

Pertanika Journal of
**SOCIAL SCIENCES
& HUMANITIES**

JSSH

VOL. 23 (S) NOV. 2015

*A special issue devoted to
Law, Society & Globalisation, and
Waqf Issues and Challenges: The Way Forward*

Guest Editors

Zuhairah Ariff Abd Ghadas, Hussin @Mohamad Ab Rahman
& Nazli Ismail @Nawang



PERTANIKA
JOURNALS

A scientific journal published by Universiti Putra Malaysia Press

Journal of Social Sciences & Humanities

About the Journal

Overview

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

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

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Journal of Social Sciences & Humanities: ISSN 0128-7702 (*Print*); ISSN 2231-8534 (*Online*).

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

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3. The chief executive editor, in consultation with the editor-in-chief, examines the reviews and decides whether to reject the manuscript, invite the author(s) to revise and resubmit the manuscript, or seek additional reviews. Final acceptance or rejection rests with the Editor-in-Chief, who reserves the right to refuse any material for publication. In rare instances, the manuscript is accepted with almost no revision. Almost without exception, reviewers' comments (to the author) are forwarded to the author. If a revision is indicated, the editor provides guidelines for attending to the reviewers' suggestions and perhaps additional advice about revising the manuscript.
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Law, Society & Globalisation, and
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Vol. 23 (S) Nov. 2015
(Special Edition)

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A scientific journal published by Universiti Putra Malaysia Press



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E-mail: executive_editor.pertanika@upm.my
URL: www.journals-ld.upm.edu.my

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Kamariah Mohd Saidin
UPM Press
Universiti Putra Malaysia
43400 UPM, Serdang, Selangor, Malaysia.
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ABSTRACTING/INDEXING

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Preface

Alhamdulillah with the Grace of Allah S.W.T., this Special Edition of the *Pertanika Journal of Social Sciences and Humanities* is successfully done. This issue includes various papers that have been accepted at the 4th International Conference on Law and Society (ICLAS) 2015 and the International Conference on *Waqf* (ICW) 2015. Both conferences were organised at Universiti Sultan Zainal Abidin, Kuala Terengganu on 10 and 11 May, 2015. The joint conferences were hosted by the Faculty of Law and International Relations in collaboration with Harun M. Hashim Law Centre, International Islamic University Malaysia (IIUM); Muhammadiyah University Yogyakarta (UMY), Indonesia; Istanbul University, Turkey; and Fatoni University, Thailand.

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

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

In the context of phenomenal changes happening in the home front and elsewhere in the world, we need to readdress and redefine our understanding of issues, challenges and solutions. The forces of globalisation and massive cyber development demands continuous improvement in perspective.

Towards fulfilling the broad scope of the conferences, the organisers accepted papers related to the relevant themes, namely, the challenges affecting the legal system including law making, dispute resolutions, legal education, professional practice; public policy and corporate governance; neo-colonialism, international relations and globalisation; and Islamic studies, anthropology, sociology, psychology.

A total of 114 papers were presented at ICLAS and another 33 papers were presented at ICW. A total of 30 papers were carefully chosen for this Special Edition. They were considered suitable for inclusion in this publication because of their vigorous examination and discussion of contemporary issues relevant to current challenges.

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

We would like to register our special appreciation to Dr. Nayan Kanwal, the Chief Executive Editor, and his dedicated Pertanika team at the Journal Division, UPM, for rendering us their generous guidance and commitment in bringing this edition to print.

Guest Editors

Zuhairah Ariff Abd Ghadas (*Prof. Dr.*)

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Nov 2015

Pertanika Journal of Social Sciences & Humanities
Vol. 23 (S) Nov. 2015

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The Slump in the Price of Crude Oil: A Call to Review Malaysian Revenue Law and Fiscal Policies

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ABSTRACT

Global oil prices have fallen sharply, leading to significant revenue shortfalls in many energy exporting nations. It should be recalled that from 2010 until mid-2014, world oil prices had been fairly stable, at around US\$110 a barrel. But since June last year, prices have more than halved. Stakeholders question the reason for the dip in oil prices. This paper looks at the potential long term solutions in a climate of persisting lower oil prices. The objectives of this paper are, first, to draw attention to the implications of the plunging oil prices in the way that it affects Malaysia, second, to show how Malaysia's reliance on oil exports could become a drag on its economy and third, to analyse the implication and impact of lesser oil revenues on the economy which policy makers should address with a particular focus on the remedial measures potentially available to them through appropriate legal mechanisms, particularly tapping alternative sources of revenue. The methodology includes an examination of the laws and policies relating to income and expenditures and a consideration of mechanisms employed by other countries in raising revenue which are of relevance to Malaysia.

Keywords: Malaysian Economy, Declining Oil Revenue, Revenue Policies, Revenue Laws

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Macro economy is today dangerously adrift with its overwhelming impact too visible to ignore. Though it is not necessarily the main instrument to employ in assessing how well a government of a country is doing, macro economy has within it what it takes to influence the factors reasonable

people will use to measure government performance on the economy; and these include some outcome variables such as Income (Gross Domestic Product and growth rate), stability of prices (inflation and exchange rate), unemployment rate and poverty rate among others.

Gail Tverberg¹ suggests in one of his works that the economy is a networked system of customers, businesses and governments which is tied together by a financial system and many laws and customs that have evolved over the years.² Obviously, energy plays a key role in an economic system. In view of this, it can be argued an effective economy is tied to energy. Following this logical line of thought, it may also be held that as far as the economy of the modern world is concerned, the importance of stable oil price is not in doubt bearing in mind that oil, as a (natural resource) product, is the largest internationally traded goods or at least one of such goods.

¹Gail Tverberg is an actuary who is interested in Finite World Issues and he has written prolifically on oil depletion, water shortages and climate change.

²See Gail Tverberg, 'A New Theory of Energy and the Economy – Part 1 – Generating Economic Growth', published by Our Finite World on Sunday, January 21, 2015, and available on the following website: <http://ourfiniteworld.com/2015/01/21/a-new-theory-of-energy-and-the-economy-part-1-generating-economic-growth/> which was accessed, Saturday, March 21, 2015.

Furthermore, it should be noted that the prices of energy-intensive goods and services are linked to energy prices, of which oil makes up the most substantial part with a capacity to impact the economy and hence, the claim in the above submission that energy as represented in oil holds the key to efficient and effective economic system. Thus, it may rightly be assumed that either upward or downward change in the price of oil is bound to have a wide-ranging effect for both oil importing and exporting countries, though the focus of this paper is on the latter based on the fact that Malaysia oil exporting country.

A Brief Overview of the Drop in the Price of Oil

In the second half of 2014, oil prices fell sharply ending a four-year period of stability.³ Brent crude oil, against which Malaysian oil is priced, peaked at US\$115 a barrel in late 2013 but declined to about US\$45 per barrel at the beginning of 2014 before bouncing back to US\$60 per barrel in February 2015. That is more than 60% drop between June 2014 and January 2015 while the American (the United States?) benchmark West Texas Intermediate (WTI) fluctuated around the US\$50 mark.

³See International Energy Agency (IEA) 2014a. Oil Market Report, June 13, Paris and 2014b. Oil Market Report, December 12, Paris. It was noted in the report that between 2011 and early 2014, monthly average oil prices fluctuated between US\$93 and US\$118 per barrel. Since 2000, monthly average oil prices touched an all-time high of US\$133 (July 2008) prior to going down to US\$61 per barrel (December 2014). Presently it is US\$59.34 (May 4, 2015)

In March 2015, the oil market seemed to have shown signs of stabilising but we could not hold onto it, as the global benchmark Brent crude oil fell below US\$53 per barrel on 16 March 2015 but later rose to US\$53.55 in the evening of the same day. It is worthy of note that the International Energy Agency had warned on 13 March 2015 that another sharp fall in oil prices was likely despite what appeared to be a rebound in early March⁴ and therefore, we were not caught unaware with the 3% fall on 16 March 2015 which at that time was a six-week low of US\$52.50 per barrel. The falling price of oil places severe pressure on oil producing countries and test the flexibility of many of them, including Malaysia.

Impacts of Low Oil Price on the Malaysian Economy

The drop in the price of oil with a subsequent revenue shortfall has a significant impact on the economy of Malaysia. Understandably, the sources and implications of the falling crude oil prices have generated controversy but what is

⁴See IEA, Oil Market Report for March, 2015 in which the watchdog that represents the world's main oil-importing nations, says the recent stabilisation in oil prices is "precarious." "Behind the facade of stability, the rebalancing triggered by the price collapse has yet to run its course," it further observes in the report, released on Friday, 13/03/2015, see: <https://www.iea.org/oilmarketreport/omrpublic/> and: <http://uk.businessinsider.com/the-oil-crash-is-not-over-says-international-energy-agency-2015-3?r=US#ixzz3V1cm7i2h> Accessed on Saturday, 21/03.2015.

certain and obvious in the intensive debate is that if low oil prices persist for a lengthy period of time, it will not only reduce the revenue of oil producing countries but countries like Malaysia will be forced to make difficult economic, social and political adjustments.

Undoubtedly, the contribution of oil to fiscal revenue is substantial and hence, the severity of the shock reflected in the Ringgit (Ringgit Malaysia - RM) currency. The ringgit has been falling since the middle of 2014 as the oil price plunged, dropping to 3.58 against the US dollar on Friday, 16 January 2015 and by the following Tuesday, 20 January 2015, it fell to 3.59. It was on that day the government announced its budget revision. The steepest fall was at 3.71 (23/03/2015) standing at 3.51 on 2 May 2015. It should be pointed out here that ringgit was not the only victim, other regional currencies such as the Singapore dollar and the Indonesian rupiah had also fallen, but some economic analysts have argued that Malaysia's reliance on oil income seems to have worsened the fall of the currency.

Malaysia's current account surplus has been declining since peaking in 2008. Lower crude oil prices are putting pressure on Malaysia's crude palm oil, a key source of export revenue. Crude palm oil exports to China, one of the major buyers of the product, fell to 22% on the year to 2.58 million tons in the January-November period of 2014. Malaysia was said to have recorded 20% year-on-year growth in its trade surplus over the same period, but some

analysts have attributed this to the boost in the electronics commodities with a warning of a potential deficit in the months ahead.

Falling oil prices have also hurt the state-owned energy firm – Petronas - which accounts for most of the government’s oil and gas revenue. The company warned in November 2014 that it would cut capital expenditure to take account of the added cost of exploring deep or difficult oil and gas prospects. It indicated that capital expenditure and operating expenditure would be cut by 15%-20% and 25-30% respectively this year.

Petronas pays the government an annual ‘dividend’ which is substantial, ranging of billions of ringgit but it is expected to try to negotiate this ‘dividend’ down with the government due to slump in oil prices. On December 2014, Petronas warned that its contribution to the government revenues in 2015 could drop to RM43 billion (US\$12 billion) instead of the previously projected RM68 billion, if oil prices remain around US\$75 per barrel.

According to MIDF Research (Malaysian Industrial Development Finance Berhad), total sales of Malaysian stocks by foreign investors topped US\$2 billion in 2014, the highest figure since the 2008 financial crisis, and the sell-off appears to be continuing this year as investors flee the country.⁵ Bursa Malaysia, the country’s stock exchange, recorded a 5% year-on-year decline in average daily turnover to 2.037 billion in 2014.

⁵ See the official website of MIDF: <http://www.midf.com.my/>

It has also been reported that the gloomy market situation has triggered cold sentiment which seemed to have wrecked a planned merger of three banks as the talks ceased on 14 January 2015 between CIMB Group Holdings and two other local lenders to create Malaysia’s largest bank by assets. While the three banks were said to be convinced that their initial proposal to merge as announced in July 2014 was based on a sound logic, the changing economic landscape that followed the announcement had made the plan less attractive.

In an internal memo to his staff, the CIMB’s acting group chief executive said “the significant change in oil prices and currency exchange rates, as well as the challenging outlook for the financial services industry”⁶ were the main reasons that why the merger deal fell through. If sustained, the oil price slump will have a huge impact on bondholders and banks with high dollar and energy exposures.

The CIMB Research had earlier last year envisaged and projected a loan growth of 10% in 2015 for the Malaysian banking sector which was the same level with that of 2014 as the growth in mortgages slowed down. Moreover, the brokerage expected banks to face other challenges such as the implementation of the goods and services

⁶ See Tan, CK (Nikkei staff writer), ‘Slumping crude starting to hit Malaysian economy,’ Nikkei Asian Review, January 22, 2015 edition, available on the following website address (accessed on Monday, 16/03/2015): <http://asia.nikkei.com/PoliticsEconomy/Economy/Slumping-crude-starting-to-hit-Malaysia-economy>

tax that will be effective from this April (2015) and this is likely to reduce consumer spending.

A more expensive dollar from falling oil prices will mean more expensive imports for the merchants. The merchants must now pass on that added expense to the consumer to break even. Things generally become more expensive across the board when inflation sets in but because the nature of this type of inflation is predicated on the structure of the economy itself, it cannot therefore be controlled by monetary policy and manipulation by interest rates. Overtime, the government and domestic economy will eventually yield to the orchestration of the international market and helpless dependency on being an oil exporting country.

It took a while for the economic fall out to trickle down but it was gradually becoming discernible enough to notice and by the middle of 2015, with the declining oil prices and non improvement of oil exports, Malaysians citizens will discover a sudden and dramatic increase in food and transportation costs, among a host of other things.

As the title of this paper indicates, the challenge for the government is to review revenue laws and fiscal policies with a view to create incentives that will prevent the economy from collapsing anytime the price of oil falls. The policy adjustment will imply fiscal tightening, lower output and currency depreciation; the latter is harder to achieve under the fixed exchange rate regimes that characterise many oil

exporters. If expectations of inflation are not well anchored, the depreciation may lead to higher inflation. A question may be raised as to what should be the appropriate policy response to falling oil prices in countries that export oil. Using Malaysia as a case study, in answering this question, it should be noted that while no two countries will experience the effect of plunging oil prices in the same way, they share common traits which may warrant some common policy response such as curtailing fiscal spending, removal of oil subsidies and depreciation of currency.

Malaysian Policy Response to Slump in Oil Prices

Malaysia is the third largest economy in Southeast Asia and one of Asia's largest producers of petroleum-based products. About 30%-40% of its fiscal revenue comes from sales of oil and liquefied natural gas. In short, its economy relies heavily on oil and gas export revenues to maintain strong growth and control its debt. This is underscored in the way Malaysia overcame the last global economic problems.

The country was able to manage a quick recovery from the 2008 financial crisis and became one of the first major Asian countries to recover from that particular global economic crunch because at the time, its enormous oil revenue allowed the government to boost spending. However, the fall in oil prices had deprived the government of the means to help the economy make a similar response, which may have informed the abolition of fuel

subsidies late 2013 and the imposition of sales tax in April 2015. It was obvious the country needed to find a new solution to address the economic challenges as the adverse turn in the oil market has put Malaysia's current account balance under strain, and ruined budget projections.

In what may be described as acknowledging the global economic backdrop and its impact on Malaysia, on 20 January 2015, the Prime Minister, Najib Razak announced policy changes in a special address broadcast live nationwide in which he revealed measures his government would introduce with a view to easing the economically challenged situation.

The speech was generally seen as a Malaysian government position and indeed its policy response to the slump in the price of oil particularly when he said: "lately, there have been reports, concerns and queries on issues, such as crude oil prices and performance of the ringgit".

At the news conference in Putrajaya, the Prime Minister proclaimed a revision to Budget 2015 to help Malaysian oil exporting economy adjust to the impact of plummeting global crude oil prices. One of the major aims of the budget revisions is to boost the value of the ringgit which had been sold down on the premise that the country revenue had fallen sharply along with slump in the oil prices. Malaysia's currency traders have been selling down the ringgit which has fallen from RM3.14 against the US dollar on 28 August 2014 to around RM3.58 in January 2015.

Najib Razak remarked that "the recent volatile capital flows and significant depreciation of the ringgit were also due to concerns over the impact of the sharp fall in oil prices on the Malaysian economy."⁷ He further noted "being crude oil exporter [and with the oil prices plummeting recently], there was a perception that export receipts will also decline drastically and result in a current account deficit."⁸

He argued that "indeed, this perception is not correct. As a net crude oil exporter, we had a surplus of RM7.7 billion from January to November 2014. However, we are an importer of petroleum products with a net import bill of RM8.9 billion during the same period. If we include both crude oil and petroleum products, we are actually a net importer with a deficit of RM1.2 billion. Therefore, the perception that Malaysia is a large oil producer is also not true. However, if we factor in exports of crude oil, and nett out petroleum products, then Malaysia is a net importer of petroleum. This does not include LNG, for which Malaysia is a net exporter"⁹.

This argument or revelation (as described by some analysts) is in sharp contrast to the generally held belief that

⁷See Najib Razak , Budget Revision: Full text of Prime Minister's speech in the Star newspaper of Tuesday, January 20, 2015. Available on: <http://www.thestar.com.my/News/Nation/2015/01/20/Budget-Rivision-Full-Speech/> the website was accessed on Tuesday, 17/03/2015

⁸ibid

⁹ibid

Malaysia is a net exporter of oil which implies lower government revenue as global oil prices fall. Conversely, in between claiming the lower crude oil prices benefit net oil importing countries like Malaysia, Datuk Najib Razak did acknowledge that falling crude oil prices would impact on government revenue. A wise and accurate approach is necessary to mitigate the effects of oil price slump on economic growth, national revenue and the value of the ringgit.¹⁰

Among other steps outlined (in the broadcast) which the country would take is cutting 2% from the RM273.9 billion in 2015's budget. It must be noted that the budget was drafted in 2014 based on the benchmark assumption of oil price at the rate of US\$100 to US\$115 per barrel. The government had revised downwards its estimate for 2015 to the average baseline price of US\$55 per barrel of oil to result in Malaysia facing a revenue shortfall of RM13.8 billion. If the revised figures are compared with the Budget 2015 as tabled in 2014, the outcome would show that despite the savings of RM10.7 billion from the implementation of the managed float mechanism for retail fuel prices, the government would face a revenue shortfall of RM8.3 billion to accommodate the measures outlined in the Budget. As a result, the higher projection made in October 2014 vis-a-vis the GDP ratio was given a downward review as the forecast for the GDP growth was adjusted to 4.5%-5.5%.

¹⁰ ibid

The Prime Minister noted that, "without any fiscal measure, the deficit will increase to 3.9% of GDP against the target of 3% for 2015. This requires government commitment on fiscal consolidation. Therefore, taking into account the revised estimates, we are revising the fiscal deficit target to 3.2% of GDP in 2015. This is still lower than the fiscal deficit of 3.5% of GDP in 2014."¹¹

Following the recovery from the 2008 financial crisis as noted earlier, the GDP has been growing at a pace of more than 5% on the brisk consumer spending and oil prices that were stable until June 2014.

Moreover, in lieu of the 3% fiscal deficit envisaged earlier, the expectation now is that Malaysia will record fiscal deficit equal to 3.2% of GDP. Abdul Wahid Omar, a Minister in the Prime Minister's Department, had declared in 2014 that Malaysia would continue to run a current account surplus in both 2015 and 2016¹² but as events turned out, this view was apparently meant to dispel speculation.

The Prime Minister also disclosed the RM5.5 billion would come from slashing government operating expenditures such as supplies and services, and grants allocated to state-owned companies. According to Najib

¹¹ ibid

¹² See TAN, CK (Nikkei staff writer), 'Slumping crude starting to hit Malaysian economy,' NIKKEI ASIAN REVIEW, January 22, 2015 edition, available on the following website address (accessed on Monday, 16/03/2015): <http://asia.nikkei.com/Politics-Economy/Economy/Slumping-crude-starting-to-hit-Malaysia-economy>

Razak, these are “proactive initiatives to make the necessary adjustments following the challenging external developments”.

In addition to the measures announced by the Prime Minister, we feel the revenue system of the country needs restructuring. The imposition of a Goods and Sales Tax (GST) since April 1, 2015 is a positive step notwithstanding the teething problems encountered. Two obvious advantages of GST: it's a) it is a comparatively more effective and efficient structure in yielding a reliable source of revenue b) it has a positive impact in controlling tax evaders. In addition to GST, we propose the implementation of a comprehensive system of capital gains tax and the reintroduction of inheritance tax.

The Rationale for a Capital Gains Tax in Malaysia

Although there is a very limited form of capital gains tax in Malaysia in the form of Real Property Gains Tax, the main objective of which is to control short term speculation in real property transactions, the authors are of the view that comprehensive capital gains tax system, notwithstanding its rationalisation on many grounds¹³, would

¹³See OECD Tax Policy Studies Taxation of Capital Gains of Individuals Policy Considerations and Approaches 2006 at [61-65]:http://books.google.com.my/books/about/OECD_Tax_Policy_Studies_Taxation_of_Capi.html?id=x5Q5hBeWo7kC&redir_esc=y: where the capital gains tax is justified for securing tax revenues and efficiency considerations. It can also be justified by the search to attain horizontal and vertical equity considerations, to encourage savings and investment; and finally for simplicity, tax compliance and administrative considerations.

strengthen the fiscal system through its equity, efficiency and the revenue raising functions.

