Muslim jurists particularly related to the injunction against the imposition of interests.

However, in practice *Murabahah* may be subject to many conceptual and practical problems. In the context of home financing, *Murabahah* is applied especially in the form of *Istisna'* (i.e., sale with deferred product/subject matter of the contract) and *al-Bay' Bithaman Ajil*.

Istisna' is a purchase order contract of an asset where a buyer will place an order to purchase an asset that will be delivered in the future. In other words a buyer will require a seller or a contractor to deliver or construct the asset that will be completed in the future according to the specifications given in the sale and purchase contract. Both parties of the contract will decide on the sale and purchase prices as they wish and the settlement can be delayed or arranged based on the schedule of the work completed (ICM Task Force, 2004). *Istisna'* is similar to *al-Bay' Bithaman Ajil* transaction as both are sale based transactions but differ in the deferment aspects where *Istisna'* refers to the deferment of the subject matter of the contract while *al-Bay' Bithaman Ajil* concerns on the deferment of the payment. However, *Istisna'* offers greater future structuring possibilities for trading and financing. This instrument is suitable for Islamic banks to finance construction and manufacturing projects (Lewis and Hassan, 2007). However, for home financing, *Istisna'* requires the bank to assume the role of a house builder, with its associated risks apart from being a financier. Hence, many banks may be unprepared to assume both roles.

The contract of *al-Bay' Bithaman Ajil* is a popular form of *Murabahah* particularly used in home financing in Malaysia, Indonesia and Brunei. *Al-Bay' Bithaman Ajil* consists of several principles employed in the Islamic financing like sale based, interest free, deferred payment and long term financing (SAC, 2006). Nevertheless, the current practice of *al-Bay' Bithaman Ajil* as the main facility for home financing is surrounded with some conceptual and practical problems. The prevailing condition is that, many housing projects are incomplete therefore the houses offered for sale are normally not yet in existence. The basic condition of the subject matter of a valid contract namely the commodity

should exist at the time of contract may be subject to challenges. When such a property is still under construction it means the subject matter which is a condition for the validity of the contract of sale is not met. The Islamic jurists, Ibn Taymiyyah and Ibn al-Qayyim view the selling of the non-existent subject matter is allowed. However, their opinion is based on the near certainty of delivery. The arising question is whether the application of *al-Bay' Bithaman Ajil* financing in Malaysia passed the test of certainty of delivery (see ibn_abdullah, 2010). Apart from the issue of non-completion, an under construction property may also pose other risks, such as late delivery which commonly occurred in the property industry, where the risks and costs are mostly borne by the buyer; In cases where the buyer is in default because he or she refuses to continue paying for an undelivered house. According to *al-Bay' Bithaman Ajil* contract, the bank may request the full payment of the purchase price together with the agreed profit which is not fair to the customer (Kamaruddin, 2007; Mohamed, 2008).

The *modus operandi* of *al-Bay' Bithaman Ajil* is the bank will purchase the property and thereafter sell the property back to the borrower at a profit. The profit appears as a difference between the purchase price paid by the bank and the sale price. The current practice of *al-Bay' Bithaman Ajil* therefore resembles a financing facility since bankers and financiers have adopted *al-Bay' Bithaman Ajil* to finance the customers (Tan, 2010). Since *al-Bay' Bithaman Ajil* is a type of *Murabahah*, it is in contrast with the original condition referring to the early practice during the Prophet time, where *Murabahah* was a trade facility (Arifin, 2008). As one commentator puts it, the validity of financial *Murabahah* is disputed by many scholars as it releases them from the associated problems such as stock keeping, marketing and other incidental risks related to trade. The seller is supposed to keep the goods together with the associated risks before a resale can be made at a profit to the buyer. This is not feasible for a purely financial *Murabahah* transaction. Moreover, *al-Bay' Bithaman Ajil* is a home

financing facility which is applied on both the property under construction and the completed ones. In addition, the prevailing risks in the home financing concerning the abandoned or incomplete projects is that any associated risks are mostly borne by the customers. This development has caused many scholars to question the validity of financial *Murabahah* under *Shari'ah* (Arifin, 2008).

The *Murabahah* price is fixed for the delivery of the complete house at the price inclusive of the agreed profit reflecting the rate with the period for deferred payment. In the event of default by the borrower (the buyer), the question is whether the banker is allowed to claim for the full amount of unearned profit. If *Murabahah* or *al-Bay' Bithaman Ajil* transactions are treated as trading facilities, the banks therefore are entitled to the full purchase price which is stated in the agreement. However, allowing this would cause hardship to the customer. In contrast, the practice of conventional financing would impose interests only up to the date on which the customer (the buyer) had committed a default. The question raised is that; should the profit be calculated in accordance to the date on which the customer had committed an event of default?