Revenue from taxes plays an important role in financing governments' expenditures. It is in this spirit that a Capital gains tax (CGT) was first introduced in Norway in 1911 followed by the United States in 1913 as a means to cover the expenses resulting from the World War I.¹⁴ Following the example of these countries, CGT has been introduced in several other countries¹⁵ around the world although stressed on different motives. In developing countries such as Malaysia, the introduction of the tax was founded on the theory of taxing unearned increment, which stresses the fact that since the gains on real estate were not the result of the

¹⁴Grubel, H. G, *Unlocking the Canadian Capital: The Case for Capital Gains Reform*, the Fraser Institute, 2000 at 5.

¹⁵The Finance Act 1965 in the United Kingdom (1965). In India, the tax was initially introduced in 1946 through the Income Tax and Excess Profits Tax (Amendment) Act (12 of 1947) to be applicable on transfers realised after the 31 march 1946. After being repealed, the tax was reintroduced from 1956 through Act (77 of 1956) which was approved on 21 December 1956 with effect from 1st April 1957. In Canada, See bill C-259 passed on June 18, 1971 with effect from 1972. The rationale for introducing CGT was justified by the need for financing growing cost of social security and the general government spending in Grubel, H. G, *Unlocking the Canadian Capital: The Case for Capital Gains Reform*, the Fraser Institute, 2000 at 6. In Australia, the introduction of the tax was to be effective on transfer made on or after 20 September 1985.

effort of the landowners but instead on social factors, taxing these gains was fair to finance community needs.¹⁶ It shows that in developing countries, the initial rationale of the tax was mainly founded on equity and fairness grounds in contrast to developed countries where besides its equity objective, the tax objective was also meant to reduce avoidance practices to ultimately generate revenue.

Given the strong economic growth of the country over the past decade resulting in marked appreciation of capital assets such as real property, shares listed on the KLSE and value of unit trusts, the authors feel that a comprehensive system of capital gains tax would fulfil the twin objectives of raising revenue for public expenditures and discharging the equity criterion of proportionate taxation.

The Reintroduction of Inheritance Tax

Inheritance tax or estate duty are called “death tax” by its opponents and is a tax levied on the net value of the estate of a deceased person before its distribution to the heirs. It was introduced in Malaysia by the Finance (Estate Duty) Act 1971 but subsequently repealed by the Finance Act

1992. The rates before its repeal were 5% on estates worth between RM2 million and 4 million, and 10% if it exceeds RM4 million.

Currently, there is strong evidence in most parts of the world of an increase in the equity gap between the rich and the poor. For example, the one thousand richest families in Britain currently control £547bil¹⁷ which represents more money than the combined wealth of poorest 40% of the population. In Australia, the richest earn more than eight times the nation’s poorest and the Taxation Statistics for 2012-13 highlights the enormous pay gap between the rich and the poor. On a geographical basis, there is an average (mean) income difference of US\$155,823 between the richest postcode (2027) and poorest postcode (2403)¹⁸. In USA, the average annual earnings in 2014 of a resident in five poorest states were US\$24,999 or less in comparison to US\$200,000, the average earnings of residents in the five richest states.¹⁹ Malaysia is no exception to this trend as confirmed by the Khazanah Research Institute Report published in November 2014. Although Malaysia is a high middle income country with a GDP of RM32,984 in 2013, 74% of

¹⁶Amatong J. D., “Taxation of Capital Gains In Developing Countries (Imposition Des Gains En Capital *Dans Les Pays En Voie De Developpement*)” (July 1968) Vol 15, No. 2 Staff Papers International Monetary Fund Palgrave Macmillan Journals, 354-355 citing the Budget Speech of the minister of finance, 1964 budget (Kuala Lumpur, November 1964), p.47 and the reasons for the introduction of the tax in India and Malaysia.

¹⁷See Sunday Times Rich List 2015: www.thesundaytimes.co.uk/sto/public/richlist

¹⁸<http://www.smh.com.au/business/the-economy/australias-richest-and-poorest-postcodes-revealed-in-taxation-statistics-20150428-1mv7xe.html>

¹⁹<http://www.forbes.com/sites/erincarlyle/2014/10/08/new-york-dominates-2014-list-of-americas-most-expensive-zip-codes/>

households have a monthly income of less than RM6,000. And the savings of the top 4% [17,061] EPF members is more than that of the lower 44% [2.85 million.]²⁰ The report also highlighted wealth inequality in the country: there are 38,000 Malaysian millionaires, wealthy Malaysians are buying million-ringggit houses and luxury cars, Malaysians were the fourth largest buyers (4%) of newly built property in London in 2012, and are the top buyers of homes in Singapore.²¹

From the economic evidence on the disparity of wealth distribution, it is evident that a good number of rich Malaysians will leave estates of substantial value for distribution to their families. The authors fully concur with the call for the reintroduction of an inheritance tax²² which can be used to improve the economic standing of the poorer segment of the population. England implemented a probate duty in 1694 and as early as 1791, France adopted a universal estate tax. The US introduced

²⁰ See Khazanah Research Institute Report on State of the Households: http://krinstitute.org/kris_publication_State_of_Households.aspx

²¹ <http://www.thestar.com.my/News/Nation/2014/11/30/Households-under-microscope/>; see also The Malaysian Human Development Report 2013 which confirms the inequality of income and wealth distribution in Malaysia: http://mhdr.my/files/editor_files//files/MHDR%202013.pdf

²² <http://www.freemalaysiatoday.com/category/nation/2015/01/22/cap-bring-back-inheritance-tax-to-stave-off-social-unrest/>

it in its Federal tax code in 1916 and 19 members of the OECD countries impose varying rates of inheritance tax on their taxpayers.²³ Given that substantial wealth has been accumulated by a small minority of the population, the reintroduction of estate duty would be in consonance with one of Adam Smith's canon of taxation that tax should be levied in proportion to wealth.

CONCLUSION

Notwithstanding its adverse effect on revenue, it must be stressed that low oil prices also provide an opportunity to reform energy subsidies and energy taxes. It is pertinent to note that the International Monetary Fund (IMF) has long advocated that government use the saving from the removal of energy subsidies toward more targeted transfers.²⁴ The removal of the subsidy since November 2014 has been accepted by the public as a necessary reform saving the Government a substantial sum [RM29 billion was used to subsidise petrol in 2013] which can now be channelled to other productive capital expenditures.

Malaysia and several other oil exporting countries need oil prices to be much higher than current levels to cover their spending but we can argue the

²³ <http://taxfoundation.org/article/estate-and-inheritance-taxes-around-world>

²⁴ See IMF on energy subsidy reforms, 2013: <http://www.imf.org/external/np/fad/subsidies/>

experience of another low in oil income offers a great opportunity for Malaysian leaders at both federal and state level to redraw our fiscal mentality.

Malaysia needs to redefine its expenditure priorities. What expenditure is necessary to stimulate economic growth and development? What expenditure will improve the quality of lives of Malaysians? And what expenditure will attract the necessary investments to open up other sectors of the economy?

In the event of a moderate oil price recovery, Malaysia would still require innovative funding and greater private sector involvement across the hydrocarbon value chain. Nevertheless, at high oil prices, we must maintain prudent and an incentive-based fiscal environment that will prevent the return of high cost of production currently experienced by industries in Malaysia. The government should be committed to ensuring clear and transparent fiscal rules of general application with appropriate incentives to investors and commensurate economic returns for the country.

Malaysia's commitment to fiscal stability in its oil and gas sector remained unflinching especially as our historical antecedents clearly demonstrate this. The current market reality of low oil prices presents an opportunity for us to improve efficiency in our operations. Fiscal stability and predictability are as crucial as the reliable forecast of government revenues.

We consider the introduction of GST to generate revenue from the consumers of goods and services and its indirect effect

of combating tax avoidance as a powerful fiscal tool. However, we believe that GST should be supplemented by the imposition of a comprehensive capital gains tax system and the reintroduction of an inheritance tax to levy taxes on the 'unearned' income of owners of capital assets and inheritors of substantial estates. These measures would provide a balancing effect in restructuring the fiscal system by subjecting the general public to GST and imposing additional taxes on 'unearned' income of the richer strata of society.

The measures suggested above have the potential to generate substantial revenues. However, the market economy, especially capital market and foreign exchange markets, foreign direct investment and other components of the economy operate best in liberal, business-friendly and corruption-free countries. It is therefore incumbent on the Government to root out corruption, curb protectionism and provide the right policies to nurture a free market economy. In such an environment, the strategy to restructure the revenue system to power the economy without over-reliance on petroleum income should be readily anticipated.

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Competition Law and Affirmative Action in Malaysia: Complementarity or Conflict?

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ABSTRACT

This paper examines the interface between competition law and affirmative action in Malaysia. It analyses the different goals of competition law and explains how that may accommodate Malaysia's race-based affirmative action programme (or also known as the pro-Bumiputera policies) introduced via the New Economic Policy (NEP) post 1969 racial riot and adopted in 1971. This paper finds Malaysian competition legislative enactment, that is the Competition Act 2010 (CA 2010), does not make any explicit reference to Malaysia's affirmative policies. Based on an analysis of the existing provisions of the CA 2010, this paper finds that Chapters 1 and 2 prohibitions can be used against 'ethnic cartels' which have the effect of preventing Bumiputera enterprises from participating in the market. This is by allowing the CA 2010 to open up the market to those enterprises providing them the opportunity to participate at all levels of production chain and putting an end to the phenomenon that they have to crowd into the least profitable level.

Keywords: Affirmative Action, Competition Law, Ethnic Cartels, Malaysian Competition Act 2010

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Malaysia, which gained its independence from Britain in 1957, has implemented race-based affirmative action policies in various forms and the most well-known is the New Economic Policy (NEP). The NEP was introduced after a series of racial riots that rocked the country in 1969. Being multi-racial, multi-religious and multi-

lingual, Malaysia (and its predecessor, Malaya) have suffered a long history of inequitable distribution of wealth between the Malay majority and the Chinese minority. This phenomenon has colonial roots but the resulting affirmative action policies have created polarising effects with their proponents¹ and opponents² vehemently defending their position on such policies.

There is a plethora of writings on the history, nature and development of the NEP namely by Gomez, Saravanamuttu and Mohamad (2013) and Sundaram and Wee (2014, pp. 20-39). The NEP was introduced to eliminate poverty and reduce wealth and income inequalities between different ethnic groups in Malaysia (Gomez, Saravanamuttu, & Mohamad, 2013, p. 1). But the policy later evolved into promoting a culture of political patronage and rent-seeking with a heavy State participation in the economy (Gomez, Saravanamuttu, & Mohamad, 2013, pp. 8-9; Sundaram & Wee, 2014, pp. 20-39). However, there is a dearth of studies on how Malaysia's affirmative action policies, particularly the NEP, interact with the regulation of competition in the Malaysian market despite the significant impact the NEP has on the market.

Vern (2013) reviews the Competition Act 2010 (the CA 2010) and discusses the conflict between NEP and other

¹For views that support affirmative action, see (Khalid, 2014), (Chua, 2003).

²For views critical of affirmative action, see (Gomez, Saravanamuttu, & Mohamad, 2013).

related affirmative action policies with the CA 2010. Unfortunately, his analysis only covers "State-induced" anti-competitive practices such as those concerning government procurement and government-sanctioned monopolies through government linked companies (GLCs). The analysis does not extend to the anti-competitive practices of private enterprises which participate in ethnic economies which are rampant in countries like Malaysia. The role of competition law in addressing such market injustices has been explored by Cao (2004) who rejects the appropriateness of affirmative action in reducing market inequalities among different ethnic communities. The failure to address market inequality and discrimination in a competition law discourse will be unfair because it allows an attack on State intervention for socio-economic or developmental reasons in favour of economic efficiency but market discrimination by private enterprises remains unchecked.

Therefore, the interactions between competition law and affirmative action must be examined in the light of the Malaysian law. This paper will first discuss the interface between competition law and affirmative action. It will then investigate how such inter-relationships affect Malaysia vide the CA 2010 which is the main competition legislation governing the markets in Malaysia. This will lead to a discussion on how the CA 2010 addresses ethnic cartels. The paper raises some important points on how inefficient

producers may benefit from the inclusion of affirmative action considerations into competition law and how the law could respond to such an issue. The conclusion summarises main findings.

THE INTERFACE BETWEEN COMPETITION LAW AND AFFIRMATIVE ACTION

There is a need to look at how competition law interacts with affirmative action. But first, the different goals of competition law and affirmative action as two distinct regulatory regimes need special attention.

The aim of a competition law is to promote and maintain the process of competition in the market. Competition refers to the process of rivalry among firms in the market and main purpose of competition law is to promote economic efficiency and takes centre stage in the regulation of market competition. As suggested by Vickers and Hay (1987, p. 2), “the prime purpose of competition law is to promote and maintain a process of effective competition so as to achieve a more efficient allocation of resources”. Affirmative action on the other hand, refers to regulation that seeks to correct past wrongs by creating measures that promote distributional objectives that can be reflected in fairer or more equitable distribution of wealth (Ezorsky, 1991). Thus, the rationales of such regulation are social. The question now is: do competition law and affirmative action operate in separate spheres?

Bakhoum (2011, p. 496) argues that economics does not operate in a vacuum

because the expected results of an economic theory, including economic efficiency, are dependent on the socio-economic, political, legal and cultural contexts unique to each individual States. This is his response to Eleanor Fox’s statement that there is an on-going split between universalists and relativists regarding what is supposed to be the goal of competition law (Fox, 2007). The universalist view which is championed by developed countries sees economic efficiency as the only goal of competition law whereas the relativist view which is supported by developing countries argues that that should not be case as the conditions in developed countries differ from those in developing countries (Bakhoum, 2011, p. 496). The over-emphasis on economic efficiency enables the law to protect efficient players although they subscribe to practices that promote market inequality. Can competition law address distributional concerns? This will require efficiency to be balanced with public interest which is the main reason for government regulation. It may be argued public interest includes the fight against inequality. This situation is explained by Stiglitz (2013, p. 42) that the failure of the market to align private incentives with social returns warrants government intervention. As the disparity between private incentives and social returns widens, so is the unequal wealth distribution among members of society.

As propounded by Fox (2000, p. 593), equality and distributional goals (of competition law) do not necessarily undermine economic efficiency. She

states “an economy that has been run by an elite group that has suppressed the majority, or by cronyism that has left out the majority, may be unable to meet its efficiency potential until a substantial level of equality in fact has been achieved” (Fox, 2000, p. 593). The (competition) law should emphasise on the realisation of the full efficiency potential of the nation, not the preservation of the domination of efficiency by one particular group inhabiting such a nation. The law should also ensure that opportunity or ability to participate in the market is distributed more equitably. If a group or segment of society is prevented from reaching and enjoying such an opportunity, the existence of efficiency will be meaningless (Fox, 2000, p. 593).

Stiglitz, when analysing how the market (especially that of the financial sector) and the government shape economic inequality, debunks the myth that “discrimination was impossible in a market economy”; in fact, his study shows that economic discrimination did occur in the American society against African Americans and Hispanics (Stiglitz, 2013, p. 85). More interestingly, he finds collusive behaviour of dominant groups (particularly Caucasians) has suppressed the economic interests of another group and such behaviour is made effective by punishments and sanctions in the event that a member of the dominant group refuses to subscribe to the discriminatory behaviour (Stiglitz, 2013, p. 86). This should be a premise on which one can argue against the use (or misuse) of the market to induce

unequal distribution of wealth between different ethnicities. Amy Chua (2003) is among those who specifically write about the market and its impact on ethnic inequalities.

Chua argues that in societies with a market-dominant ethnic minority (including Malaysia), the economic concentrations will be in the hands of a few although political institutions will still be controlled by the majority (Chua, 2003, pp. 6-12). This breeds economic inequality. The solutions proposed by Chua include affirmative action that seeks to level the playing field between market-dominant minorities and impoverished indigenous majorities, putting an end to political favouritism which according to Chua, contributed to wealth accumulation by market-dominant ethnic minorities (Chua, 2003, pp. 151-157). Chua’s thesis was critiqued by Cao (2004) who commented that ethnic groups like the Chinese in South East Asia gained wealth and success in business because of their middlemen status which gave them the ability to create social capital despite having to endure persistent discrimination and oppression (Cao, 2004, p. 1052). The middlemen status distinguishes the Chinese from the whites in Southern Africa and Latin America “whose wealth is derived from brutal colonial policies” i.e. the latter being the direct beneficiaries of colonialism (Cao, 2004, p. 1048). The Chinese in Colonial Malaya had suffered market discrimination by the British who imposed restrictions to maintain European monopoly in important

industries including the tin mining industry (Yuen, 2013, pp. 106-123). But one must remember that the indigenous people suffered even more injustices than ethnic minorities. In Colonial Malaya, the indigenous Malays were prevented from venturing into the more profitable rubber plantation. They could only participate in the less profitable paddy cultivation instead, but the Chinese were given full opportunities to develop the rubber plantation industry in Malaya (Khalid, 2014, pp. 59-62) (Fujimoto, 1983).

While history may repeat itself, the term “ethnic economy” is key to understanding the dynamic relationships between competition law and race-based affirmative action. An ethnic economy exists when the economy is owned by ethnic members and they predominantly hire members of the same ethnic group (Du Bois, 1907; Waldinger & Aldridge, 1990; Cao, 2004, p. 1057). Where an ethnic economy persists, entrepreneurship, skills and competitiveness will not be enough to break the market domination by a particular ethnic minority especially when the latter conducts businesses with members of the same ethnic group only. It is this situation that brings our attention to competition law or regulation. Cao states “persistent ethnic disparities may be locked in as a result of monopoly power or anticompetitive conditions” which happen through “ethnically based trading networks which are impenetrable to outsiders” and “ethnically based vertical and horizontal integration” (Cao, 2004, p. 1083). Within

the realms of competition law, Cao argues that such a law can be steered towards addressing ethnic disparities by regulating monopolies, predatory pricing and vertical integration (Cao, 2004, p. 1090). These three areas reflect the US competition law but are not all found in the Malaysian competition law. An analysis of the Malaysian competition legal regime will direct us to the specific areas in which affirmative action concerns may or may not be addressed by competition law in Malaysia.

INTERFACING COMPETITION LAW WITH AFFIRMATIVE ACTION IN MALAYSIA

The primary source of Malaysian competition law is the Competition Act 2010 (CA 2010). The CA 2010 prohibits any agreement that restricts, distorts or prevents competition in the Malaysian market (anti-competitive agreements) and abuse of dominant position. The CA 2010 however, does not address anti-competitive mergers. As regards affirmative action policies, no explicit mention is made in the CA 2010 including the NEP. This means Malaysia takes a different approach from South Africa whose competition regulation makes explicit reference to affirmative action.

The CA 2010 has an economic bias. Its preamble stipulates that its primary objective is to protect the process of competition based on the belief that effective competition will result in economic efficiency and innovation, and a secondary

objective is to promote consumer interest. Both objectives may come in conflict with affirmative action unless the beneficiaries of such affirmative action policies are economically efficient. However, the two objectives of the CA 2010 are tied to a wider objective that is the objective of promoting economic development. This means ensuring competition and economic efficiency alone is not sufficient because it has to achieve a higher end i.e., economic development (Ahamat & Rahman, 2014, p. 178). Affirmative action is an integral part of economic development. Policies such as the NEP strive to reduce poverty and increase the income of the less market-dominant indigenous communities in Malaysia and thus affirmative action may continue to be relevant alongside competition law if one takes a contextual look at the CA 2010. Nevertheless, conflicts between economic efficiency and economic development considerations are likely (Ahamat & Rahman, 2014, p. 178) and the application of multiplicity of objectives by competition law enforcement may lead to ineffective enforcement and political capture. The political capture arguments have been refuted by Stiglitz (2013) who breaks the myth that political capture is only limited to regulation. He commented that the financial institutions in the United States, among the biggest money makers in the US, have been actively asking the authorities to provide exemptions from regulation using their economic and financial might to lobby the government against the use of competition in the sector

that it participates (Stiglitz, 2013, p. 43). This suggests that political capture can also be associated with deregulation.

THE USE OF COMPETITION ACT 2010 AGAINST ETHNIC CARTELS

Cartel is an agreement between competitors (who may or may not form associations) to control (among others) prices, total industry output, market shares, market territories and division of profits (Khemani & Shapiro, 1993, pp. 18-19). The purpose of cartels is to exclude competitors from the market. Cartels are notorious enough that they have been mentioned in writings that discuss competition law from the socio-economic or developmental angles. They are found in various sectors of basic necessities where cartelising producers exploit small farmers and producers and even consumers through purchasing cartels, boycotts and even physical threats in Latin American and African countries, some of which still experience widespread poverty (Mehta & Nanda, 2004; Evenett, Alvarez, & Wilse-Samson, 2007; Fox, 2007, p. 117).