Authorities from decided cases suggest that claiming for unearned profit should not be allowed. In *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67, Abdul Wahab Patail J held that Islamic banks are merely entitled to claim the sum due to them on the date of the default and further profit on a daily rate basis instead of claiming the full sums outstanding of the purchase price. This question was again answered in a similar tone by the same learned judge in *Bank Muamalat Malaysia v Suhaimi bin Md Hashim* [2007] 1 MLJ 275. The learned judge again reiterated that banks when foreclosing on property due to the default by the borrower could only claim the amount profit due on the date of default. Earlier, in *Dato Hj Nik Mahmud Bin Daud v Bank Islam Malaysia Berhad* [1996] 4 MLJ 295, it was held that *al-Bay' Bithaman Ajil* is not a trade facility because it does not involve any transfer of ownership

but only a right to a registrable interest. The court did not actually assert to the extent that the execution of the property sale agreement and the property purchase agreement is a mere disguise of sale transaction. Nevertheless the court said that they merely constituted part of the process required by Islamic banking procedure before the bank customer could avail him of the financial facilities provided by the bank under the *al-Bay' Bithaman Ajil* principle. The learned Hamid Sultan bin Abu Backer J.C. asserted that "abhorrent to the notion of justice and fair play when compared and contrasted with the secular banking facilities" if the payment of unearned profit is allowed, it constitutes a 'glaring injustice.' The judgments in *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67; and *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 were followed. In *Malayan Banking Bhd v Ya'kup Oje & Anor* [2007] 6 MLJ 389, Hamid Sultan Abu Backer J.C. stated that:

If a contract between the contracting parties becomes an instrument of injustice, a judge cannot ignore the unfairness and insist on strict adherence to the letter of the contract. Hence, a judge is empowered to set aside a contract when the fact discloses gross unfairness on one of the parties as the Islamic system is a just and equitable system that promotes close relationship between the banks and the customers based on co-operation and the equitable sharing of risks and rewards.

An interesting observation may be made from the above development. Theoretically, the conventional banking and financing is prohibited because the imposition of interest is considered a kind of commercial exploitation. Unfortunately, it is evident in the above *al-Bay' Bithaman Ajil* contracts that the profit rate payable by the customer to the bank may be higher than the payable rate if reverted to the conventional banking (Arifin, 2008). In the

conventional system, customer has to pay only the outstanding principal amount and earns interest at the time when the early settlement is made. The unearned interest is normally waived by the financier. Contractually, however, the customer in Islamic financial system has to settle the total outstanding selling price in a case of early settlement (Abdul Razak, *et al.*, 2008).

Islamic bank normally gives rebate to its customer who makes early settlement. However, giving rebate is made at the discretion of the Islamic banking institution. The doubt as to whether the customers are eligible to receive rebate when they make an early settlement still persists. Any perception of uncertainty and unfairness from this system may cause the consumers to turn to a more orderly conventional financing. In order to stay competitive, the problems should be rectified. Therefore, in order to promote certainty and overcome confusion in the granting and computation of rebate by Islamic banking institutions, a clause on promise to provide *ibra'* to customers who settle their debts earlier than the stipulated period was introduced (SAC, 2006). *Ibra'* is a discount amount given either when the customer pays the loaned sum earlier, or when the customer defaults in his repayments. Without any clear clause in the agreement, *ibra'* or discount which is given at the discretion of the banks may become uncertain.

However, SAC acknowledged that there is a view that there should be no fixed rule as to discount to be stated in the agreements concerning *al-Bay' Bithaman Ajil* contracts. This issue is however considered by the SAC's in that incorporation of such clause promising to give *ibra'* to customers in the Islamic financing agreement is permissible by *Shari'ah* (Mohd Nor, 2008). Doing this however may cause such an *al-Bay' Bithaman Ajil* instrument equivalent to the conventional financing, namely profit amount payable is an interest equivalent under the conventional financing system where the profit rate tracks the market interest rate (Meera & Abdul Razak, 2005).