Drawing on the socio-economic condemnation of cartels, there is the notion of 'ethnic cartel', which has been seen by many economists as a type of economic discrimination, used by the more economically dominant White Americans to obtain economic gains from the discriminatory practices in the market at the expense of the less dominant Black Americans (Becker, 1957, 1971; Krueger, 1963; Chiswick, 1995, pp. 15-17; Sundaram, 2006, p. 38). The application of

such notion of cartel was generally limited to discrimination in the labour market (for example discrimination between employees of different ethnicities) (Krueger, 1963; Sundaram, 2006, p. 38) but it was later made applicable to the relations between enterprises or firms in the market. Thurrow (1969) identifies White cartels against the Blacks to include “capital discrimination” (blocking Black Americans’ access to capital) and “price discrimination” (Black American buyers are charged a higher price while Black American sellers get lower prices).

Malaysia is no stranger to these types of cartels where it is common to find Malay companies and firms prevented from entering or forced to exit the market as a result of boycotts, refusals to supply, price discrimination and other forms of cartel; but the main problem is with detecting the cartel, as most of the occurrences of ethnic cartel could only be established through anecdotal and indirect evidence. Most information on this practice could only be obtained from informal sources including privileged communication between businesses and business associations with the relevant ministries and regulatory bodies, including the Ministry of Domestic Trade, Cooperatives and Consumerisms and the Malaysian Competition Commission (MyCC). But some light can be shed by studies on the level of market concentration in specific sectors. A study by Mohamed, Shamsudin, Abdu Latif and Muazu (2013, p. 1465) reveals that market is concentrated in the poultry sector and

such market condition creates barriers to new entrants. This study is complemented by Adlan Abdul Razak (2014) who links price increase of chicken in Malaysia with possible anti-competitive practices in the relevant market. This is one of the many sectors which experience high likelihood of such market conditions – other products include fertilisers, animal feed, retail etc. Ethnic cartel is imminent with certain communities controlling the supply chain from production to retail and blocking entry into the market companies from different communities, or forcing those companies to crowd into less profitable level(s) of the chain (which could be retail).

The question now is: can the CA 2010 be effectively used against ethnic cartel? Ethnic or discriminatory cartel as understood by Thurrow refers to both collusive and unilateral conduct which is subject to Section 4 and Section 10 of the CA 2010 respectively.

As regards collusive conduct, Section 4(2) of the CA 2010 allows for the creation of prohibition targeting cartel. The provision prohibits price fixing, market sharing and output limitation by the object of the behaviour, not its effect. This means the MyCC does not need to look at the effect of the behaviour on the market. However, collusive firms and companies can argue based on Section 5 of the CA 2010 (on relief of liability) that their conduct has efficiency, technology or social benefits (though there are other cumulative requirements that have to be met, which will not be discussed in this

paper). This creates a dilemma. What if members of an ethnic cartel are efficient? Will an action against them reduce economic efficiency? It can be said that this goes against the philosophy of competition law but as explained in Section 2 of this paper, competition law objectives are not necessarily universal whereby they may be relative to the specific conditions of a particular country (Bakhoun, 2011, p. 496). Economic efficiency and consumer welfare may need to be balanced by creating access for economically deprived groups and communities to the market. The conditions in Malaysia warrant special attention to be paid to the existence of ethnic cartels here. Fox (2000, p. 593) has explained that apart from efficiency in competition, one should consider opportunity to participate because inefficient firms and companies may become efficient over time if they are given such an opportunity. This philosophy should not be considered alien to the CA 2010 as it reflects the position in the EU competition law which places emphasis on the process of competition, not its outcomes. The latter reflects average welfare gains to consumers from competition in the market (Fox, 2003; Andriychuk, 2009).

There is a second type of conduct known as unilateral conduct. A cartel is usually understood as involving more than one party but the concept of ethnic cartel as understood by Thurrow also includes unilateral behaviour. This requires the discussion to include prohibition under Section 10 of the CA 2010 which deals with abuse of dominant position. Under Section

10(1), it is illegal for a dominant firm or company to abuse its dominant position. Such abusive conduct can be performed individually or collectively. Therefore, as will be seen below, many instances of ethnic cartels that attract the prohibition under Section 10 involve more than one dominant enterprise and it is possible that they may attract the prohibition under Section 4 simultaneously. The prohibition of abuse of dominant position can be excluded if there is a reasonable commercial justification to the conduct of the dominant (Section 10(3)).

The MyCC has to establish two grounds namely dominance and abuse. Again, this paper will not provide a detailed explanation on how dominance is determined but instead focuses on the types of abusive conduct by an ethnic cartel. Section 10(2) of the CA 2010 proscribes *inter alia* the following conduct, if resorted to by a dominant firm: (a) imposing unfair trading conditions on supplier or customer, ... (c) refusal to supply to a particular enterprise or a group of enterprises, (d) market discrimination, ... (f) predatory behaviour and ...

Regarding “imposing unfair trading conditions on supplier or customer”, it is important to note that such trading conditions include charging excessively high prices to a dominant enterprise’s customer or excessively low prices to a dominant enterprise’s supplier (monopsony). Instances of Bumiputera businesses being slapped with excessively high premise rentals or Bumiputera farmers

having to pay high prices of fertilisers and animal feed have been reported to be common and the CA 2010 allows penalty for such behaviours. However, it will be unfair to generalise and blame the Chinese unjustifiably to resorting to such abusive conduct as these unacceptable conduct may even originate from Bumiputera-related corporate entities (including GLCs) or foreign companies (particularly hypermarkets). This may weaken the nexus between the relevant types of abuse and ethnic cartel.

Behaviour (c) is about refusal to supply to a particular enterprise or a particular group of enterprises. This conduct may be relevant to the issue of ethnic cartels in Malaysia because the particular group of enterprises may refer to enterprises formed by a particular ethnic group. Refusals to supply have been reported to be prevalent in some markets such as the fish and vegetable product markets. In some states in Malaysia such as Selangor, the middlemen controlled the supply of fish and vegetable through container transport. There have been occasions when the middlemen who are mostly non-Bumiputeras (particularly Chinese) did not allow fish and vegetables to be unloaded at the Selangor Wholesale Market (Pasar Borong Selangor) causing supply to concentrate at the rival Selayang Wholesale Market (Pasar Borong Selayang) (Nuh, 2015, p. 2). This has affected Bumiputera sellers because most of them operate in the Selangor Wholesale Market while the vegetable and fish business in Selayang Wholesale Market is dominated

by non-Bumiputera sellers. Apart from Section 10 (prohibition of abuse of dominant position), this conduct may also attract the prohibition of anti-competitive agreement by object under Section 4(2) as an agreement to limit output.

Behaviour (d) is best explained using the term “market discrimination”. Section 10(2)(e) of the CA 2010 provides that the following can be abusive if it is done by a dominant party such as – applying different conditions to equivalent transactions with other trading parties to an extent that may:

- (i) discourage new market entry or expansion or investment by an existing competitor;
- (ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or
- (iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;

The different conditions applied to different trading partners include the charging of different prices to different purchasers from different ethnic groups. This problem has been widely debated as it cuts across ethnic politics and business in Malaysia where Malay entrepreneurs have long complained that they receive less favourable prices than their Chinese competitors. One of the complaints relates to the hand phone retail business at a shopping mall which was controlled only by

two 'towkays' (bosses) although there were numerous kiosks run by both Bumiputera and Chinese enterprises (Utusan Malaysia, 2012). The two enterprises charged lower prices to Chinese kiosk operators while higher prices were charged to Bumiputera kiosk operators. This may constitute an ethnic cartel prohibited by Section 10 (collective abuse of dominant position). It is possible that the Chinese dominant enterprises despite being suppliers do not participate in the downstream market. The question now is: what if they price-discriminate among unrelated competitors (both Chinese and Bumiputera) within that market? Paragraphs (i) and (ii) of Section 10(2)(e) talks about discouraging market entry or forcing out from the market *of an existing competitor* which means the allegedly abusive dominant enterprise must compete with the victim of the price discrimination. However, paragraph (iii) refers to discrimination that harms competition in any market in which the dominant enterprise is participating *or* in any upstream or downstream market. The implication of the word 'or' is that if discrimination by the dominant enterprise harms competition in the downstream or upstream market, abuse can still be detected, despite the enterprise not having presence in such a market.

Behaviour (f) (predatory behaviour) usually refers to the practice of pricing below cost. Pricing goods or services too low may be good for consumers but such pricing strategy will become predatory if used by a dominant enterprise or company

to push out competitors from the market. At the same time, a dominant enterprise may price below cost for many reasons such as to gain initial market share or existing enterprise may price a new product below cost initially to attract consumers.³ In order to distinguish between pricing that is predatory and low pricing that is benevolent, one must look at whether the pricing is in relation to marginal cost namely the cost of producing the last unit of output.⁴ There are different concepts of costs that the MyCC considers but they will not be elaborated in this paper except that the Malaysian competition regulatory body may consider whether price is below the cost and whether it excludes an as-efficient competitor (competitor who is as equally efficient as the dominant enterprise).⁵

The link between predatory behaviour and ethnic cartels in Malaysia is founded on complaints that dominant non-Bumiputera (particularly Chinese) businesses practise a strategy that suppresses prices to the detriment of the smaller Bumiputera competitors as the prices offered in the market are too low for them to recoup the costs incidental to the supply of their goods or services. One of them is expressed in the *hansard* to the CA 2010 (Dewan Rakyat Malaysia, 2010). A Sabah Member of Parliament raised a concern that Chinese express boat operators in Sarawak had

³Malaysian Competition Commission Guidelines on Chapter 2 Prohibition, para. 3.12.

⁴*Ibid.*, para. 3.13.

⁵*Ibid.*, para. 3.15.

reduced their boat fare too low that smaller Bumiputera operators had been forced out of the market and thus, making it easy for the cartels formed by the former to buy out the latter's business (Dewan Rakyat Malaysia, 2010, p. 153). It is still unclear whether the price charged by the dominant boat operators is below the types of costs that will bring the MyCC to an affirmative finding of predatory pricing, though the behaviour of ethnic cartels that falls under this category can also attract the prohibition of anti-competitive agreement under Section 4(2) i.e. price-fixing.

COMPETITION LAW, AFFIRMATIVE ACTION AND INEFFICIENT COMPETITORS

The CA 2010 and competition legislation in many jurisdictions place emphasis on the attainment of economic efficiency and the enhancement of consumer welfare (this has been discussed in Section 2 of this paper). However, with ethnic cartels, it is possible that the CA 2010 is used to promote market openness and participation to enterprises from outside the ethnic group which controls the supply chain in various Malaysian markets. In this regard, the MyCC may need to balance between enhancing consumer welfare and ensuring opportunity to participate in the market. Since the non-Bumiputera (particularly Chinese) enterprises are generally more efficient, the use of the CA 2010 against ethnic cartels must focus on Bumiputera enterprises which can potentially or actually participate in the market and should the anti-

competitive behaviour be reduced, they may strive to be as efficient as enterprises from market dominant ethnic communities. It will be difficult to use the CA 2010 to protect "tenderpreneurs" who are only active in procuring contracts or projects but lack the capacity to operate those contracts or projects. These tenderpreneurs have the tendency to hand over contracts or projects to non-Bumiputera (particularly Chinese) enterprises upon payment of a certain sum of money, leading to wastage of resources.

CONCLUSION

Despite the economic biases behind competition law, affirmative action justifications are warranted for they force open the market to market dormant communities before the communities are able to compete on a level playing field. Although the Bumiputeras (and Malays) became politically dominant post-independence, there was still a wide economic gap between Bumiputeras and non-Bumiputeras (particularly Chinese). To reduce such a gap, the Malaysian government has introduced affirmative action measures including those which seek to enhance the participation of Bumiputera enterprises in the market. However, this paper has shown those measures could be obstructed by ethnic cartels. This suggests that competition law, in particular the CA 2010, being racially neutral and is a good option to make the best of affirmative action. The CA 2010 allows the opening up of market to Bumiputera enterprises providing them the opportunity

to participate in all levels of production chain and ending the period where they have to crowd into the least profitable level. Nevertheless, conflicts between affirmative action and the Competition Act 2010 are still improbable. Government-linked companies (GLCs) have become one of the channels for operationalising affirmative action and certain conducts of the GLCs have been seen as harming market competition. This requires future researchers to examine how the conduct of GLCs may or may not come in conflict with prohibitions in both Section 4 (anti-competitive agreement) and Section 10 (abuse of dominant position).

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***Takzir* Offences and Youth Offenders : A Critical Appraisal of the Syariah Criminal Offences (*Takzir*) (Terengganu) Enactment 2001**

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ABSTRACT

Committing *syariah* offences by teenagers has become increasingly worrisome nowadays in Malaysia particularly in the state of Terengganu. News on the arrest of these teenagers by the authorities frequently appears in dailies and reports. If such offences are not controlled or effectively overcome, it will result in moral collapse among the future generations. Therefore, this paper examines the age and gender of the youth offenders and types of offence and Islamic law (*takzir*) punishments imposed on them. It also investigates the adequacy of law and enforcement in the prevention of such offences in Terengganu. The study adopts qualitative methodology where data are collected through library research and semi-structured interviews with key informants. Data of *takzir* offences in the form of case law decided by the Terengganu Syariah Courts between 2008 and 2013 were analysed. The study found that nearly half of the youth offenders were aged 17 and were girls and most of the offences committed were sexual in nature. This paper concludes by providing suggestions on improving the law and administration process in dealing with these offences.

Keywords: Enforcement, law, punishment, *takzir* offences, Terengganu, youths.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Malaysia has federal and state laws. Islamic law matters are governed at state level through the Syariah Courts by virtue of the State List of the 9th Schedule to the Federal Constitution. A state's jurisdiction, including Terengganu, over Islamic matter is definite. The state may create laws and

punishments for the offences while the Parliament at the federal level may not in any circumstances enact laws on this matter. However, the laws to be enacted are limited to the subject matters listed out in the State List which covers *inter alia* family matters, Malay customs and offences against the precepts of Islamic religion. Furthermore, the jurisdiction relating to those matters shall be exercised only over Muslim persons. Therefore, Islamic criminal offences under Malaysian law refer to offences which are provided for in the enactments passed by the state authorities, either in the *syariah* criminal enactments or other enactments with provisions relating to offences and punishments of custody, imprisonment, whipping or fine (Abdul Halim El-Muhammady, 2007).

In Terengganu, statistics showed 291 youths (aged between 12 to 17 years) were convicted for committing takzir offences between 2008 and 2013. There were 29 cases in 2008, 32 cases in 2009, 50 cases in 2010, 76 cases in 2011, 68 cases in 2012 and 36 cases in the following year. The number of the cases had increased in 2010 and 2011 but dropped in 2013 due to the fact that many cases reported in the latter year were still in the process of trial. Statistics proved the existence of youth involvement in takzir offences whereby the numbers may increase in the absence of suitable or effective prevention efforts. This paper examines the types of offences and punishments committed by the youths as well as age and gender of the offenders. It also investigates the adequacy of Syariah

Criminal Offences (Takzir) (Terengganu) Enactment 2001 ('SCOTT'), the law governing takzir offence applicable in the state of Terengganu and its enforcement.

YOUTH, TAKZIR OFFENCES AND PUNISHMENTS UNDER THE SYARIAH CRIMINAL OFFENCES (TAKZIR) (TERENGGANU) ENACTMENT 2001

Criminal responsibility of youth under syariah

Criminal responsibility in Islam is based on understanding and free-will. A person's understanding is divided into three stages. The first stage is *ghayrul mumayyiz* namely the absence of understanding which begins from the day a child is born until he reaches seven years old. Most Islamic jurists have asserted that the child at this stage is unable to distinguish between right and wrong or between good and bad, and incapable of understanding the consequences of their actions (Audah, 1964). The age of seven is fixed by the jurists to standardise rules and facilitates the judges in making decisions in relation to child offenders (Audah, 1964). The child will not be accountable for any punishment either *hadd* (major crimes punishable with a fixed punishment imposed as the right of public where the crimes and punishments are mentioned clearly in the text of the Quran and Sunnah), *qisas* (crimes of homicide or injury punishable with a fixed punishment imposed as the right of individual where the victims or relatives have the right to choose whether to demand the infliction of *qisas* punishment

on the offender, or to claim compensation, or to forgive him) or *takzir* (discussed later). The second stage is *mumayyiz* which refers to a child of infirm or weak understanding. This stage begins at the age of seven and continues until the child attains puberty. At the stage, the child develops his awareness in a sense he or she is able to distinguish between right and wrong, yet, weak on understanding of the consequences of his or her actions (Audah, 1964). A *mumayyiz* will not be liable for *hadd* or *qisas* punishment (Audah, 1964) but he or she may be punished with *takzir* punishments such as warnings and admonition. The last stage is *baligh* referring to puberty or having reached full understanding. When a child reaches the age of puberty, he is totally responsible for all of his deeds.

Naturally, puberty is an indication of maturity of man and woman through the existence of physiological signs. This is based on surah *al-Nisa* verse 6 which means: “*And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them*”. The physiological signs of puberty both for male and female are first, the emission of semen (wet dream); second, according to Hanabilah, the growth of coarse hair around the private part, under the arms and on the face (Al Buhuwtiy, 2005) while the Maliki’s school is divided into two: the first opinion states that the hair growth in private part is the absolute sign of puberty while the second opinion states that it is a sign of puberty for offences pertaining the

rights of individuals only (Ad-Dardir, n.d.). Syafi’iyah is of the opinion that hair growth in private part is the sign of puberty for non-Muslim only (Al-Syarbini, 1994). The accepted opinion of the four schools is the notion that the growth of pubic hair is a sign of absolute legal age for Muslims or non-Muslims, covering both rights of the public and individuals. The third sign is voice gets deeper and the development of breasts (Ad-Dardir, n.d) and lastly, additional signs for women are menstruation and pregnancy (Audah, 1964). Those are the signs of puberty that some Muslim jurists agree with others don’t. In the absence of those signs, puberty of a person will be determined according to his or her age. Muslim scholars however, have different views in determining the appropriate age of puberty. According to Imam Abu Hanifah, the age of puberty for male and female is 18 and 17 respectively (Audah, 1964). The Malikiyah school on the other hand fixed the age of puberty for both male and female as 18 while the Syafi’iyah and the Hanabilah schools fixed it at 15 (al-Kasani, 1982). The youth offenders referred to in this paper are those in the second stage, ranging from seven years old until attainment of puberty. However, it should be noted that since the jurists differed in determining the age of puberty, confusion and uncertainty are likely to arise in determining the actual liability of the youths.

Definition of youth

Nasimah (2007) examined the legal provisions pertaining to the criminal liability

of child offenders under the Malaysian law and *Syariah* and its application in Syariah Courts of Malaysia. It was found that the age of criminal responsibility under the Malaysian law begins at the age of 10 while in the Syariah Court, it is based on attaining the age of puberty under Islamic Law. One view is the age of puberty should be 15 while the other 18. The Syariah Criminal Procedure (Federal Territories) Act 1984 defines a “youthful offender” as an offender above the age of 10 but below the age of 16. Consequently, this discrepancy imposes different standards on children upon entering the criminal justice system. Wafaa and Anita (2014) discussed these provisions based on two types of legislations namely, the *syariah* criminal enactments and *syariah* criminal procedure enactments and compared them with the *syariah* in relation to the determination of the age and status of child offenders by virtue of opinions from Islamic jurists. The findings however, revealed that there is a *lacuna* in the Islamic legislations. The analysis showed that the determination of the age of a young offender under the Malaysian *syariah* criminal procedure enactments as a person who must be above the age of 10 but below the age of 16 can be disputed if reference is made to the age of *baligh*.

The *syariah* criminal procedure enactments in 11 states of Malaysia define youthful offenders as a person over the age of 10 years and less than 16. Perlis is the only state that provides the term ‘*remaja*’ or ‘youth’ in *syariah* criminal procedure

enactment and defines it under section 2 as a male or female person under the age of 18 years. The Kedah enactment does not provide for the definition of young offenders as there is no relevant provision with regard to *baligh* (puberty or adulthood) or *mukalaff* in *syariah* criminal law, except one section on criminal procedure against a young offender under section 130 of the Syariah Criminal Procedure Enactment. The definition of *baligh* is provided in most of the *syariah* criminal legislations of the states except for Kedah, Kelantan, Pahang and Perlis. The general definition of *baligh*, which is “having attained the age of puberty according to Islamic law” is adopted in most states except the Perak enactment which uses a more specific term of “*akil baligh*” and Negeri Sembilan enactment which exclusively defines *baligh* as a person who has reached the age of 12 according to *qamariah* years. Despite the fact that Malacca and Sabah do not have the definitions of *baligh*, Malacca sets out that a person under 15 *qamariah* years shall be presumed as a child or a non-*baligh* while Sabah provides that a child is a person under the age of 12 *qamariah* years.

In Terengganu, the applicable legislation is similar to the majority of the states, section 2 of SCOTT refers *baligh* as “having attained the age of puberty according to *Hukum Syarak*”. The provision also defines the term *mukallaf* as “a Muslim who has reached puberty in accordance with *Hukum Syarak* and is not mentally defective nor deaf and

blind". It further elaborates that *Hukum Syarak* refers to "*Hukum Syarak* according to any recognized *mazhab*". Under the Terengganu *syariah* law, the liability for criminal act is attributed to the act of a person who has attained *baligh*, having sound mind and of free will. However, the age of a teenager who can be prosecuted in the *Syariah* Court has become an issue due to the fact that there is no express legal ruling on the actual age of *baligh*, and that Islamic jurists have different opinions on the same.

Takzir offences

Takzir offence is defined as discretionary punishment to be inflicted for transgressions against Allah, or against an individual, for which there is neither a fixed punishment nor penance (*taubah*) or expiation (*kafarah*) prescribed (Al-Kasani (1910), Al-Mawardi (1973)). It excludes all sorts of crimes for which specific punishments are prescribed in the Quran and Sunnah. With regards to the types of *takzir* offences as codified in SCOTT, they are divided into five categories:

- i. Offences relating to '*aqidah* (religious belief) (section 3 to 7);
- ii. Offences concerning sanctity of the religion of Islam and its institution (section 8 to 23);
- iii. Offences relating to decency (section 24 to 36). The punishments for these three categories are fine, imprisonment and whipping for seven offences namely false doctrine, incest, preparation for

prostitution, preparation to prostitute wife and child, prostituting wife or child, *muncikari* and *musahaqah*;

- iv. Offences relating to public justice and security (section 37 to 54). The punishments for these offences are only fine or imprisonment or both; and
- v. Offences with regard to abetment and attempt (section 55 to 59). There is no specific punishments for this category, instead, the punishment for the abettor is the punishment provided for the offences that he abets for. This is because in the absence of such help (or abetment), the offence might not have occurred. Here, a group of criminals in a conspiracy to commit an offence is regarded as one person (Paizah, 2014).

There are 52 offences listed out in SCOTT and five provisions for abetment.

Punishment for youth offenders

Youth offenders are punishable by *takzir* punishment, which is based on the discretion of the *syariah* judges to impose suitable punishments. The judges have a wide range of punishments from which he can select a suitable one for a particular crime, keeping in his view the substances of the criminal, his previous criminal records and psychological condition (Siddqi, 1985). Under the federal law of *Syariah* Court (Criminal Jurisdiction) Act 1965 Revised 1988 which governs all states in Malaysia including Terengganu, the *takzir* punishments that are prescribed against

the *syariah* offenders are of three types and limited to the prescribed maximum punishment namely a fine not exceeding RM5,000, imprisonment for a term not exceeding three years and whipping not exceeding six strokes of rattan. As a result, the quantum of punishment provided for the Syariah Court is very small and limited compared with that of the civil courts including the lowest court, the Magistrate's Court. Despite that, based on reported cases, the syariah court judges hardly use their discretion to impose maximum punishment on the *syariah* offenders. Thus, a convicted youth offender may be punished by a fine of less than RM5,000, imprisonment of less than three years and whipping of less than six strokes.

In addition, section 67 of SCOTT provides that the Syariah Court may order a male offender to be committed to an approved rehabilitation centre to undergo counselling or rehabilitation for any period not exceeding six months. However, if the sentence of imprisonment is imposed together with counselling or rehabilitation, the period thereof shall not exceed three years. This is because the maximum period of imprisonment which could be imposed by the Syariah Court is three years only (section 2 of the Syariah Court (Criminal Jurisdiction) Act 1965). If the period of imprisonment exceeds three years, the judgement is null and void. Relatively similar, section 68 of SCOTT provides that the Syariah Court may order

a convicted female offender to be sent to an approved home for a period not exceeding six months but if the sentence of imprisonment is imposed together with committal, the period shall not exceed three years. The Islamic authority may, by notification in the *Gazette*, appoint any place or institution to be an approved rehabilitation centre or an approved home for the purposes of this Enactment (Section 66 of SCOTT). Section 128 of Syariah Criminal Procedure Enactment 2001 mentions that when any youthful offender is convicted of any offence punishable by fine or imprisonment, the Syariah Court may (a) order such an offender to be discharged after due admonition or (b) order such offender to be delivered to his parent or to his guardian or nearest adult relative or to such other person, and these persons have to execute a bond with a surety, that they will be responsible for the good behaviour of the offender for any period not exceeding 12 months or (c) order the offender to be of good behaviour for any period not exceeding two years. At the same time, the Court may inflict on his parent or guardian a fine not exceeding RM200 if it is satisfied that such parent or guardian has neglected in taking proper care of such an offender.

RESULTS AND DISCUSSION

The research found that a total of 291 youth offenders were brought before the Syariah Court in the state of Terengganu from 2008 to 2013. The findings are as below:

TABLE 1
Involvement of youth in takzir offences based on age and gender

Year/Age	2008		2009		2010		2011		2012		2013		
Gender	F	M	F	M	F	M	F	M	F	M	F	M	
17	10	2	6	1	23	3	26	14	25	14	18	2	144
16	8	-	10	5	14	2	21	3	14	2	9	-	88
15	7	-	4	-	6	1	7	-	10	2	4	1	42
14	1	-	5	-	1	-	5	-	1	-	2	-	15
13	-	-	1	-	-	-	-	-	-	-	-	-	1
12	1	-	-	-	-	-	-	-	-	-	-	-	1
TOTAL	27	2	26	6	44	6	59	17	50	18	33	3	291
	29		32		50		76		68		36		

Table 1 shows that the *takzir* offences were mostly committed by youths aged 17 with 144 cases accounting for almost 49.5% of total offenders. The table shows that the younger the youth, the less number of offences he or she had committed. About 30% of the offences were committed by youths aged 16, 14% by those aged 15 and 5% by youths aged 14. With regard to youths aged 12 and 13, only 0.35% each was recorded. At the same time, Table 1 also shows that the involvement of female

juvenile is much greater than the male. Compared with the males, the female offenders accounted for more than half of the total number of youth offenders each year with not less than 74%. Interviews with the Registrar of the *Syariah* Judicial Department showed that most cases involved female teenagers who were caught with adult males aged 18 years and above, and these juveniles were secondary school students and school dropouts.

TABLE 2
Involvement of youth in takzir offences based on the types of offence

Year / Offences	2008		2009		2010		2011		2012		2013		
Gender	F	M	F	M	F	M	F	M	F	M	F	M	
S. 29 (attempt to commit zina)	1	-	2	3	5	1	6	3	5	2	5	-	33
S. 31(close proximity/khalwat)	22	2	22	2	38	5	51	13	42	14	27	3	241
S. 33(male posing as woman)	-	-	-	-	-	-	-	-	-	2	-	-	2
S. 34(indecent acts in public place)	4	-	2	1	1	-	2	-	1	-	-	-	11
S. 36(watie)	-	-	-	-	-	-	-	-	-	-	1	-	1
S. 55(abetment)	-	-	-	-	-	-	-	1	2	-	-	-	3
TOTAL	27	2	26	6	44	6	59	17	50	18	33	3	291
	29		32		50		76		68		36		

Table 2 above reveals that except for abetment, all of the offences committed by youngsters relate to decency. The most committed offence by the youngsters is the offence of close proximity or *khalwat* which totalled 241 cases or 83%. The

second highest is the attempt to commit adultery (11.3%) followed by indecent acts in public place (3.8%). Only three cases were recorded for abetment, two cases for male posing as woman and one case for the offence of *watie*.

TABLE 3
Types of punishment imposed on youths

Year /Punishment	2008		2009		2010		2011		2012		2013		
	F	M	F	M	F	M	F	M	F	M	F	M	
Fine or imprisonment	19	1	12	4	29	6	40	14	36	10	19	3	193
Good behaviour with bond	4	-	11	1	8	-	10	3	6	2	5	-	50
Sent to women's shelter	-	-	-	-	6	-	6	-	7	-	9	-	28
Sent to akidah rehabilitative centre	-	-	-	-	-	-	-	-	-	4	-	-	4
Warning	1	-	2	-	-	-	-	-	-	-	-	-	3
DNAA/Case drop/ Discharge	3	1	1	1	1	-	3	-	1	2	-	-	13
TOTAL	27	2	26	6	44	6	59	17	50	18	33	3	291
	29		32		50		76		68		36		

Table 3 indicates that fine is the most popular punishment ordered by the *syariah* judges whereby it was imposed on 193 offenders. Here, if the offenders are unable to pay the fine, they would be imprisoned. A total of 50 offenders were punished with bonds of good behaviour, 28 female offenders were sent to women's shelters in Selangor and four male offenders were sent to the *aqidah* rehabilitative centre for reformative and counselling process. Warning was only meted out to three offenders, while prosecutions for 13 other cases were withdrawn because of lack of evidence.

RECOMMENDATIONS

Based on the above results and discussion, several suggestions are forwarded in order

to improve the implementation of the Islamic principles in the Malaysian *syariah* courts as well as the administration of youth offenders.

First of all, the term *baligh* should be clearly clarified. Under the existing *syariah* enactments, the definition of *baligh* refers to having attained the age of puberty according to Islamic law. This definition is confusing because Islamic jurists have not come to an agreement on the exact age in relation to *baligh*. It is suggested herein that the relevant authorities must clearly specify an age for a *baligh* person and standardise its application in all state enactments so that such uniformity may further improve the position of the *syariah* law in Malaysia.

Other than that, the age of young offenders should be determined. The provisions of *syariah* procedure enactment containing the term “young offender” should also be included in SCOTT provisions. It is submitted herein that a youth offender should be a person who is under 18 years old as provided in section 2 of the Perlis enactment. Moreover, it is in conformity with the views of the Hanafi and Maliki schools of law as well as the provisions of civil law in Malaysia, particularly the Child Act 2001.

Another issue relates to women and underage girls (those below the age of 18 under the Child Act 2001) who are convicted for *syariah* offences. By virtue of section 68 of SCOTT, the Syariah court has power to send the offenders, upon conviction of an offence relating to decency, to an approved home for a maximum period of six months as a substitutional or additional punishment. However, the legislation does not provide similar provisions in relation to the male offenders especially underage boys. Consequently, a boy convicted for *khalwat* for instance, is liable to pay a fine of not exceeding RM3,000 or imprisonment for two years or both. No alternative is given to him for any rehabilitation programme like the female offender. This situation becomes a barrier to rehabilitate the boys defeating the preventive measures in place to stop them from re-committing the offences. As a comparison, Malaysian civil law through the Child Act 2001 allows a child offender (including male) of more than 10

but less than 14 years old to be admitted to a probation hostel or an approved school (Section 62 and 66). However, if the child offender is 14 years old but below 18 years old, he may be sent to Henry Gurney School or a prison (Section 74 and 96). It is submitted here that similar provisions should be included in the Terengganu enactment to provide proper rehabilitation for underage male offenders.

One of the alternatives for implementing rehabilitative process and training for women and girls who have social problems and been ordered to be detained for a certain period, is to provide them with protection and rehabilitative services. In 2001, the Juvenile Court Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991 were repealed and replaced by the Child Act 2001. The Act is to provide for care, protection and rehabilitation of children including girls in support of the principles of the United Nation Convention of Rights of the Child to which Malaysia is a state party. Unfortunately one of the indirect implications of the Child Act is that the Social Welfare Department had discontinued the admission of *syariah* offenders into its facilities or institutions. Therefore, state rehabilitative centres should be set up and gazetted in Terengganu according to section 66 of SCOTT, just like the state of Selangor. To date, Terengganu does not have a special rehabilitative centre to cater for *syariah* offenders in view of sections 67 and 68 of SCOTT as discussed above. As such, it is extremely important

and necessary to have these centres set up properly and gazetted as alternative rehabilitation for young offenders.

Apart from that, the relevant authorities including the legislators and religious council should also take active steps, such as to publicise the offences stated in the syariah legislations to the public at large to instil awareness of the syariah offences; amend relevant provisions of Islamic criminal law enactments so that they are in line with Islamic rulings; enforce legal provisions relating to all Islamic criminal offences without bias or being selective to certain offences only; enact statutory provisions which are educational and rehabilitative like social works, and strengthen Islamic law position and *syariah* court's jurisdiction by imposing heavier punishments as lessons for members of the public. Besides that, the substantive law should also be amended due to its ambiguous wordings. Constructive elements or main ingredients of some offences such as indecent acts in public, non-attendance of Friday prayer in the mosque within his *mukim masjid* for three consecutive times or exposing bodies in public by women should be clearly defined and sufficiently explained to avoid ambiguity or problems in its implementation and enforcement besides helping all parties to understand the nature of the offences themselves.

Improvement should also be made pertaining to the enforcement officers since without proper and full enforcement, a law passed will be useless. In this

context, several suggestions have been forwarded by the respondents during interviews. Among them are enforcement officers should have very high interest in discharging their duty effectively and not to be solely attracted to promotion, they should have excellent manners of *al-muhtasib* so that they may effectively confront the offenders, especially the teenagers, the officers and staff of the Islamic Enforcement Department must be able to perform the sacred obligation of enjoining goodness (*amar ma'ruf*) and prohibiting evil (*nahi mungkar*), the enforcement officers or prosecutors should be given proper and intensive trainings so that they will acquire related skills before they are allowed to conduct any case or enforcement process, and enforcement proceedings must be improved. Additionally, enforcement of maintenance order against a father must be given emphasis as it is the main cause for teenagers becoming neglected in cases of divorce. In such cases, mothers are forced to care less for or neglect their children in order to become sole breadwinners for their families. Places which are notorious for or prone to crimes should also be monitored closely. Such a pro-active measure should replace the present approach of 'action can only be taken when there is a complaint'. In carrying out this close monitoring, equal emphasis should be given to both public as well private premises. In short, law enforcement should be given emphasis and be improved holistically and systematically.

CONCLUSION

From the study, it can be concluded a high percentage of female teenagers aged between 15 and 17 years were involved in *takzir* offences. Most of them were studying in secondary schools while others were school dropouts. Almost all of them were involved in sexual offences particularly the offence of *khalwat*. In most cases, judges imposed fine to the convicted offenders but if the offenders are below 14, they would be sent to women's protection centres. Despite the efforts of punishing and rehabilitating, youth involvement in *takzir* offences continues. The legislative authority of the state should consider other types of punishments approved by the *syariah* which are more suitable and effective in preventing crimes. Additionally, approaches through community based programmes and counselling sessions may also be considered as effective preventive measures. All of these are important for ensuring efficiency of *syariah* law and effectiveness of its enforcement in the state of Terengganu specifically and other states generally.

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Compulsory Acquisition of *Waqf* Land by the State Authorities: Compensation Versus Substitution

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ABSTRACT

The compulsory acquisition of land is a process by which the government acquires from private landowners their lands which are needed for any public purpose or for a purpose beneficial to the economic development of Malaysia. It is a form of governmental interference as it results in the deprivation and removal of landowners from their properties. Many of the *waqf* lands donated by an individual or a group for the purpose of charity have been acquired by the government for this purpose. The objective of this paper is to compare two methods of rectifying damages for the loss namely ‘compensation’ and ‘substitution’. The study adopts qualitative methodology where data is collected through library research and semi-structured interviews with key informants. The paper employs descriptive analysis and concludes that the *waqf* or donated land will not be taken by the authority without reasonable grounds, but only in critical situations and during emergency.

Keywords: Compulsory Acquisition, *Waqf* Land, Compensation, Substitution

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

There are various definitions of *waqf*. Basically it refers to an irrevocable gift of a corporeal property (‘*ayn*’) for the benefit of donor’s family or someone else or something, in perpetuity. It can also be defined as a charity promised and executed normally during the life-time of the donor, which is not capable of transfer, gift, and

transmission thereafter (Abu Zahrah, 1971); al-Syirbini 1994; Ibn Qudamah, 1999). *Waqf* estate is owned by Allah for the benefit of Muslims (beneficiaries) and held by the state. The state being the guardian of *waqf* estate is endowed with the power to intervene and in some cases take away the property with a view of protecting the social and individual interests (Siddiqi, 1978). In Islam, there are two situations where the state may take possession of *waqf* property to fulfil public interests (*maslahah amah*): (i) to implement the requirements of the al-Quran and the *Sunnah* (ii) based on the principle of necessity (*daruriyyat*) or public benefits (*maslahah amah*) which is in accordance with the judicial maxim namely “necessity removes restrictions” (al-Jawwad, 1971). The application of public benefits must fulfil four requirements, namely it (*maslahat*) is not contrary to the true purpose of *Syariah*, it is reasonable to the human intellect, it is aimed at removing existing hardship and it should be general in nature (al-Jawwad, 1971). In Malaysia section 3(1) of the Land Acquisition Act 1960 (LAA) states that private property can be compulsorily acquired by a State Authority if it is needed for any public purpose, for a purpose which, in the opinion of the State Authority, is beneficial to the economic development of Malaysia or any part thereof, or for mining/ residential/ agricultural/ commercial/ industrial/ recreational purposes or any combination of such purposes. The term ‘public purpose’ has not been expressly defined and the matter is left to the courts to interpret.

In this regard, the 46th *Muzakarah* (Conference) of the *Fatwa Committee of the National Council* for Islamic Religious Affairs Malaysia decided that:

- a) *Waqf* land shall not be transferred at all except during emergency but with certain conditions.
- b) *Waqf* land that had been transferred to the government shall be compensated according to the value of the land or replaced by other land that has equal or better value.
- c) *Waqf* land that will be developed should be excluded from the conditions of land transferred for the construction of public amenities such as roads, sewerage, and electrical substation site and so on. Therefore, the public amenities can be constructed and be made available on the *waqf* land.

This *fatwa* shows that basically the *waqf* or donated land will not be taken by the authority without reasonable grounds, only in critical situations and during emergency. Therefore, the *waqf* lands should not be reclaimed unless certain conditions are fulfilled. In this regard, the authorities provide monetary compensation in exchange for the land or replace it with another land that has similar or better value.

MONETARY COMPENSATION

Views of Jurists

The State reserves the right to acquire land from landowners should the need arise or if it is beneficial for society. Acquisition of land by the State must be with the

proprietor's consent and with adequate payment of compensation. The Prophet s.a.w. had acquired the property of some of the people of Madinah for a construction of mosque with their consent and he paid compensation to the owners in accordance with the prevailing price although the owners did not demand any price (Islahi, 1620). During the time of Caliph Umar where a Syrian cultivator complained that the army had trampled down his crops, the Caliph ordered the Syrian cultivator be paid ten thousand *dirhams* as compensation (Abu Yusuf, 1968). Muslim jurists ruled that the State could not acquire the property of its subjects unlawfully without adequate compensation (Zaidan, 2002). Compensation is a repayment or reimbursement due to the use of the right of either party to meet the needs and interests of other parties (Zaidan, 2002). In acquiring something belonging to a party, the government is required to pay compensation based on the following principles:

Market value

In Islam, the market value or the current value (*thamanul-mithli*) of the land during acquisition shall be taken into account in determining the compensation. The compensation payment must not be less than the market value at the time of the acquisition. The amount of compensation envisaged in Islam covers not only the loss of ownership of property but also to indemnify the owner of his expenses incurred on the land and the loss of income resulting from the loss of use of the land.

The rightful owner must bear in mind that what he actually has is the right to use the land and what he owned is the benefit or right to the usufruct of the land. The compensation is usually based on what he has actually been deprived of. It does not only emphasise the compensation for the loss of ownership but also includes loss of any benefit derived from it, and any costs and expenses incurred on the land such as constructions, buildings as well as loss of earnings from the land (Buang, 1989). In this respect, there is no restriction in adopting the principle of market value contained in the First Schedule of LAA as long as it does not contravene the provisions of Islamic law.

Evaluation by real estate experts / realtors

In Islam, a valuation of the acquired land shall be conducted by a real estate specialist (*Ahlul-khibrah*). This is in line with the fact that Islam recognises expert evidence as one way of establishing proof (Awang, 1994). Opinion or expert evidence means opinion given by someone who has expertise in a particular field such as specialists in real estate. Such opinion is based on the specific knowledge which requires a high level of understanding / wisdom (Othman, 1990). Allah says in Surah al-Nahl, verse 43 says: "And We sent not before you except men to whom We revealed [Our message]. So ask the people of the message if you do not know". Expert opinion is conclusive and binding and therefore, when a judge faces a doubt, he should ask the people who know, and this was practised by the Companions

(Othman, 1990) such as in the case of the appointments of Uthman bin Hanif by Caliph Umar in Sawad, Iran and Nu'man in Madinah as valuers and assessors or tax collectors (*al-kharaj*) (Yusof, 1968). In the above cases, both of them were experts in assessment and measurement for the purpose of valuating and assessing land tax (*al-kharaj*). To achieve a fair and just compensation, any forms or manners of valuation either by way of comparison, investment, or progression may be used by the experts (Awang, 1994). In Islam, valuation by a specialist is acceptable as a means of proof, and expert opinion is binding, but in the Malaysian law, it is based on the discretion of the judge who decides whether or not the expert's opinion is to be accepted in his or her decision making.

Accelerating compensation

According to Awang (1994), the payment of compensation to the affected land owners or his representative shall be done immediately, unless the land owner has agreed to defer the receipt of payment. Again, the sense of urgency in paying compensation is clearly emphasised in *Majalah al-Ahkam al-Adliyya*, where Article 1216 provides: "When required, by order of the authorities, one's possessions can be taken by paying the price (*qimah*) and connected with road. But the property shall not be taken as long as the price has not been paid". This principle is important because the currency value will change over time.