MUSHARAKAH MUTANAQISAH: THE ALTERNATIVE MODE OF FINANCING

Following the controversies surrounding the inconsistencies of *al-Bay' Bithaman Ajil* as a mode of Islamic home financing, an innovative Islamic financial concept employing partnership contract and leasing was developed (Mohd Nor, 2008). *Shari'ah* scholars had introduced the diminishing or declining partnership (*Musharakah Mutanaqisah*) which is underpinned by the more equitable concept of *Musharakah* as a method of financing. The partnership concept (*Musharakah*) is used, and this literally means a partnership between the entrepreneur and investor who contribute to the capital (such as assets, technical and managerial expertise, working capital, etc.) of the operation in varying degrees and agree to share the returns, as well as the risks, in proportions as agreed by them in advance (ICM Task Force, 2004).

Musharakah is a traditional yet pragmatic instrument which can keep pace with the ever-advancing need for modern speedy transactions. *Musharakah* has set some broad principles which can accommodate numerous forms and procedures. A financing package incorporates *Musharakah* can be acceptable to the *Shari'ah* as far as it does not violate any basic principle laid down by the Holy Qur'an, the Sunnah or the consensus of the Muslim jurists (Usmani, 2005).

The traditional *Musharakah* concept if used for financing would involve the bank as a permanent partner in a particular venture. This departs from the main business of a bank as financier and it may find this unattractive. A hybrid concept which integrates the concept of *Ijarah* (leasing) is therefore introduced. *Ijarah* (leasing) is an instrument originally designed for financing an asset or equipment. Basically, the contract is over a *manfaah* (benefit) or the right to use the asset or equipment. The lessor leases out an asset or equipment to the client at an agreed rental fee for a pre-determined period pursuant to the contract (ICM Task Force, 2004). The ownership of the leased asset remains in the hands of a lessor. This feature is not appealing to many house buyers who look forward to

the full ownership of the property eventually. For the purpose of *Musharakah Mutanaqisah*, the contract of *Ijarah mawsufah fi zimmah* (forward lease) is adopted in cases of house under completion.

Musharakah Mutanaqisah is a combination of two contracts namely partnership and leasing. Under *Musharakah Mutanaqisah* contract, the financier and the customer share the ownership of the property. The customer will make payment in two phases; a rental payment for the part of the property owned by the financier and a buy-out of the part of the ownership by the customer. The bank's share in the equity (in this regard the property) is diminished each year through partial return of capital while at the same time, the portion of the property owned by the customer increases, until he owns completely the property before the contract is terminated (ICM Task Force, 2004). The bank receives periodic profits based on its reduced equity share that remains invested during the period. The SAC defines *Musharakah Mutanaqisah* as a contract of partnership between a financier and a recipient of financing (the customer) to own a property in which one of the partners (the financier) gives the right to the other partner (the customer) to buy his equity share of the asset either by one payment or several payments based on agreed conditions (SAC, 2006).

One of the issues arises is whether a combination of more than one contract in an agreement is allowed for financing purposes. Partnership and leasing require two different contracts and they are combined under a *Musharakah Mutanaqisah* instrument. The *Shari'ah* principle has made it clear that a combined agreement and made conditional to each other is not permissible. According to the SAC resolution, under paragraph 36, the Council in its 56th meeting held on 5th February 2006/7th Muharram 1427 resolved that;

The financing product structured based on Musharakah Mutanaqisah contract is permissible. Musharakah Mutanaqisah being a contract

recognised in Islamic muamalat is the underlying reason. However, certain conditions are imposed in implementing such a Musharakah Mutanaqisah contract. The contracting parties may combine the two contracts of musharakah and ijarah in one document of agreement, provided that both contracts are concluded separately and clearly not mixed between each other (SAC, 2006).

PRACTICAL PROBLEMS OF MUSHARAKAH MUTANAQISAH

The *Musharakah Mutanaqisah* concept also has its own operational problems. The works of Meera have highlighted these problems using a hypothetical calculation of the implementation of *Musharakah Mutanaqisah* contract. The main problem is related to the determination of the rental rate that the customer is required to pay. Rental rate is normally based on the market rental value. Factors such as location and time may be vital even though most likely the rate is always increases. This may cause burdensome on the part of the customer to pay the ever increasing yet uncertain amount of rent year after year while the bank would find it cumbersome as well to keep track with the changing rate (Meera & Abdul Razak, 2009). In this context, the interest rate which relates to the base lending rate (BLR) is more practical in offering more certainty and transparency. In this regard, the rental rate should be replaced with the interest rate which is floating based on the market interest rate. However, Shaikh Nizam Ya'quby and Muhammad Taqi Usmani have warned that the benchmark normally used in the interest-based transactions should not be used in the Islamic transaction to avoid resemblance with an interest-based transaction (*Asharq Al-Awsat*, personal communication, January 22, 2010). Majority of the financial institutions in Malaysia which offer *Musharakah Mutanaqisah* Islamic financing packages showed that they offered their financing packages based on a rental rate which fluctuates according to the