References to the court

According to Islamic law, the proprietor of the land involved in the acquisition is allowed to refer to the Court with regard to purpose of acquisition and rate and amount of compensation granted (Awang, 1994). This right is given to ensure fairness to the owner of the land involved and thus, the proprietor of land is entitled to question in court in terms of the acquisition, whether it coincides with the element of public benefits and in terms of value of compensation whether it is fair or otherwise.

Application in Malaysia

All the provisions referred below are contained in the LAA which requires payment of compensation based on the following principles:

Market value

Article 13 (2) of the Federal Constitution states that: "No law shall provide for the compulsory acquisition or use of property without adequate compensation". Compensation may be defined as the pecuniary recompense which a person is entitled to receive in respect of damage or loss which he has suffered other than result of an actionable wrong, litigated in the civil court committed by the person bound to make the recompense (*Adong bin Kuwau v Kerajaan Negeri Johor*[1997] 1 MLJ 418). The general rule is that the measure of compensation is to be based on the market value of the acquired land. Compensation was defined in *Rickets v Metropolitan Rail Co* (1867) L.R. 2 H.L. 175 as the amount

required to put the dispossessed landowner in the same position as if his property had not been acquired. Market value is “the compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both the vendor to sell and the purchaser to buy at the market price without any element of compulsion” (*Ng Tiou Hong v. Collector of Land Revenue, Gombak* [1984] 2 MLJ 35). Thus, the market value is the price that would be paid by a willing purchaser to a willing seller in circumstances actuated by fair business principles and there is no disinclination on the part of the vendor to sell and the purchaser is not compelled by any urgent necessity to buy. The LAA provides a clear guideline in determining the compensation (except for loss of earnings), but each individual interprets it differently. It is suggested that the LAA should be revised and simplified to disseminate all information without confusion as to which items can and cannot be claimed (Anuar & Md Nasir, 2006).

Evaluation by real estate experts / realtors

Section 12 (1) requires the land administrator to conduct fair and transparent investigation to obtain detailed information about compensation that ought

to be granted to the landowner. The land administrator may refer to the valuation made by the assessors to help him determine the quantum of compensation. This fact was supported by the Federal Court decision which held that *proviso* to subsection 12 (1) provides that the land administrator may obtain a written opinion on the value of all scheduled lands from a valuer prior to making an award under section 14. The written opinion or report only acts as a guidance to the land administrator and the latter is not bound to accept the valuation report prepared by the Government valuer which merely acts as a guide in determining the award of compensation (*Singapore Para Rubber Estate Ltd v Pentadbir Tanah Daerah Rembau, Negeri Sembilan* [2007] 5 CLJ 71). It was stated in *Ong Yan & Anor v. Collector of Lands Revenue, Alor Gajah Malacca* [1986] 1 MLJ 405, where Wan Yahya J. summarised five methods of valuations: opinion of experts, costing method, comparative sales of land in the neighbourhood, number of years’ purchase of the profits and the residual methods. Out of the five methods, the judge in this case chose a comparative sales price as the best way to get a fair assessment and not bound by the evaluation made by a real estate. In this sense, it is different from Islamic point of view as discussed above.

Accelerating compensation

The process of acquisition will start with the acquisition notice in Form A (section 4) which is valid for 12 months. Within this period, the State must publish a declaration in Form D that particularises the lands and

areas intended to be acquired (section 8). The validity of Form D is two years upon its publication in the gazette. Within these two years, the land administrator is required to hold an enquiry into the value of the property and make an award on the amount of compensation payable to the landowner. If no such actions are made within such period, the whole acquisition shall be terminated and will have no effect. The State is required to pay compensation for any damages done due to prior permitted entry for undertaking any work on the property or costs incurred as a result of the enquiry proceedings.

Immediate action must be taken within the period mentioned above in order to avoid any inconvenience on the part of the registered owner. The slow pace of the process will result in the occurrence of injustices against the land owner. In this regard, if the payment of compensation is delayed, the landowner is impeded from enjoying and utilising the compensation money towards investment, purchase of land as replacement, business capital, managing the relocation from the acquired land to other places and also for other purposes. The delay may reduce the monetary value of the land that will make the compensation amount to be insufficient for any of the above purposes (Awang, 1994). In short, the whole process of the acquisition should be done within prescribed time otherwise, the acquisition is declared null and void.

References to the court

Landowners who are dissatisfied with the award by the land administrator are entitled to make a written objection within six weeks upon receiving the award (section 37). The landowner's objection is limited to one of the following: the measurement of land, the quantum of the compensation, the persons to whom it is payable or the apportionment of the compensation. While section 49(1) allows any interested person to appeal against the decision of the High Court to the Court of Appeal, new section 40D appears to have restricted the ambit of such an appeal. Section 40D (3) provides that any decision as to the amount of compensation awarded shall be final and there shall be no further appeal to the higher court on the matter. The effect of the introduction of section 40D and the amendment to section 49(1) were discussed in *Calamas Sdn Bhd v. Pentadbir Tanah Batang Padang* [2011] 5 CLJ 125 ('*Calamas*'). Hashim Yusoff FCJ said that it is trite law that courts must give effect to the clear provisions of the law. He did not see anything ambiguous in sections 40D (3) and 49(1) and that the appellant is precluded from appealing against the order of compensation issued by the learned trial judge. This case effectively makes the right of appeal contained in section 49 (1) of the Land Acquisition (Amendment) Act 1997 (Act A999) worthless because the Federal Court had failed to consider the correctness and legality of the judicial evaluative process undertaken to arrive at the quantum of compensation awarded.

Calamas would invariably deprive the right of appeal on compensation irrespective of whether the appeal is one on a question of law or not. Likewise the matter of acquisition cannot be challenged in the court (refer to section 68A). The effect of section 68A is the removal of court jurisdiction to strike down unlawful acquisitions, even if acquisition was done in bad faith. However, in Islam, the landowner has the right to appeal not only against the amount of compensation but also the purpose of acquisition. The purpose of acquisition must fulfil all principle of public benefits discussed above. Under the present laws of acquisition in Malaysia, there is no room for landowners to challenge the validity of the acquisition (*Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2014] 1 CLJ 344).

SUBSTITUTION (IN EXCHANGE FOR OTHER LAND)

Views of the Jurists

According to the view of the jurists or *fuqaha*, *istibdal* is buying corporeal property ('*ayn*) as a *waqf* replacement (Ibn Qudamah, 1999) while *ibdal* is selling corporeal property to buy property or other assets or in the form of money (Al-Syirbini, 1994). In the context of land acquisition over *waqf* property which is occurs nowadays, it refers to the concept of the sale of '*ayn Waqf* or *Ibdal* to the Government which will be subsequently replaced either in the form of land or with compensation money (Rani, 2008). On the other hand, the concept of

Istibdal refers to purchase of other lands to be endowed as replacement by the *waqf* administrator using the proceeds of the sales of the original *waqf* lands. The words *Ibdal* and *Istibdal* are related due to the fact that *ibdal* of a *waqf* property leads to *istibdal* of the said property. Each sale of *waqf* property must be followed with procuring another '*ayn* as a substitute to the *waqf* property sold, and the replacement can be in the form of currencies or other assets or '*ayn* (Abu Zahrah, 1971).

Waqf is a perpetual dedication of movable or immovable properties for religious, pious or charitable purposes (Al-Syirbini, 1994) while *istibdal* refers to an action of replacing an existing *waqf* with a new *waqf* (Al-Syirbini, 1994). The main elements that must be preserved in *waqf* are the concepts of perpetuity, everlasting, and continuity of benefits and interest to beneficiaries (Zuhayli, 1977). Islamic jurists have different views on the concept of *istibdal*; some reject it on the basis that *waqf* is for an eternal motive (Al-Syirbini, 1994). If *istibdal* is permitted, then it is against the eternal concept when the assets are exchanged or substituted with other assets. On the other hand, the jurists who are in favour of *istibdal* argue that the eternal concept may be divided into (i) the eternity of assets (ii) eternity of the benefit of *waqf*. The main goal for *waqf* is the eternity of benefit and without benefits, a *waqf* property will lose its meaning. If this happens then it should be exchanged with other assets in order to ensure continuity of benefit for the interest of the beneficiaries (Mansur, n.d.)

The Maliki and Syafi'i schools agree that the *waqf* of mosque cannot be sold or is interchangeable, except on the basis of *maslahah* which is inevitable (Abu Zahrah, 1971). This means that all types of *waqf* property cannot be taken over by the Government for whatever form of development. Such strict ruling in Syafi'i school is based on the *waqf* principle that it cannot be disposed by way of sale, gift or inherited, and this is by virtue of a *hadith* whereby Umar who had endowed a land in Khaibar had imposed conditions that such land cannot be sold, purchased, given away and inherited (Authentic Muslim). The purpose of creation of a *waqf* cannot be changed other than what was intended by the donor (Al-Nawawi, 2000). Nevertheless, the Hanafi and Hanbali approaches are less restrictive and more liberal in allowing the implementation of *istibdal* compared with the Syafi'i and Maliki schools. The Hanafi school allows *istibdal* in all circumstances, as long as it caters for the interest and *maslahah* or for the betterment of the public (Ibn al-Humam, 1977).

Application in Malaysia

In general, the concept of *istibdal* is not new and has been practised in the States in Malaysia as allowed by *fatwas*. Several *fatwas* had been issued by the National Council's Fatwa Muzakarah Committee and by states concerning *istibdal* of *waqf* property. In 1993, the Consultative Committee for Syariah Ruling of Federal Territory has agreed to allow *istibdal* of *waqf*

in order to transfer more *waqf* lands which can generate benefit by imposing conditions that the land value will be replaced with the same value or more. Similar *fatwa* was once made by the Islamic Religious Council of Kelantan State in 1995 to the effect that replacement or disposal of *waqf* lands can be implemented in situation to meet public interest including endowment assets that do not have sufficient revenue to cover the cost of their maintenance and repairs.

In addition, the enactment of the State *Waqf* also empowers the State Islamic Religious Council ('SIRC') to implement the concept of *istibdal*. There are three states that have enacted a specific enactment pertaining to *waqf*:

- (i) *Wakaf (State of Selangor) Enactment 1999* (the Selangor Enactment)
- (ii) *Wakaf (State of Malacca) Enactment 2005* (the Malacca Enactment), and
- (iii) *Wakaf (State of Negeri Sembilan) Enactment 2005* (the Negeri Sembilan Enactment).

Section 2 of the Selangor Enactment provides that the meaning of *istibdal* is "to substitute a *waqf* property with another property or with money which is of the same or higher value than it either by substituting, purchasing, selling or any other means in accordance to Shariah law". In short, all the three *waqf* enactments of Selangor, Malacca and Negeri Sembilan allow the implementation of *istibdal* if the *waqf* land has been legally acquired by the authority, or, the use of *waqf* land

is no longer in line with the purpose of *waqf*, or it ceases to benefit in the manner it was originally intended to (section 19 of Selangor Enactment & Malacca Enactment, and section 12 (1) of the Negeri Sembilan Enactment). Nevertheless, the Negeri Sembilan Enactment further provides additional grounds to implement *istibdal*, namely in the event the conditions of *waqf* are inconsistent with the law, or, the conditions are no longer viable. The same enactment further stipulates that the Council shall seek the view of the *Fatwa* Committee if the Council intends to implement *istibdal* in respect of: a mosque or site of a mosque endowed as *wakaf*, or, in circumstances other than those specified in subsection 12 (1). It is important to note that the execution of any conditions set by donor / *waqif*, if any, must not contravene any written law, and in the situation where the Council is not able to execute any of the conditions set by the donor / *waqif*, the Council shall resort to other reasonable means of executing the *waqf* so that the *mawquf* may be utilised in such manner that has been intended by the donor / *waqif* (section 12(3)). The provision also highlights that the value of the *mawquf* obtained through *istibdal* must not be lesser than the value of the original *mawquf* (section 12(4)).

In other states, the law of *waqf* is stated in various rules and statutory provisions. The Wakaf Rules 1983 of State of Johor (the Johor Rules) for example, defines *istibdal* as replacing the *waqf* property with other better property through purchase or sale or

exchange or the like according to Islamic law. Section 9(1) states that the Johor Rules empowers the Wakaf's Committee with the approval of its Religious Council among other things, to replace or, invest in the *mawquf* in accordance with the syariah principles. The Johor Rules further provides that the Wakaf's Committee may purchase movable or immovable property using the cash obtained from the sale of replaced assets.

RECOMMENDATIONS AND CONCLUSION

An important principle is the *waqf* land affected in view of land acquisition by the government should be purchased or replaced by other lands and compensation money shall not be kept or merely saved in fund (Al-Syirbini, 1994). Basically the *istibdal* theory by awarding money as compensation is acceptable in Islam. Nevertheless, the aspects of its implementation do not meet the requirements and conditions set forth in the *waqf* law. Therefore, this paper has provided several recommendations which can be considered by the authorities with regard to arising issues related to the acquisition of *waqf* lands.

First, it is suggested that a comprehensive state enactment relating to *waqf* must be enacted. Section 4 (2) (e) of National Land Code 1965 (the Code) explicitly states that the Code does not govern *waqf*. Therefore, separate laws should be legislated to govern *waqf* comprising both substantive and procedural provisions, hence the state legislatures,

as empowered by List II Schedule Ninth of the Federal Constitution should be responsible to ensure the implementation of comprehensive state enactments governing *waqf* respectively.

Second, based on the data maintained by *Majlis Agama Islam dan Adat Istiadat Terengganu* (MAIDAM) the State of Terengganu has so far paid compensation to MAIDAM for the acquired *waqf* lands, particularly those lands where mosques were constructed on them (Ngah, 2015). This practice has been preferred as it is easier in terms of implementation rather than getting another land to replace the acquired land. Nevertheless, the authors' interviews revealed that none of the compensation sums was utilised to purchase new lands as the sums were inadequate for such purpose. It does not mean that the compensations were insufficient. In reality, the process to identify potential lands for *waqf* takes time and the fact that land value increases day by day, it is not possible for MAIDAM to use the proceeds of compensation to buy new lands for *waqf* replacing the acquired ones. Based on this finding, the authors urge MAIDAM or SICR and the State Authority to attempt *istبدال* as the preferred means to replace *waqf*, rather than simply resorting to monetary compensation. This will reduce the acquisition of *waqf* lands which ought to be benefit all Muslims respective of regions.

Third, subsequent to the above point, namely acquisition of *waqf* lands with mosques built on them, the State Authority

would usually just construct new mosques on other state lands. The purpose of acquisition is not for surrendering the ownership to the State, but it is more for the purpose of replacing old mosques with new ones (Mohamad, 2015). This happens where the original mosques built on *waqf* lands are no longer suitable to be used and not viable to be maintained. In such cases, although the *waqf* lands were declared to be acquired, they become abandoned lands and are no longer utilised nor developed by the State. Therefore, it is proposed that the State Authority and MAIDAM or SIRC revisit those lands and explore how they can continuously benefit the public, instead of being abandoned.

Finally, in respect of monetary compensation receipt or new lands granted as substitution, there is no specific policy in any of the states in Malaysia whether it must be utilised within a prescribed time or not. Failure to utilise the money or the substituted lands will nullify the purposes of *waqf* lands namely perpetuity, everlasting, and continuity of benefit and interest to beneficiaries. Therefore, it is strongly recommended explicit regulation be introduced to ensure the continuity of use over the money or substituted land for the common benefits of the community.

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Organisational Citizenship Behaviour Readiness: A Demographic Study on Local Government Employees in Southern Region of Malaysia

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ABSTRACT

Plagued with increasing complaints from the public expressing their dissatisfaction on what they perceive as poor quality of service by local government, this paper seeks to investigate the impact of demographic factors of gender, supervisor's gender, organisation type (city council, municipal council and district council), organisational seniority and dyadic tenure towards organisational citizenship behaviour readiness in local government agencies in the Southern region of Malaysia. Data from 222 employees working in nine local government agencies in the Southern region of Malaysia were collected using stratified random sampling approach. Inferential statistics of t-test and ANOVA test were employed using SPSS version 20. Results revealed that dyadic tenure and organisation type have significant influence in elevating employees' Organisational Citizenship Behaviour. Gender, supervisor's gender and organisational seniority were found to be immaterial and to be equal among these respondents. Generalization of these findings cannot be assumed and a larger geographical coverage throughout Malaysia is highly recommended so as to make the findings more meaningful. Empirical evidence provided support that demographic factors could have

significant impact towards elevating Organisational Citizenship Behaviour. Thus, the management should take proactive action in ensuring that these demographic factors can be manipulated towards achieving its mandated objectives and to instil public confidence in the multifarious services provided by the local government.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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Keywords: Demographic, Local Government, Organisational Citizenship Behaviour, Southern Malaysia

INTRODUCTION

Local government, the lowest in the Malaysian government hierarchy, is a non-profit service organisation with a high customer contact where their multifarious services meet almost all aspects of societal needs such as rubbish collection, beautification, approval of building plans, granting licences and permits, safeguard public health and sanitation, general maintenance functions of urban infrastructure. Managing towns and cities that are expanding in tandem with economic growth of the country has exerted tremendous pressure on the local governments as the services provided are constantly under the watchful eyes of the public. The public is becoming increasingly aware of their rights as consumers, demanding for clearer and increase transparency in the way the local government makes decision and implementation of development plans. In short, the public has become more vocal in voicing their grouses over the services provided. These phenomena have caused the public to record their grievances with the Public Complaint Bureau where statistics showed that local governments recorded among the highest level of complaints by the public, hence, raising concerns on the issue of incompetency and the inefficiency of employees in discharging their duties.

In order to respond to public outcry for improvement, accountability and

transparency in service delivery and quality of local government, its management needs a workforce willing to exhibit organisational citizenship behaviour (OCB) - discretionary behaviours that are unrecognised by formal reward system and collectively promotes the effective and efficient functioning of an organisation (Organ, 1988). The OCB is the possible solution in meeting public satisfaction as it is considered a low cost vehicle in achieving organisational effectiveness, employee satisfaction, and acts as lubricant in social machinery of the organisation (Organ, 1988).

As the satisfaction level at the grass-root level is low, , this study attempts to explore how demographic variables of the employees, who have close contact with the public, are able to influence OCB among local government employees in southern region of Malaysia.

Local Government

Local government is the lowest level government after Federal and State governments and has three levels of hierarchy: district council, municipal council and city council. As a public sector organisation, local government has played a pivotal role as the manager of urban environment that drives the economic growth and social development of a particular district and its residents. Local governments are set apart from the Federal or State governments as they are subordinate units to these higher governments which link the public interest relationships between the tiers (Norris, 1980).

In general, the local government is under the jurisdiction of the state government and the power of decision-making is transferred to the local government to administer within its locality. Hence, local government is bestowed with a wide range of powers to administer, plan and enforce responsibilities where they play two key roles that impact the lives of its populace. The first role relates to provisions of basic services aimed at the upkeep of the local community including businesses within its area and the second is to regulate land use and business activities within its administrative area (Abdullah & Kalianan, 2008).

Organisational Citizenship Behaviour (OCB)

The OCB can be defined as a behaviour that goes beyond the formal requirement of the job and is beneficial to the organisation (Spector, 2008). The underlying theory underpinning OCB is social exchange theory (Blau, 1964) and the norm of reciprocity (Gouldner, 1960) which involves a series of interactions that are independent, contingent on the actions of the other partner in the social relationship and generate obligations (Cropanzano & Mitchell, 2005). As noted by Vigoda and Golembiewski (2001), OCB is particularly critical in enhancing governmental effectiveness since it can supplement formal bureaucratic operations that may be somewhat restricted by limited administrative and financial resources and protocols. By demonstrating OCB,

governmental operations, in the case of local government, can be managed with greater efficiency and services can be delivered with better quality, thus contributing to a strong image as the manager of urban environment.

Although there are numerous conceptualisations of OCB, five factors introduced by Organ (1988) and operationalised by scales propounded by Podsakoff, Mackenzie, Moorman and Fetter (1990) are the most robust and distinct factors in assessing OCB. There are (i) altruism – employees help co-worker with job relevant duties and tasks (ii) courtesy – being polite, considerate of others and treat them with respect (iii) conscientiousness – when employee goes beyond normal requirements or expectations (iv) sportsmanship – a positive attitude and willing to tolerate less than ideal circumstances without complaining (v) civic virtue – participating in the governance of the organisation.

The Impact of Gender and Supervisor's Gender on OCB

Studies that examined the influence of gender on OCB has revealed inconsistent findings. Generally, women are seen as more likely to engage in OCB than their male counterparts (Allen & Rush, 2001). This finding is consistent with Kark and Waismel-Manor (2005) who contend that women engage in OCB (dimensions of altruism and courtesy which are feminine behaviours) more than men (dimensions of civic virtue and sportsmanship which are

masculine behaviours) because the former are typically perceived as concerned with the welfare of others namely caring and considerate and holding a higher level of empathy and sympathy. However, the dimension of conscientiousness does not seem to be attached to any particular gender (Kidder & Parks, 2001). A study by Long (2012) on a highly diverse workforce from a large South Texas university found that a supervisor's gender has no significant mean difference on OCB. In the study of local government in the east coast states of Malaysia, gender and supervisor's gender failed in influencing OCB (Rashidah & Mazuri, 2013). Due to inconsistent findings, the following hypotheses are proposed:

H1a: Gender will have a positive impact on OCB among local government employees

H1b: Supervisor's gender will have a positive impact on OCB among local government employees

The Impact of Organisational Seniority on OCB

This represents the length of an employee being employed. It is worth noting that local government is a closed service organisation where the possibility to be transferred to another local government within the state and among state is very limited. They can be considered as loyal employees and usually stayed in the same local government until they reach retirement age. Since OCB is exhibited when an employee orients newcomers or helps others, one can argue that an individual who has been employed over a long period of time possesses more

job experience and coupled with the act of altruism and benevolence would assist others with less experience.

Tenure-OCB link was found to be significant among IT professionals working in various industries in USA (Shih & Pearson, 2011). Thus, this indicated that the longer the service tenure among IT professionals, higher levels of OCB are exhibited. Two studies by Rashidah, Aziz and Munir (2014) and Sapie (2012) on local government employees in east coast states of Malaysia showed insignificant mean differences in organisational seniority. Since the geographical area for this study is focused on southern region of Malaysia, the following hypothesis is proposed:

H2: Organisational seniority will have a positive impact on OCB.

The Impact of Organizational Type on OCB

Local government is also known as city council, municipal council and district council depending on the number of residents being served as well facilities and infrastructure available in its locality, Rashidah and Mazuri (2013) found significant mean difference where municipal council employees showed more willingness to OCB activities compared with district council employees in relation to active economic activities in the locality, educated, working and bodily-able inhabitants, supported with good infrastructure and developments compared to that of district council. On the other hand, Sapie (2012) noted insignificant association of local government type on competency level.

Turning to the private sector, a study on manufacturing sector by Long and Ismail (2009) revealed firm size correlated significantly with competencies. They pointed out that larger firms seemed to be more aware of and competent in dealing with customer requests and would invest in the latest information system and data base application to improve operations flow and meet customer needs and wishes. Due to inconsistency in the above results and to further determine the effect of local government type in southern region of Malaysia, the following hypothesis is put forward:

H3: Organisational type will have a positive impact of on OCB.

Dyadic Tenure Towards OCB

This represents the length of supervision a subordinate has with his or her current supervisor and it is common among local government to conduct job rotation exercise among its workforce so as to improve employee multitasking skills and competency. A positive significant mean difference was noted for dyadic tenure exceeding 21 years where low OCB was exhibited compared with those in dyadic tenure range between 16 and 20 years (Rashidah *et al.*, 2014) Among the reasons in displaying low OCB is age whereby those approaching retirement age find their salary has hit the maximum ceiling and the possibility of promotion limited. Respondents in dyadic tenure of between 16 and 20 years reported a higher OCB which increases their chance to be noted

and be promoted or receive additional benefits from their supervisors. Based on the notion of social exchange theory and norm of reciprocity, managements have been found to take some form of OCB into consideration in evaluating an employee's overall performance (Organ, 1990). In order to determine whether local governments practising job rotation to enhance multitasking skills and work experience among employees in the southern region of Malaysia has an impact on OCB, the following hypothesis is presented:

H4: Dyadic tenure will have a positive impact of on OCB

MATERIALS AND METHOD

The sample and target population comprises the workforce working in local government agencies in the southern region of Malaysia. Since the local government is categorised under three types, city council, municipal council and district council, a stratified random sampling was used. This technique is considered appropriate where various departments with different job functions existed in a local government while functions between them are almost similar in nature. In determining the sample size, disproportionate random sampling is used as the number of Professional and Administrative group (top level management) is much smaller compared with Support I (middle level management) and Support II (low level management). Utilising Krejcie and Morgan (1970) sample size table, a total of 350 questionnaires were distributed to selected

nine local governments consisting of one city council, three municipal councils and five district councils.

Data was collected using a questionnaire survey method. There were two sections: respondents' demographic information and OCB scales developed by Podsakoff, *et al.*, (1990) with 22 items. The OCB scales comprised five items each for altruism and conscientiousness dimensions and four items each for courtesy, civic virtue and sportsmanship dimensions. Hoffman, Blair, Meriac and Woehr (2007) suggested that predictive relationships with the broader OCB criterion were as good as, or superior to, those with narrower dimensional criteria. This view was supported by LePine, Erez and Johnson (2002) that operationalisation of OCB was best viewed as indicators of a general OCB factor. Thus, based on the said suggestions, a latent construct is employed to measure OCB.

The OCB scale, anchored on 5-point Likert scale, has been translated to Malay language in view of the fact local government employees are primarily Malays and the majority of them have basic tertiary education. A total of 250 copies were returned and after data screening and normality tests undertaken, only 222 copies were used for empirical analysis.

Statistical Analysis

Descriptive statistics of mean, standard deviation, frequency and percentage were used to explore data collected and to make some general observations about

the respondents' profile. Overall OCB is computed by taking the average of the five factors namely altruism, courtesy, civic virtue, conscientiousness and sportsmanship. Based on the minimum score of 1 and maximum score of 5, a possible score was calculated and categorised as low, moderate and high. Thus, a person with a low OCB level would have a score of between 1.00 and 2.40 while a person having a moderate OCB level would have a score between 2.41 and 3.79 and a score between 3.80 and 5.00 was categorised as having a high OCB level. In order to examine the differences among the local government employees in exhibiting OCB level, variables such as on gender, supervisor's gender, organization type, organisational seniority and dyadic tenure, independent sample *t*-test and one-way ANOVA were computed. Post-hoc comparison test using Tukey test was executed to further analyse the mean difference between each group in the overall OCB.

RESULTS AND DISCUSSION

Characteristics of Respondents

Respondents from the sample study were predominantly female (56.8%) and were mainly under the supervision of a male superior (63.5%). Respondents from the municipal council dominated the sample at 43.2% followed by district council respondents at 38.3%. The majority of them can be considered new whereby 44.6% of them have been working for less

than five years while 22.1% of them have an organisational tenure of between 5 and 10 years. For those who have less than five years, 41.9% of these respondents currently reported to their present supervisors due

to job rotation being exercised in these local governments so as to enhance the workforce's multitasking skills and work experience. Table 1 summarises the demographic profile of these respondents.

TABLE 1
Demographics of Respondents

Variable	Frequency (N = 222)	Percentage (%)
<i>Gender</i>		
Male	96	43.2
Female	126	56.8
<i>Supervisor's Gender</i>		
Male	141	63.5
Female	81	36.5
<i>Organisation type</i>		
City council	41	18.5
Municipal Council	96	43.2
District council	85	38.3
<i>Organisational Seniority</i>		
< 5 years	99	44.6
5 – 10 years	49	22.1
11 -15 years	32	14.4
16 -20 years	14	6.3
> 21 years	28	12.6
<i>Dyadic Tenure</i>		
< 5 years	93	41.9
5 – 10 years	63	28.4
11 -15 years	24	10.8
16 -20 years	24	10.8
> 21 years	18	8.1

Factor Analysis

A principal component analysis with varimax rotation was used for data reduction to determine meaningful factors of OCB. Since OCB is measured as a latent construct, factor analysis produced one factor with eigenvalue of 8.56 explaining a total variance of

39.93%. The Kaiser-Meyer-Olkin measure of sampling adequacy stood at 0.88 and a significant Barlett's Test whereby Chi-square = 2601.03, $p < 0.001$. Four items with factor loadings of less than 0.5 (Hair, Black, Babin & Anderson, 2010), were dropped from further analysis, leaving only 18 items.

Descriptive Statistics

As reflected in Table 2, Cronbach alphas for each OCB sub-dimension and overall OCB achieved above the minimum benchmark of 0.7 which indicated strong internal consistency and reliability

(Sekaran & Bougie, 2010). Overall OCB and four OCB sub-dimensions (courtesy, conscientiousness, sportsmanship and civic virtue) recorded high mean scores while altruism achieved a moderate mean score.

TABLE 2
Descriptive Statistics

Variables	Cronbach's Alpha	Mean	Standard Deviation	Interpretation
Altruism	0.75	3.75	0.64	Moderate
Courtesy	0.83	4.08	0.61	High
Conscientiousness	0.86	4.03	0.58	High
Sportsmanship	0.84	3.95	0.64	High
Civic Virtue	0.79	3.85	0.64	High
Overall OCB	0.91	3.97	0.66	High

Note: (1-2.40) = Low, (2.41-3.79) = Moderate, (3.80-5.00) = High

Hypothesis Testing

Hypothesis 1a proposed that gender will have positive impact on OCB where result from t-test indicated that gender was unable to influence OCB level as no significant mean difference was noted ($t = -0.732, p > 0.05$). Despite the insignificant relationship, the negative direction of the relationship was as predicted as female showed higher OCB score compared with their male counterparts. The supervisor's gender (hypothesis 1b) also failed to exhibit significant mean difference ($t = 1.53, p > 0.05$). However, it was noted that male supervisors demonstrated high OCB level compared with females in this insignificant association. Thus, this implied that the OCB level was similar for both female and male irrespective of whether he or she was a subordinate or holding supervisory

position. This finding was similar to Rashidah *et al.*, (2014) where gender showed no significant relationship towards OCB among local government employees in east coast region. The findings are also in line with that of Long (2012) but inconsistent with that of Allen and Rush (2001) and Kark and Waismel-Manor (2005).

Hypothesis 2 proposed that organisational seniority will have a positive impact on OCB. Unexpectedly, this relationship was not significant ($F = 1.32, p > 0.05$). This implied that whether a respondent is newly employed or edging towards retirement age, the exhibition of OCB level is similar. Although insignificant relationship is noted, those respondents approaching retirement age demonstrated higher OCB arising from attitude of

benevolence and sharing from their work experience. This finding was in line with that of Rashidah *et al.*, (2014) and Sapie (2012) who looked at local government employees in east coast of Malaysia.

Hypothesis 3 proposed that organisation type will have a positive impact on OCB. As predicted, the result showed that organisation type (city council, municipal council and district council) was statistically significant ($F = 10.29$, $p < 0.001$). Post Hoc HSD revealed that municipal and district councils have higher OCB level compared with city councils. This finding was in line with that of east coast region where Rashidah & Mazuri (2013) reported that municipal council exhibited higher OCB compared to district council.

Hypothesis 4 proposed that dyadic tenure (supervision period) will have a positive impact on OCB. As envisaged, dyadic tenure has the ability to influence OCB exhibition ($F = 3.40$, $p < 0.01$). Post hoc HSD revealed that those with dyadic tenure of less than five years exhibited lower OCB compared with those having between 11 and 15 years supervision bracket. The possible explanation for this significant association was that respondents who have been supervised by their current supervisor in the range of 11 and 15 years could be considered as in-group member

where mutual trust, respect and affection have built up between them and they were in the close communication circle of the supervisors. Hence, exhibiting higher OCB would increase their chance to be noted by their superiors and increase their chances for promotion and getting other exclusive benefits that were a discretion of the higher management (Graen & Uhl-Bien, 1995).

While respondents with less than five years dyadic tenure reported lower OCB presumably because they were still new to the organisation and still in the process of familiarising themselves with the working environment, colleagues and senior management. These new employees can be considered as out-group members where mutual trust, respect and affection have yet to be established (Graen & Uhl-Bien, 1995). A positive and significant association was also noted by Rashidah *et al.*, (2014); however, significant mean difference was noted for dyadic tenure exceeding 21 years where low OCB was exhibited compared to those in dyadic range of between 16 and 20 years. Approaching retirement age whereby salary has hit the ceiling coupled with the low possibility of promotion prospects were among the reasons for in the respondents displaying low OCB. A summary of the results on mean differences of OCB according to demographic profile is tabulated in Table 3.

TABLE 3
Summary of Demographic Analysis on OCB

Variable	Gender	Supervisor's Gender	Organisational Seniority	Organisational Type	Dyadic Tenure
OCB	X	X	X	√	√

CONCLUSION

The aim of the study was to examine the impact of demographic variables including gender, supervisor's gender, organisational type, dyadic tenure and organisational on OCB. This research had attained its objective and contributed to literature and knowledge on OCB and human resource literature by examining one of the important agencies in the government sector that has the capacity to drive social and economic growth within its jurisdiction. By incorporating and analysing demographic characteristics of local governments' employees in southern region of Malaysia, this research had provided insight for local government management that organisational type (municipal and district councils) and dyadic tenure between 11 and 15 years have significant impacts in elevation of OCB. Nonetheless, the management should also acknowledge that the other demographic variables namely gender, supervisor's gender and organisational seniority, although insignificant, need to be looked into so that OCB exhibition can be further improved and fortified since OCB has been acknowledged as a low cost vehicle in promoting organisational effectiveness.

Being the government's lowest tier and has the closest relationship with the communities, the management should acknowledge that employees are the most valuable assets a local government can acquire. Being a service-oriented public sector organisation with high customer contact, the local government has to rely on employees to perform its multifarious

services, thus, monitoring and reviewing of its human resource practices should be undertaken periodically. By having a workforce that has high OCB work culture can contribute towards reducing level of complaints and instil public confidence in its varied services provided. Like other research, this study has shortcomings that need be taken into considerations. The research area has been confined to local governments situated in southern region of Malaysia and hence, it may raise the issue of generalisation of the findings. Thus, to make the findings more meaningful and profound, the geographical coverage needs to be extended to cover the nation. Moreover, the respondents in this study are predominantly Malays and by expanding the geographical area, multi-ethnic employees that are being employed in local governments would embody differences in terms of demographic background, religion, cultural practices beliefs and values which may have an impact on the exhibition of OCB. This study only explores the impact of demographic characteristics on OCB, however, the antecedent variables that could promote OCB are worthwhile to be explored. Thus, it is recommended that antecedents of OCB such as task characteristics, organisational conditions, employee attitudes and leadership styles be explored in future studies.

ACKNOWLEDGEMENTS

This study is funded through a research grant provided by Universiti Sultan Zainal Abidin, Terengganu.

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The Legal Concept of Children Beyond Control: A Global Perspective

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ABSTRACT

In any part of the world there have always been and will always be children who will not follow their parents' orders, run away from home, play truant, smoke or commit other misbehaviours. In most countries, they are known as 'status offenders'. Frequent commission of these non-criminal acts indicates that the children are beyond control of their parents which accordingly places them in a risk of delinquency. Many studies have linked these behaviours with crime whereby ineffective rehabilitation will lead to the commission of serious offences such as injuring, raping and killing. The aim of the study is to examine the concept of children beyond control in terms of its definition and rehabilitative measures adopted in several countries including Malaysia, Singapore, England and Wales, Scotland and United States of America. It employs library research (textual) method for data collection. The study analyses statutes, books, journals, reports, newspaper articles, conference proceedings and other periodicals. It concludes that although children beyond control across the world manifest relatively similar examples of behaviours, different concept of children is applied whereby some countries manage them as children in need of care and protection while others treat them as juvenile offenders. In either practice, the international standards which support restorative justice are increasingly adhered to for the best interest of the children.

Keywords: Children beyond control, legal perspective, status offence

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Children beyond control are those who are simply out of control of their parents or guardians. Some countries adopt the term of 'beyond parental control' while others label the children as 'disobedient', 'incorrigible',

'unruly' or 'ungovernable' (Global Report on Status Offences, 2009) and form part of status offenders (children who commit acts that are illegal for underage persons but legal for adults). When children runaway, skip school or demonstrate uncontrollable behaviour, it is usually with reasons. The basic risk factors which place a person as a child-in-risk can be divided into five categories: individual, family, peer, school and society (Carroll, Houghton, Durkin, & Hattie, 2009). Nevertheless, studies have reported that that children's misbehaviour is usually a response to their environment whereby most of them come from families with histories of neglect, physical and sexual abuse, alcoholism, drug addiction and mental illness (National Council of Juvenile & Family Court Judges, 1990). Some of these children are a product of dysfunctional family unit characterised by lack of parental education, inadequate activities arranged by parents and lack of active supervision over their children (Bigler, n.d.).

Increased attention has to be paid to the problem of beyond control children due to a correlation between their behaviour and the potential for delinquent or later adult criminal acts (National Council of Juvenile & Family Court Judges, 1990). Many researches have linked status offence (including beyond control behaviour) to crime whereby behavioural problem is a warning signal that a child needs greater attention and better supervision (Loeber, Farrington, & Petechuk, 2003; Ozawa, n.d.; Whyte, 2004; Regoli & Hewitt, 2006). Kendall (2007) observed that thousands of

American youths are at risk of becoming delinquent and entering the criminal justice systems each year due to the status offence. In most jurisdictions where parents feel that they are no longer able to provide controls, the state may intervene to uphold the interests of the child or protect the public. Measures for care and control may include supervision and placement in institutions among others.

MEANING OF CHILDREN BEYOND CONTROL

Beyond control children are those who habitually refuse to obey the proper orders of their parents, guardians or school authorities. However, the behaviour must be more than a simple disobedience whereby it has to be repeatedly done, disruptive or dangerous and the order disobeyed must be legal (Theoharis, n.d.). Some common examples of beyond control behaviour are not staying home when told to do so, not going to school, having undesirable friends, partying and violating curfew laws while some common examples of beyond control attitudes are ungratefulness, uncooperative, lying, laziness, arguing and disobedience (Bigler, n.d.). Social research conducted in Malaysia revealed similar at-risk behaviours such as truancy, running away from home, loitering around, smoking, involving in gangsters and sexual behaviour and illegal motorbike racing (Najmuddin, 2007; Yahaya, Ab Ghaffar, & Baharom, 2010; Hamzah, Mustafa, & Che Din, 2011; Sharif & Mohamad Roslan, 2011).

Children beyond control are one of the categories of status offenders in many parts of the world. Status offenders are defined as 'young people charged with offences that would not be crimes if committed by adults such as breaking tobacco or alcohol consumption laws, not attending school, breaking curfew laws, running away from home or being beyond the control of parents' (Michon, n.d.; 'Status Offenders Law & Legal Definition', n.d.). The actions are considered as a violation of law only because of the youth's status as a minor (Michon, n.d.). In other words, status offence refers to behaviours that are unlawful for children but legal for adults (Arthur & Waugh, 2008; 'National Standards for The Care of Youth Charged with Status Offenses', 2013). The offence must be distinguished from delinquency (juvenile criminal behaviour) which are acts that if performed by an adult, would be termed criminal. ('Delinquency', n.d.). Status offenders who violate a court order governing their behaviour can be found delinquent and detained ('Status Offenders Law & Legal Definition', n.d.).

CHILDREN BEYOND CONTROL IN MALAYSIA

A child in Malaysia is defined as any person under 18 years old. The Child Act 2001 (which came into force on 1st August 2002, referred to as 'the CA') as the main legislation governing children, protects five categories of children, namely those in need of care and protection, those in need of protection and rehabilitation,

those being trafficked or abducted, those beyond parental control and those who commit crimes (Jamaluddin, 2002; Mohd Awal, 2002; Dusuki, 2006). However, unlike other categories of children, the definition of children beyond control is not provided in any statutes including the CA (Jamaluddin, 2002; Dusuki, 2006). Section 46(1) of the CA simply states that in the event the parent or guardian is unable to exercise proper control over the child, he or she may make a written request to the Court For Children to detain the child in an institution. To what extent out of control behaviour is not determined and what is the proper control over the child by the parent is not elaborated. The absence of a definition necessitates a literature search which includes the relevant government department publications. Drawing from experience of the implementation of similar provisions of previous statutes, some local researchers have concluded that beyond control behaviour is manifested through several acts such as running away from home, involvement with drugs and gangsters, frequently disobedient, incorrigible and illegal motorbike racing (Zakaria, 1992; Dusuki, 2006). The Child Rights Coalition Malaysia (2012) labelled the children as those who are having behavioural problem while the Department of Social Welfare (Jabatan Kebajikan Masyarakat Malaysia, n.d.) defines it as a conduct which may lead to crime or moral danger. Some studies appear to equate beyond control behaviour with status offence in which both terms are used interchangeably (Ahmad, 2013).

Beyond control behaviour under the CA is labelled as status offence (Child Frontiers, 2013) and the examples of beyond control behaviour are closely similar to those of status offence (Dusuki, 2006; Child Rights Coalition Malaysia, 2012). Therefore, the meaning of children beyond control in Malaysia is ambiguous and vague. While most of the above sources treat it as non-criminal behaviour, examples of misconduct cited by some researchers reveal the contrary.