movement of the interest rate. Some banks may use the expression such as Islamic Base Rate (IBR) or Profit Rate for this purpose which is essentially floating based on the movement of the Base Financing Rate (BFR). At the same time, a fixed rate package for home financing normally for a longer term (about 10 – 20 years of tenure) may be offered as another option. Similarly, a combination of fixed and variable rate may also be offered (see Malaysiacentral.com) However, if BFR is not used, the offered packages may resemble the former contract of *al-Bay' Bithaman Ajil* instrument and give rise to the problems related to it. Meera and Abdul Razak proposed that instead of depending on the interest rate, a house price index may be used for the purpose determined by the Malaysian House Price Index (Meera & Abdul Razak, 2009).

Another interesting issue is the risk distribution and the costs sharing. For example, legal fees for the legal documentations involved are to be borne by the buyer including the processing fees, legal fees, stamping and transfer fees and possible penalty charges. Under *Musharakah Mutanaqisah*, the sharing principle means the contracting parties should share these costs. A typical Islamic financing agreement may state exactly that the customer will bear all these costs. In promoting the Islamic financing schemes, however, financial institutions may offer to pay the legal fees on the legal documentation as part of their marketing package. This is normally dubbed as *Zero Entry Cost* (ZEC) in the banks' adverts.

Following the controversies surrounding the application of *al-Bay' Bithaman Ajil* contracts, a few Malaysian Banks which offer Islamic banking services have shifted to *Musharakah Mutanaqisah* (Mohd Nor, 2008) whilst many retain the *al-Bay' Bithaman Ajil* packages. *Musharakah Mutanaqisah* may address certain concerns which give rise to disappointments among the banks and customers. *Musharakah Mutanaqisah* should be the best option available for the dilemma faced by the customers when the project is incomplete since the sharing of risks and profits principle may protect the customers from continuing paying the instalments for

an undelivered house. Unfortunately, this is normally not the case. In practice, the financier may insert a clause which excludes them from the liabilities arising from a house financing under the *Musharakah Mutanaqisah* instrument including that caused by an abandoned project. The clause may make the buyer/customer liable if he or she refuses to continue payment because that non-payment constitutes an event of default which triggers a breach of contract.

On the other hand, *Musharakah Mutanaqisah* may eliminate certain operational issues such as related to the claiming of unearned profits in the event of default by the customer. The issue related to uncertainty of how much rebate is payable also does not arise. Many conceptual issues arising under *al-Bay' Bithaman Ajil* may be able to be overcome. This is due to the fact that *Musharakah Mutanaqisah* contract is a diminishing partnership and not sale based. In fact, the leasing element in its payment structure secured fair risk to both parties in the event of default.

During the early introduction of the concept of *Musharakah Mutanaqisah*, a straight application of the instrument was only possible through cooperative societies. The lending and financing using *Musharakah Mutanaqisah* was adopted by a number of Islamic financial services providers, which predominantly cooperative-type models including the Islamic Housing Cooperative (Canada), Ansar Cooperative Housing (Canada) and the Ansar Housing Limited (U.K) whose purpose was to cater the need of Muslim customers in home financing (Meera & Abdul Razak, 2005).

Even though the concept is now widely adopted and practiced by the commercial banks, they still hesitate to offer *Musharakah Mutanaqisah* according to its original virtues. In practice, the home financing instruments like *Musharakah Mutanaqisah* and *al-Bay' Bithaman Ajil* are structured to be similar operationally to the conventional system as part of the attempts by the bankers to make it viable yet friendly and attractive to the widest range of customers. The common strategies adopted by the banks in offering their products of home financing

packages are to suit various kinds of customers' needs. Various financing packages are available for different individuals' needs depending on their nature of income, either regular or flexible. For example, certain customers may seek financing to meet their temporary financial problems. A first-time homebuyer prefers a low initial repayment. On the other hand, if someone is upgrading his or her current home or buying property as an investment, there is a possibility of early settlement or a lump sum to be made at the end of the tenure. These are the considerations that many banks have when offering their financing packages (BNM and the Association of Banks in Malaysia, 2011). Each of this may find its way translated into Islamic financing packages offered along with the conventional packages.