Under the juvenile justice system, a magistrate heads the Court For Children ('the Court'). Section 46 and 47 of the CA gives the magistrate the jurisdiction to hear beyond control applications and make orders either detention in an approved school (Sekolah Tunas Bakti), place of refuge (Taman Seri Puteri), probation hostel (Asrama Akhlak) or centre (private institutions), or placed under supervision for a maximum period of three years. The order is made after considering the probation report prepared by the probation officer and upon satisfaction that it is expedient to deal with the child and the parent or guardian understands the results of the order and consents to it. Pending the completion of the probation report (which normally takes not more than 30 days), the child may be placed under temporary detention in an institution. However, as a matter of practice, before a case is referred to the court, the probation officer may, if he thinks necessary, bring the child to a counsellor from the Department of Social Welfare for an individual counselling

session. Under the supervision order, the probation officer will visit, offer advice and befriend the child. If necessary, he or she may bring the child to the Supervising Court (the Court For Children for the area in which the child probationer is required to reside) to amend the Magistrate's order and detain the child in an institution or place him or her in the care of a proper person. In certain cases like running away from the institutions, the child may be sent to Henry Gurney School under the Prison Department. Despite the enforcement of the CA, Malaysia's fundamental approach to children beyond control basically seemed to remain relatively similar since it was first introduced in 1947. Global strategies like diversion are not adequately reflected. Child Frontiers (2013) observed that based on United Kingdom's system, Malaysia's approach to juvenile justice is grounded in formal court-based interventions and institution-based rehabilitation. Additionally, children beyond control are subject to similar treatment as children who commit crimes since they are placed in the same rehabilitative institutions (Zakaria, 1996; Child Rights Coalition Malaysia, 2012; Child Frontiers, 2013).

CHILDREN BEYOND CONTROL IN SINGAPORE

A juvenile is defined under the Children and Young Persons Act (Chapter 38) ('the CYPA') as a person between the age of 7 and 16 years. Similar to Malaysia, Singapore formally adopts 'beyond parental control' term ('BPC'). Despite

the absence of formal definition of the children, the Ministry of Social and Family Development gives a clear explanation of it. It describes them as those who frequently have problems at home or in school and display delinquent and at-risk behaviours whereby even though they are not offenders, their behaviour may be serious enough that the parents might apply to the court for assistance in managing them. Researchers found that some of the common manifestations of BPC behaviour are defiance towards parents, running away from home, keeping late nights, playing truant, involvement in gangsters, involving in vice drug taking, smoking, moral danger and homicide attempt (Basu, 2008; Ng, 2012; Ozawa, n.d.).

Singapore which instituted BPC order in 1997 is believed to be the only country which has such a formal order to deal with juvenile delinquency (Balhetchet, 2006). By virtue of Section 50 of the CYPA, parents may apply to the Juvenile Court for the order. However, the court only makes the order if the parent can prove that the child is beyond control, that he or she understands and consents to the making of the order and that the court is satisfied that it is expedient so to deal with the child. Before the complaint is sworn, the parent or parents are approached by counsellors from the Singapore Children's Society who will resolve the matter without court intervention. This Pre-Complaint Counselling Programme is implemented by the court to divert cases out of the juvenile justice system ('Power of the Court on

Beyond Parental Control (BPC) Cases', 2006). Laying a complaint in the court is often the last resort as it could severely affect the relationship between parents and child. In addition to counselling, multi diversionary programmes are also available before the order is applied, including the Beacon Works, Round Box and the Family Care Conferencing (Balhetchet, 2006; 'Power of the Court on Beyond Parental Control (BPC) Cases', 2006; Kim, 2010; Ozawa, n.d.). Upon the receipt of the complaint, the Ministry of Social and Family Development will be ordered to prepare a social report. Pending its completion, the court may remand the child at a remand home. Under the orders of the court, the child may be sent to an Approved Home for two to three years or placed under statutory supervision for a maximum of three years. The court may also make additional orders requiring both the child and parent to undergo mandatory counselling, psychotherapy or other treatment under the CYPA.

CHILDREN BEYOND CONTROL IN ENGLAND AND WALES

Similar to Singapore, the term 'beyond parental control' is used under section 31(2) of the Children Act 1989. The provision lays down that a court may make care or supervision order if it is satisfied that the child is suffering or is likely to suffer significant harm and that the harm is attributable to the care given to the child or the child is being beyond parental control. Bana Vaid & Associates, a legal firm

(‘Care Proceedings’, n.d.) explains that a child is considered potentially beyond parental control when he or she continues exhibiting severe disciplinary problems such as disobedience, truancy, running away from home, sexually promiscuous and addicted to drugs which result in the parents being helpless to improve the child’s behaviour, while Brady (2013) associates beyond control with hostile and destructive behaviours which may endanger own self.

Unlike Malaysia and Singapore, beyond parental control children are treated as children in need where the local authority has a duty to safeguard their welfare. These children are handled under care proceedings in the Family Proceedings Court separately from the Juvenile Court which try child offenders. In England and Wales, ‘beyond parental control’ is part of the threshold criteria that needs to be satisfied before the court can make Care or Supervision Order. According to Lowe & Copley (2011), this minimum criteria is provided for the purpose to limit state intervention to certain kinds of harm. The Care Order gives the local authorities the parental responsibility over all rights, duties and obligation while the Supervision Order directs the authorities to befriend, advise and assist the parents without having any parental responsibility (‘Care Proceedings’, n.d.). The order may be applied by the local authorities upon proof that the child is suffering from significant harm and beyond parental control. However, the proceeding will not be carried out if the authorities manage to

work together with the parents in the first place. In other words, children beyond control are recognised as those who need care and supervision and the Children Act 1989 marks a complete separation between the child in need and delinquent child.

CHILDREN BEYOND CONTROL IN SCOTLAND

Distinguished from the above jurisdictions, in Scotland, children termed as ‘beyond the control of any relevant person’ come under the Children (Scotland) Act 1995 and Children’s Hearings (Scotland) Act 2011. The purpose is to allow other persons who have parental rights/responsibilities to take responsibility since families are fragmented and grandparents have more role in safeguarding the welfare of children (Scott Q.C., 2013). Empirical study by Allard (n.d.) found that some common out of control behaviours are disobedience, truancy, being aggressive, destroying properties and stealing.

Children beyond parental control in Scotland is one of the three categories of children focused in the Kilbrandon Report 1964, being the basis of the present Scottish Children’s Hearing System, in addition to delinquents and those in need of care and protection categories (Paton, 2004; Burman, Bradshaw, Hutton, McNeill, & Munro, 2006; Scott Q.C., 2013). Similar to England and Wales, children beyond control are categorised as those requiring supervision for the purpose of protection, guidance, treatment or control. However in Scotland, they are not separated from

those who commit crimes but are instead, administered under one roof. Burman et al. (2006) explained that cases are informally heard by a tribunal with integrative welfare-oriented approach under a single system of civil jurisdiction for all children with problems. They may be brought to the tribunal by anybody including the parents, police, educational and health agencies, members of public or even the children themselves (Whyte, 2004; Burman *et al.*, 2006;). Among the types of orders made are supervision by a social worker, staying with relatives or foster family or placement in an institution (Whyte, 2004). Intervention measures are also practised such as the '10 Point Action Plan 2002' which created partnerships with various agencies such as local authorities, police, parents, schools, health sectors and volunteers (Burman *et al.*, 2006).

CHILDREN BEYOND CONTROL IN UNITED STATES OF AMERICA

Children beyond control in America is an example of several common behaviours that demonstrate the non-criminal juvenile status offences along with truancy, running away from home, curfew violations, begging, gang association, anti-social behaviour and alcohol consumption or possession (Steinhart, 1996; Clement, 1997; Bishop & Decker, 2006; 'National Standards for The Care of Youth Charged with Status Offenses', 2013). Section 601 of the California Welfare and Institutions Code for instance, defines a beyond control child as a person under the age of 18 years who

habitually refuses to obey the reasonable and proper orders of his or her parents, guardians, custodians or school authorities ('Is Your Child Out of Control?', n.d.). Some researchers label beyond control behaviour as 'incurability' (Loeber *et al.*, 2003; Bishop and Decker, 2006; Kendall, 2007) while others term it 'ungovernability' (Arthur and Waugh, 2008; Michon, n.d.). Different statutory terms which are used to refer to status offenders such as 'persons in need of supervision' (PINS), 'minors in need of supervision' (MINS), 'children in need of supervision' (CHINS), 'dependent children' or 'neglected children' (Clement, 1997; Michon, n.d.) imply the children are victims of circumstances and need supervision.

Although status offenders are not delinquent, they are subject to arrest and detention where cases are normally brought to the attention of authorities by the parents ('Global Report on Status Offences', 2009). By virtue of the Juvenile Justice and Delinquency Prevention Act 1974 (JJDPA), the government initiated a national policy of status offenders called 'deinstitutionalisation' to support community-based treatment programmes and prohibit confinement. The rehabilitative measures vary according to each state in the US since there is no standard federal law governing the offences. Several states revised their legal approaches to decriminalise some of the status offences and reduce detention. Connecticut for example, made a shift from court involvement to community-

based approach for serving children and families known as Families With Service Needs (FWSN) while New York requires all counties to refer status offenders (except runaways) to diversion services in order to provide immediate response to families in crisis and divert the youths from being the subject of a petition in family court (Arthur and Waugh, 2008). New Mexico under a systematic change of policy, transfers primary jurisdiction for status offenders from juvenile justice system to the Children Youth and Families Department to ensure all diversion options are exhausted before petitioning the court (Arthur & Waugh, 2008). However, if informal efforts fail to remedy the problem, the child will end up in juvenile court (Kendall, 2007; Michon, n.d.). In recent years, the Coalition for Juvenile Justice (coalition of several national organisations and experts) developed national standards for the care of status offenders to promote best practices in prohibiting detention, diverting from the delinquency system and promoting uniform practice and policy across the states ('National Standards for The Care of Youth Charged with Status Offenses', 2013).

CHILDREN BEYOND CONTROL IN OTHER COUNTRIES

Beyond control behaviour is also treated as part of status offences in countries such as Bahrain, Morocco, Belize, Kazakhstan, Nigeria, Bangladesh, Japan, Indonesia and Philippines. The Global Report on Status Offences (2009) reported that in Bahrain,

repeat status offences such as begging, peddling, truancy and lack of parental control will cause the child to be brought to the Juvenile Court for punishment. Similarly in Morocco, status offences are manifested from behaviours demonstrated by 'children in difficult situations' such as spending time with delinquents, disobeying parents or guardians and playing truant. In Belize, the Certified Institutions (Children's Reformation) Act allows parents to send their children to juvenile detention called Youth Hostel for being 'out of control' and absconders are detained in prison. The situation in Japan is of no much difference where children with behavioural problem including habitual disobedience are treated under the same rules as juvenile delinquents. Criminalisation of status offences also occurs in Kazakhstan whereby the children are taken to the Police Departments on Juvenile. In Bangladesh, children who manifest 'uncontrollable behaviour' are subject to arrest and detention while in Nigeria 'beyond parental control' children which forms part of juvenile offenders are increasingly detained in police custody before they are sent to the Boy's or Girl's Remand Home.

Some Asian countries recently have decriminalised status offences including Indonesia and Philippines. It is reported that Indonesia adopts legislation on restorative justice and provides alternatives such as admonishment, non-institutional treatment, social services, supervision and vocational training (Promoting Restorative Justice for Children, 2013).

The Philippines on the other hand, under the 2012 statutory amendment, records status offenders as ‘children at risk’ where they are brought back to their parents and appropriate intervention programmes such as counselling, group activities and parenting seminars are provided (Congress of the Philippines, 15th Congress, Third Regular Session’, 2012).

CONCLUSION

Children beyond control across the world manifest almost similar examples of behaviour or characteristics. Generally, they display non-criminal acts as a result of being influenced by surrounding factors including family, peer influence and society. In fact, they are the victims of circumstances rather than real perpetrators. Nevertheless, the legal concept of beyond control children varies between countries. Some jurisdictions namely Singapore, England and Wales label them as ‘beyond parental control’ and treat them as children in need of care and protection, separately from the child offenders or delinquents. Other countries including Nigeria, Bangladesh, Japan and most states in America label them as ‘status offenders’ and manage them as juvenile offenders who are subject to arrest and detention. However, several countries had decriminalised and deinstitutionalised status offenders and introduced community-based rehabilitations such as Indonesia, Philippines and several states of America such as New York and New Mexico, in support of the international standards

for the best interest of the children. Singapore and Malaysia seem to share similar characteristics under their beyond parental control application and order, with Singapore leading in implementing various intervention measures. Nevertheless, Malaysia’s practice of pre-court counselling indicates a positive measure towards a restorative-based approach.

By making beyond parental control part of status offences signifies that it is an offence for a child to be disobedient. Status offences which make certain acts illegal for a child but legal for an adult have been a major concern by international laws as a violation of children’s rights. The United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) for instance, urges that legislation should be enacted to prevent stigmatisation, victimisation and criminalisation of status offenders. Together with the United Nations Convention on the Rights of the Child (CRC) and United Nations World Report on Violence Against Children, the UN calls for the abolition of status offences in order to establish equal treatment for children and adults (Global Report on Status Offences, 2009). Today, most of the juvenile justice systems are shifting from punitive to restorative based approach with various methods of diversionary programmes and early interventions. In this context, the CRC supports diversion as an alternative measure for dealing with behavioural problem children without resorting to formal court proceedings. Although the rehabilitative measures vary according to local situations

and needs in each jurisdiction, restorative approach has the potential to promote and protect the best interests of a child throughout various procedural stages.

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Protecting Women's Interest (*Maslahah*) in Marriage Through Appointment of a Guardian (*Wali*) Under Islamic Law

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ABSTRACT

The term *Wali* (loosely translated as guardian in English) in general refers to a person who consents to or executes a marriage contract. Under the majority school of law (*jumhur*) including the Shafie, wali constitutes one of the pillars of marriage, the absence of whom will render the marriage void. However, under the Hanafi school of law, *wali* is not a pillar but merely one of the conditions for execution of a marriage contract and his absence does not appear to render the marriage invalid so long as the marriage fulfils some other conditions and the *wali* does not intervene in the marriage of his ward. Nevertheless, this condition does not deny the importance of *wali* in the marriage of his ward. This paper attempts to highlight and emphasise on the fact that the appointment of wali in marriage of a woman is significant in protecting the women's or the wards' welfare (*maslahah*). The paper also examines the importance and wisdom of having wali in marriage of a woman and explores why the consent of wali is considered crucial particularly under the majority school of law. Additionally, a comparative analysis on the requirement of *wali* under the law in Malaysia and several Muslim countries will be conducted. The paper is based primarily on library research though interviews with certain scholars and their opinions on the importance of having wali in marriage have been taken into consideration. It is believed this study will contribute significantly to knowledge on this subject especially

on the philosophy and wisdom of having a guardian (*wali*) under Islamic law. This is in the face of a rising trend among many Muslim women nowadays (with special reference to Malaysia) to disregard the need for a wali while contracting their marriage.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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Keywords: Marriage, Guardian in marriage (Wali), Women's Interest, Maslahah

INTRODUCTION

The significance of the institution of marriage receives its greatest emphasis from the hadith: "Marriage is my *sunnah*. Whosoever keeps away from it is not from me". Abdur Rahman I. Doi rightly opines that in Islam, Allah the almighty has created man and woman to play distinct roles in human society and a woman's biology and physique best suit her, at base for the maternal role so necessary in the creation of healthy and happy families (I. Doi, A. R, 2006). In Islam marriage is considered a contract between two equal (compatible) partners. Women were created with a different nature compared with men. With that difference, they can complement one another. Due to the distinct nature of women, they need a protector. Not only when they are small but also before they are married. In Islam, choosing a good and suitable husband requires a second opinion from a man of experience. For this purpose, a guardian or *wali* is assigned to guard the woman who is his ward.

Nevertheless, there have been many occasions where a marriage disregards the role of a guardian. This can be seen from marriages that were contracted in the absence of a guardian or wali nasab, i.e. marriages solemnised without the consent and presence of wali; or marriages solemnised across the Malaysian border or those solemnised by Wali Raja due to Wali Nasab's refusal to be *wali* (see for example

Husin v Saayah [1980] 7 JH 35, Azizah v Mat (1976) 2 JH 251; Muhammad v Bahrunnasran dan Mazliani(1997) JH 99; Mohd Azam lwn Che Norina Nov (2004) JLD XVIII BHG I JH 123). Therefore, the premise of this research is that marriage without wali nasab will undermine the roles of a wali outlined under Islamic law for the benefit of his ward thus, compromising the interest of the latter.

DEFINITION OF WALI

Under Islamic law, *wilayah* or guardianship connotes a position of authority or control over others. In other words, whoever can satisfy this criterion of having authority or control over others can be regarded as *walī*. (Al-Khin, Mustafa *et al.*, 2011). Therefore, *wali* can be defined as a person who has the authority to give away a woman in marriage (Nasution, S, 2009). *Al-wilayah* is defined literally as power and capability. According to Muslim jurists, *al-wilayah* means authority to decide without depending on approval from others. (al-Zuhaily, 2001) These definitions reflect that a guardian or a *walī* is a person who is responsible towards his children or towards the person who are under his protection and obligation.

Muslim jurists have divided guardianship of marriage into two namely general and specific guardianship. It follows that the guardian in marriage is of two kinds i.e. general guardian (*walī am*) who have a general authority of guardianship over women in a Muslim

territory such as a ruler or head of state; specific guardian (*walī khas*), is someone who has authority specifically on those daughters or relatives based on lineage or blood relationship. They include the father, grandfather, the germane or consanguine brother or brothers, paternal nephews, paternal uncles and so forth from residuary group (*asabah*) of inheritance. (al-Zuhaily, 2001).

WALI AS AN ESSENTIAL REQUIREMENT OF A VALID MARRIAGE

All Muslim jurists seem to agree on the importance of *wali* in the marriage of his ward. Due to this reason, *wali* is recognised as one of the marriage requirements for a Muslim though some Muslim jurists seem to regard *wali* as a conditional requirement. Basically, there are four juristic views on this. The majority of Muslim jurists including Imam Malik, Imam Shafi'ie and Imam Ahmad view that *wali* as an important pillar of marriage and therefore, his consent is compulsory in a marriage contract. A woman regardless of whether she is a virgin or non virgin is to be given in marriage by her *wali*. On the other hand, Imam Abu Hanifah, Zufar (disciple of Imam Abu Hanifah), Sha'bi (Successor) and Zuhri (Successor) are of the view that *wali* is not a marriage pillar and his consent in marriage is merely recommended (*mandub*). Daud al-Zahiri regards *wali* as one of the essential elements in the marriage of a virgin but not non virgin (*thayyib*) while Ibn Sirin, al-Qasim bin

Muhammad, al-Hasan bin Saleh and Abu Yusuf are of the view that a woman, if she leads her own marriage without the *wali*'s consent, her marriage is considered pending until the *wali* consents. If the *wali* consents then the marriage is valid and if the *wali* does not consent then the marriage is not valid (Al-Sartawi, 2008; Al-Ashqar, 2012). Thus, *wali* as an essential requirement of a marriage is a majority view (including the Shafies). They highlight that a father (as a *mujbir wali*) may solemnise the marriage of his daughter without her consent, whatever her age may be, provided she is still a virgin even though the father is recommended to consult his daughter for her opinion on her future husband. In the case where the daughter has lost her virginity by a previous marriage, her formal consent to the marriage is necessary. Loss of virginity puts an end to the right of disposing of a daughter's hand without her consent (al-Nawawi; n.d.). The Shafies emphasise that if the Muslim women solemnise their marriages without *wali*, the marriages are considered invalid and both parties should be separated. If parties have already consummated the marriage, the women are entitled to a proper dower (*mahr mithli*) which is equal value with dower (*mahr*) given during the solemnisation of the marriage. (Al-Khin *et al.*, 2009). This view is supported by the *hadith* reported from Aishah. The Messenger of Allah said to the effect:

“Whichever woman married without the permission of her walī her marriage is invalid, her marriage is invalid, her

marriage is invalid. If he entered into her, then the mahr is for her in lieu of what he enjoyed from her private part. If they disagree, then the Sultan is the wali for one who has no wali “(Al-Shawkani, 1998).

On the other hand, the Hanafi jurists emphasised on the role of *wali* by making the latter one of the pre-conditions for an execution of a marriage contract. In other words, even though the consent of *wali* is recommended, the *wali* may always intervene in the marriage of his daughter especially in the case where his ward married a man who is not in equal status with her. (Muhammad Abu Zahrah, n.d.). This also indicates that despite the fact that the Hanafi jurists regard that *wali* is not a pillar of marriage but a mere condition to its execution, the importance of *wali* in marriage is still acknowledged and recognised.

The importance of *wali* as one of the pillars of marriage is seen in Malaysia, based on the Shafie school of law. The provision on requirement of *wali* in a marriage of a woman is incorporated in all state enactments including Federal Territories. As a pioneer Act that governs Muslims in Malaysia, Islamic Family Law (Federal Territories) Act 1984 (Act 303) (hereinafter referred to as IFLA) provides the mandatory consent of *wali* in the marriage of his ward (IFLA, s. 13(a)) as well as on of the presence of *wali* in the marriage of his ward:

“A marriage in the Federal Territory shall be in accordance with the

provisions of this Act and shall be solemnized in accordance with hukum Syara’ by;

- (a) *The Wali in the presence of the Registrar;*
- (b) *The representative of the Wali in the presence and with the permission of the Registrar; or*
- (c) *The Registrar as the representative of the Wali*

(2) Where a marriage involves a woman who has no Wali from nasab, in accordance with Hukum Syara’, the marriage shall be solemnized only by the wali Raja.” (IFLA, s. 7 (1&2)).