The resemblance of *al-Bay' Bithaman Ajil* and *Musharakah Mutanaqisah*, or in fact, any *Shari'ah*-compliant home financing instruments, with the conventional financing packages therefore cannot simply be overruled. They were invented akin to financing facilities. Financiers would stress on the profitability of the financial packages they offer for their own sustainability. In the end, a customer may find that whether the instrument is *Musharakah Mutanaqisah*, *al-Bay' Bithaman Ajil* or a conventional loan, the amount payable is more or less the same and they bear similar risks, especially when the prevailing interest rate is used as a benchmark (Meera & Abdul Razak, 2009; Osmani & Abdullah, 2010). As one commentator puts it, Islamic banks may mask themselves by merely using Arabic terminologies but retain the methods of operation and tools of the conventional banks (Arifin, 2008).

CONCLUSION

Islamic compliant financing packages should address consumers' needs and interests so that they should not be perceived as more exploitative and unfair to the customers. A strict application of *al-Bay' Bithaman Ajil* has shown that such contract may allow the earning of full payment prematurely in the event of default by

the customer or if the customer sought an early settlement. Unfortunately, the solutions put in place are not necessarily consistent with the *Shari'ah* either.

Any Islamic compliant concepts to be used in financing at the same time must be as far as possible compatible and at par with the existing practices of conventional financing. This is the greatest challenge for the Islamic financing instruments in order to stay competitive. Any arbitrage opportunities arising from the perceived generosity in the application of Islamic concepts may be adjusted by the banks to meet their own interests. The banks are profit oriented whose businesses are to earn profit from the financing activities. Therefore, *Musharakah Mutanaqisah* which is purely based on the sharing of revenues and risks may not be appealing to the majority of these financiers.

As discussed above, in either situation, this may expose inconsistencies with the principles in the *Shari'ah*. There is a practical limit each time the Islamic finance can offer side by side with the conventional system especially in addressing the challenges posed by the need to strike a balance between market pragmatism on the one hand and complying with *Shari'ah* requirements on the other (Osmani & Abdullah, 2010). Some jurists opine that the resemblance of the two systems is not healthy within the context of Islamic finance development (Meera & Abdul Razak, 2009; Osmani & Abdullah, 2010).

The high expectation is therefore on the shoulder of 'Shari'ah Advisory Council' (SAC) established under sec 56 of the Central Bank of Malaysia Act 2009. The council sole purpose is to be a specialized committee in the field of Islamic banking to speedily ascertain the Islamic law on financial matters so as to command the confidence of all in terms of the sanctity, quality and consistency of the interpretation and application of *Shari'ah* principles pertaining to Islamic finance transactions. A recent anomaly arises with respect to the scope of authority of this council. Each bank offering Islamic products needs a *Shari'ah* Advisory Body (SAB) as required by the Islamic Bank Act, essentially in ensuring *Shari'ah* compliance.

The new Central Bank of Malaysia Act 2009 provides that the Islamic banks are to seek the advice of the *Shari'ah* Advisory Council (SAC) of the BNM; and it is mandatory for the Islamic banks to comply with the advice given by the SAC. This will ensure that *Shari'ah* compliance is always strictly observed and adhered by the Islamic banks with the advice of the SAC. The close relationship with SAC can also facilitate shorter timeframe in endorsing any new products in IBF (Engku Ali, 2008). However, the recent judgment by Mohd Zawawi Salleh J in *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* [2011] CLJ JT(2) may cast some doubts for a secure future direction of the Islamic finance system generally. While acknowledging the advisory power of the council, the SAC is merely required to make an ascertainment and not determination of Islamic laws related to any questions on Islamic financing issues (para 85 and 87-88). Any disputes related to the validity of the instruments or contract used in a particular transaction is a judicial decision and traditionally is exercised by the courts (para 102, 105 and 106). This means there is no finality in terms of the validity of any of the instruments introduced in the Islamic finance system until the court confirms. Therefore, the question of whether a resilient legal environment for Islamic finance has been appropriately put in place continues.

Al-Bay' Bithaman Ajil has been criticised for its incompatibility with the existing system of neither Islamic finance nor the conventional one. The implementation of the partnership concept in *Musharakah Mutanaqisah* is another test of how pragmatic is the *Shari'ah* principle alongside the conventional system, taking into consideration the limited viability and the power of authority concerned in paving the way for its future direction. Therefore, the issue of SAC of course requires a different analysis of its own.

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Swan and Kanwal (2007) reported that ...

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