Similar provisions with similar wordings can also be found in other state enactments, for example in Selangor, Kelantan, Johor, Malacca, Negeri Sembilan, Kedah Darul Aman, Penang, Perlis and Pahang.

The importance of *wali* in the marriage of a woman is also highlighted in the law and practice in several Muslim countries. For example in Egypt, even though the Egyptian law is based on Hanafi school of legal thought and provides among others that a Muslim woman with full legal capacity has the right to give herself in marriage, in practice, the people do not deny the importance of *wali* in marriage. According to social practices in Egypt, this right is seldom utilised, unless the women have no remaining paternal relatives. There are also cases where some Muslim women rebelled against their guardians through court applications, in which they requested

that their marriages to be annulled on the grounds that the conditions of valid marriages have not been satisfied (Shaham, R, 1997).

The law relating to marriage and *wali* in Jordan is governed by Jordanian Law of Personal Status, 2010 (hereinafter referred to as "JPS"). Jordanians are active followers of the Hanafi school of legal thought. However, the law stipulates the presence or the consent of *wali* in the marriage of a woman who is a virgin. The law among others provides that the consent of *wali* who is in the list of priority is sufficient in the marriage of a woman provided that the man is *kufu* to her. (JPS, s. 16) Where the *wali nasab* refused to give consent for the marriage of his ward who have attained the age of 15, they may seek to apply for consent of *wali hakim* to solemnise the marriage provided that the *wali nasab* refuses to give consent without any valid reason (JPS, s.18).

In January 2004, the Moroccan government introduced family law reforms which entitle an adult woman (regardless of her marital status) to exercise self-guardianship in marriage. In addition, legal age of marriage for Moroccans has been increased from 15 to 18 years. The law also gives women and men the rights to compose their own marriage contracts. (Rashad H., 2005). The said law reflects that the scope of guardianship is extended to the parties of the marriage and such position is one of the major amendments to the law regarding marriage guardianship in Morocco. The law (the Moudawwana, 2004) states that marriages for those who are below the

age of majority depend on the agreement of their guardian (The Moudawwana, 2004, art. 9). The Moroccan law seems to suggest the *wali*'s role is crucial only when his ward is a minor. Nevertheless, there is no such contention so far that the *wali* is not important in the marriage of his ward even though the latter might exercise self guardianship in her marriage.

Based on interviews with some of the Muslim scholars in Jordan from the Hanafi school of legal thought, *wali* is regarded as a very important person in the marriage of his ward. According to Dr Ibrahim 'Uju, the Head of studies and research in Dar al-Ifta, a woman in Jordan is prohibited from solemnizing marriage on her own. If the *wali* declines to solemnise her marriage, she must file an application to solemnise the marriage through *wali 'Am*. (Ibrahim 'Uju, 2012). This is also the view of Dr Mansour Abdullah al-Tawalibeh, a judicial inspector at the Supreme Court Department of Jordan. He stated that even though generally Jordanians subscribe to the Hanafi school, *wali* has been made a marriage prerequisite especially in virgin woman's marriage (al-Tawalibeh, 2012). According to al-Sartawi a professor at Jordan University, in practice, the marriage in Jordan is solemnised by her *wali* upon the woman's consent. This is in line with the nature of a woman who is shy and soft-spoken. (al-Sartawi, 2012) This view was supported by Mufeed Sharhan, the Manager of al-'Affaf Society, a non governmental organisation in Jordan. He opined that the consent (*rida*) of the *wali*

in marriage will indicate the strength of the relationship. If the *wali* did not consent, the family ties will be very weak and fragile. (Mufeed Sharhan, 2012).

IMPORTANCE AND WISDOM OF HAVING WALI IN MARRIAGE OF WOMEN

The classical and modern scholars and writers highlighted several reasons why *wali* is considered important in the marriage of a woman. The first reason which appears practical in nature is that the guardian can be an advisor for the Muslim women. In this circumstances, the *walī* is in the position to recommend or to give suggestion for women under his care concerning marriage with certain men (al-Latifi, A.K., 2000). Such a wisdom can be traced to the historical record of Prophet Syuaib AS when he suggested his daughter to Prophet Moses for marriage. It was apparent that Prophet Syuaib AS knew that Prophet Moses was a person who displayed honesty and piety. (Sayyed Qutb, n.d.). The Quran states to the effect:

Said one of the (damsels): "O My (dear) father! Engage Him on wages: truly the best of men for Thee to employ is the (man) who is strong and trusty" ... "(The Quran, al-Qasas, 26). He said: "I intend to wed one of these My daughters to thee, on condition that Thou serve me for eight years; but if Thou complete ten years, it will be (grace) from thee. but I intend not to place Thee under a difficulty: Thou wilt find me, indeed, if Allah wills, one

of the righteous." ... ". (al-Qasas, 27). He said: "Be that (the agreement) between me and thee: whichever of the two terms I fulfil, let there be no ill-will to Me. Be Allah a witness to what we say".(al-Qasas: 28).

The above verse reflects that *walī* is in the position to advise his ward to marry a person with such characteristic of piety, has a strong knowledge of Islam and committed to practising Islamic teachings. Syed Sabiq stated that generally, it should be understood that a woman is weak physically, socially and psychologically. Hence, the presence of *wali* is essential as an advisor and protector to the women (Syed Sabiq, 2004).

Furthermore, guardianship is a kind of protection to women. By having *walī* as guardian for women in general in matters concerning marriage, the *walī* will act as protector for the Muslim women so as to safeguard their interests. This duty falls on the close male relative or father of the women. There are instances where women are easily cheated and deceived but not the *walī*. In addition, matters relating to marriage require a lot of experiences and *walī* has a lot of these compared with his ward (Mohd, A. et al., 2014).

The importance of *wali* is also reflected by the fact that having a guardian is consistent with nature. Women are bestowed with feminine nature which embodies softness and shyness. In matters of marriages, such shyness prevents representation in negotiating the dower (*mahr*) and any other related matters. It

is feared that shyness in a woman will jeopardize her rights in negotiating her marriage contracts. (Mohd, A. *et al.*, 2014). As shyness is natural attribute of a woman and cannot be erased easily, the presence of *wali* is essential as protectors, mediators and negotiators for women and their rights.

Apart from the above, having a guardian may avoid flattery and deceit. According to the author of Hedaya, the existence of guardian or *wali* is important in order to avoid flattery and deceit which may happen. It is said this is, "because the end purpose in marriage is the acquisition of those benefit which it produces, such as procreation and so forth (al-Marghinani, n.d.). Moreover, the existence of *wali* is vital to guard his ward from being victimised by an unscrupulous person or from marrying a person who is morally and socially unfitted for her. It is also to protect progeny (*nasab*) from any problems or shame. Hence, the Shari'ah laws have imposed an obligation to the close relatives of women to be their *wali* because they are among those who love them the most and know the value of dower (*mahr*) for marriages. (Sayyid Qutb, n.d.).

In addition, guardianship may provide security for the sanctity of marriage contract. Due to lack of exposure or experience of the virgin daughters in connection to marriage contracts, the wali's intervention is necessary since it supplements the presumed incapacity of a woman to understand the nature of the contract, such as to settle the terms and other matters of similar importance. It should be emphasised that the Hanafi

jurists allow women to marry on their own based on their capacity to make decisions in daily matters and transactions. Thus, the same principle is also applied concerning marriage where the women who are of full age can make decision in marital affairs. (Al-Latifi A'K., 2000)

Finally, guardianship reflects close relationship in family ties. In other words, having an authority on the ward (the bride), may further strengthen the relationship between the wali and his ward. Besides, it is believed that blessings from family are important for a successful marriage. Hence, the consent from the *wali* can be considered a direct form of blessing from the family members. At the end of the day, the married couple will become part of the family. Thus, good and strong relationship will flourish easily if the marriage has already obtained the approval from the very beginning. (Al-Latifi A'K., 2000).

WALI AS PROTECTOR FOR MUSLIM WOMEN'S INTEREST (*MASLAHAH*)

The emphasis on the role of *wali* and the wisdom of having *wali* in marriage of a woman reflects the role of *wali* as a protector i.e. to protect and safeguard the best interest of his ward. Thus, the requirement of *wali* as a pillar of marriage can be considered as protecting the interest (*maslahah*) of women. Muslim jurists define *maslahah* as the seeking of benefits and the repelling of harms as directed by the Lawgiver (Nyazee, I.A.K, 200). Al-Ghazali defines *maslahah* as considerations that

secure benefits or prevent harm but which are simultaneously harmonious with the objectives of the *shariah*. The *maslahah* in general is divided into three based on its level of importance which are the essentials (*daruriyyāt*), the complementary (*hājiyyāt*) and the embellishments (*tahsīniyyāt*) (Kamali, M.H., 1998). The Muslim scholars have quoted a number of *hadiths* which authorise the actions based on *maslahah*. The main reference is provided by the *Hadith* which stipulates to the effect: ‘No harm shall be inflicted or reciprocated in Islam’. This *hadith* encompasses the essence of *maslahah* in all of its varieties (Kamali, M.H., 1998). By applying the principles of *maslahah*, the existence of *wali* is important to avoid negative consequences on the wards in future. This is because logically, if the *wali* gives consent to the marriage, it indicates his blessings to such a marriage. Therefore, the involvement of *wali* is vital in ensuring happiness in the marriage.

The requirement of *wali* is also necessary in order to avoid unlawful ends and in this context, the application of ‘blocking the means (*Sadd al-Dharīah*)’. The principle is not concerned with unlawful acts because those are prohibited anyway. It is concerned with lawful acts that may be prohibited as they lead to unlawful results (Nyazee, 2000). The authority of the application of the *Sadd al-Dharīah* can be found in the Quran, for instance, when the Qur’ānic text forbids the Muslims from insulting idol-worshippers,

notwithstanding the inherent enormity of idol-worshipping or the actual intention behind. “Revile not ye those whom They call upon besides Allah, Lest They out of spite Revile Allah In their ignorance. Thus have we made alluring to each people its own doing. In the end will They return to their Lord, and we shall then Tell them the truth of all that They did”(The Quran, al-An’am, 108).

Sayyid Qutb in his commentary of the Quran said that it is human nature for a person to assume his or her deeds are well intentioned and thus defends those actions (whether it was bad or good). Even in error, he or she still believes that act was good. “The unbelievers ascribed partners to God and appealed to them instead of appealing to Him; yet they accept that God is the One who creates and provides sustenance. If Muslims have reviled the unbelievers’ deities, the latter would have disregarded what they believe of God’s position and abuse God himself in order to defend their concepts and worship of other deities.” (Sayyid Qutb, n.d.).

Applying such opinion into current issues, it is believed that the requirement of *wali* is important to ensure that the ward will choose the right life partner who she will share her life with. This procedure will start even before the marriage takes place when the father or guardian interrogates the man to value his character and suitability. As the guardian undertakes the contracting of the marriage of the woman under his guardianship, this predisposes him to

protect her and makes his relatives, friends, associates, neighbours ready to assist him in achieving such protection. It is believed women will not lead their own marriage due to the fact that they are very shy by nature. Thus, herein lays the importance of wali to lead the marriage of his ward. Furthermore, the opinion of guardian (*wali*) is also necessary when daughters are to decide matters related to the feelings, emotions and love. It is agreeable facts that marriage is something serious and vital in the life of women. Therefore, the selected partner should be the right person. It is expected a father or guardian always want the best for his daughter and that she lives happily in her marriage. Accordingly, the requirement of guardian (*wali*) is important to safeguard the right and interest of the women. In addition, by applying the principle of *Sadd al-Dhari'ah* based on the Quran and the Sunnah of the Prophet (pbuh), having guardian (*wali*) in marriage of his ward can also be considered as one mechanism in preventing marital problems in future through selection of the right life partner. The cooperation, agreement and blessing from *wali* are also important to guarantee his participation and help in future. For a marriage to succeed, both husbands and wife need mutual understanding to guarantee its longevity. This further reflects the crucial role of a guardian (*wali*) in protecting the interest of his ward on the day of her wedding as well as her long term marital bliss.

CONCLUSION

Islamic law emphasises the importance of guardian or wali in the marriage of a woman making it an important pre-wedding requirement. This was indicated by the verses of the Quran as well as the Sunnah of the Prophet (pbuh) which became the basis for a general consensus among Muslim scholars that wali is one of the important elements in the marriage of a woman. Islamic law as applied in Malaysia also adopts and is in agreement with the role of wali in the marriage of his ward. Several Muslim countries have adopted similar approaches namely requiring the presence and consent of wali in solemnising a marriage. The extensive discussion by classical and contemporary Muslim jurists on the issue of wali or guardian reflects the latter's importance in a Muslim marriage. The appointment of wali is to protect and safeguard the interest of his ward in marriages and ensuring a long lasting and happy marriage. The above discussion also reflects that, the appointment of wali as guardian in marriage of a woman in Islam is not to deny her right to marry on her free will (CEDAW 1979, Art. 16(b)) but to provide assistance for her in choosing the most suitable spouse and raising a family. It is also undeniable that wali, being a man, knows the characteristic of a man more than a woman and with this basic knowledge, he may provide sound opinion and advice to his ward. Most importantly, the wali's role is to make sure she has made a good choice and proper preparation for a good and successful life.

ACKNOWLEDGEMENT

This research is funded by International Islamic University Malaysia through EDWB research grant scheme.

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Right to Education for Irregular Migrant Children in Malaysia; A Comparative Analysis

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ABSTRACT

Irregular migrants are defined as persons who enter into a particular country through illegal means or persons who had lawfully entered into the country but overstayed after the expiry of their permits. Irregular migrant children are children who are born from these irregular migrant parents. Irregular migrants do not have the right to stay in the country and thus they are subjected to detainment and deportation to their home country according to the law of immigration. This process usually takes time and during this period, many of their children's basic rights may be refused or denied, such as the right to education and the right to health care. In Malaysia, the law does not guarantee the right to education for irregular migrant children and thus, they would continuously be denied of this right so long as they remain in Malaysia illegally. This would significantly affect their intellectual development which is vital for preparation of adulthood. Hence, the paper seeks to examine the legal aspects of the right to education for irregular migrant children under the Malaysian laws and under the International law and to compare that with the laws of United Kingdom.

Keywords: Irregular migrant children, right to education, human rights

INTRODUCTION

Education contributes to the strong foundation of a modern society in terms

of its economic and social aspect. In order to compete internationally, society has to be equipped with good educational background which does not only help them to succeed but also ensures a better quality of life. Establishing and providing for the right of education at an early age enables an individual's potential to be utilised to the maximum thus contributing to the development of the country.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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Internationally, the right to education is recognised as one of the most basic human rights as contained and preserved in the 1948 *United Nations' Universal Declaration of Human Rights* (UDHR).

The UNESCO Education for All Report in 2013 has stated that education can increase an individual's income level and develop his productivity, skills in entrepreneurship and innovation. Education also contributes to the economic growth of a country and reduces poverty of a community. In addition, education can be aimed at promoting health and contribute to social development, culture and politics. Unfortunately, in certain places, access to education is still not guaranteed and the poor level of education offered is not sufficient to achieve the above-mentioned purposes. Thus, the law is needed to ensure the accessibility of an education which is not only guaranteed to all, but which standards reached the UNESCO approved level of education for sustainable development community.

This study is done by way of qualitative approach by examining the law on the right to education in Malaysia and compares that to the law in United Kingdom. The comparative analysis with the principle of education in United Kingdom is chosen since Malaysia is a Commonwealth nation and the comparative method will enable this study to explore a range of alternative approaches that can be used as a basis for law reform in Malaysia.

IRREGULAR MIGRANTS CHILDREN IN MALAYSIA

Section 6(1) of the Malaysian Immigration Act 1957/63 provides a requirement of a valid entry permit before a person is allowed to enter Malaysia. This of course, applies only to non-citizens. Anyone who violates the requirement shall be considered as entering Malaysia illegally and referred to as an 'illegal immigrant'. The term 'illegal' is however not sufficiently accurate to classify a person as a human being cannot be illegal. The term illegal refers to the act of the person who has done something wrong in the eyes of law. Therefore, the authors would use the term 'irregular migrant' which refers to a person who enter into a country without valid passports or travel documents. Some of those who fall under this classification are also persons seeking asylum, an act which is not necessarily illegal even though their means of entry might be illegal, refugees and undocumented people or stateless persons (Kassim & Mat Zin, 2011).

Malaysia is not a contracting state to the 1951 Refugee Convention or its 1967 Protocol and thus, it does not differentiate between irregular migrants, asylum-seekers and refugees. In addition, Malaysia does not have an appropriate system in place to govern the status and rights of asylum seekers, refugees or irregular migrants. As such, all are treated alike i.e. being persons who have no authority or permission to be in Malaysia and have no protection of the law.

Irregular migrants enter a particular country for various reasons. Some of

them move voluntarily in search of better economic opportunities (they are termed as ‘economic migrants’) while others are forced to move out by forces beyond their control such as by reasons of war or natural disaster. Those who left their home country either voluntarily or by force often become victims of human trafficking activities. Luke *et al.* (2009) categorised irregular migrants according to different modes of entry into the country of destination. They are:

- (a) Illegal entrants – including those who avoid official immigration control and those who present fabricated documents;
- (b) ‘Over stayers’ – migrants who have extended their stay without legal permission even though their original presence in the country was lawful. They include asylum seekers who are denied to stay in the country and over stayers who failed to renew their period of legal residence.
- (c) Children born to irregular migrants parents. Since the parents often do not have right to stay in the country, the status of ‘irregularity’ is passed onto the child. They are not considered migrants but since their birth is not recognised as legal by the country of residence, they therefore have no right to remain in the country.

‘Irregular migrant children’ are therefore children who are born from these irregular migrants parents. There are between one and two million

undocumented or irregular migrants in Malaysia (Ministry of Human Resources Malaysia, 2013) and among them, it is estimated about 44,000 children who were born from irregular migrant parents were denied schooling (Ministry of Education, Malaysia, Study on Children without Official Identification Documents in Malaysia, Educational Planning and Research Division, Kuala Lumpur, 2009). As persons with irregular status, they have no legal residence in the country they are residing in and in breach of the country’s immigration law and subject to deportation to their home country if detected by the authorities (European Commission, 2009). This is provided under section 6 (1) of the Malaysian Immigration Act 1959/63 which states that “no person other than a citizen shall enter Malaysia unless he possess a valid entry permit to enter the country and any person who has acted in contravention of this provision shall be guilty of an offence and liable to a fine and imprisonment”. Another consequence of being convicted of the offence under section 6 (1) is that the person shall be liable to be deported to their home country [Section 32 (1)].

The lack of legal protection in Malaysia continuously exposes irregular migrants to severe protection risks. Due to lack of legal protection, it would be difficult for the irregular migrants to get affordable health care, social services as well as reliable job opportunities. These affect the social safety of the irregular migrants living in Malaysia, especially the children. For example, irregular migrant

children are not provided with elementary education since the law does not give them the right to attend public schools (UNHCR, 2013). Though education projects run by UNHCR in cooperation with the non-governmental organizations, or community-based education classes are available for children of irregular migrants, the latter face difficulties in accessibility and the programmes themselves also suffer from a lack of funding, facilities and human resources constraints (UNHCR, 2013).

THE RIGHT TO EDUCATION

The right to education was perceived as having a qualitative and quantitative aspect and its role has increased in the modern society. The right to education or education itself plays a crucial role in developing potential of individuals and to the success of a country in terms of its economic development, social justice, and spiritual strength, moral and ethical standards (McMillan & Simkiss, 2009). The importance of education was emphasised by the court in the case of *Brown v Board of Education of Topeka* 347 U.S.483 (1954) where Justice Warren said that lack of education as a result of denial of such right may reasonably prevent the child from succeeding in his/her life. Though US cases are not applicable to Malaysia, this case highlights the general principle of the importance of education for the purpose of this article. John Locke suggests that education is an individual autonomy, effort and responsibility and it is at the core of the issue of development of a child's

understanding. It is the education that a child receives that determines the way in which his understanding and character will develop, and for the vast majority of people a proper education is crucial if the child is to grow into an adult who will act according to his justified reason (Neill, 1989; Samoff, 2013). As part of the economic, social and cultural rights, the right to education should be protected and defended against any denials and violations (Tomasevski, 2005).

Most countries in the world stipulate that education is a constitutional right given to their citizens, adopting the stipulation in the *1948 United Nations' Universal Declaration of Human Rights* (UDHR) that provides that everyone has the right to education. Even though this Declaration is an internationally acknowledged statement of principles, it does not have a binding force as opposed to a treaty. The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights are treaties which have a force of law on each ratifying states and these treaties were originally statement of principles from the UDHR. Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966) for instance, recognises everyone's right to education.

Article 28 of the United Nations Convention on the Rights of the Child 1989 further laid down the right to education as an undeniable basic right for every growing human being. The International human rights law defines right to education as a universal human right (Tomasevski, 2005) and as such, it is in every child's best

interest to be provided of an opportunity to education as a basic fundamental right and to ensure that they are adequately trained to become effective jobholders in their adulthood (Koren, 2001; Mcmillan, 2011). The United Nations Convention Relating to the Status of Refugees 1951 provides a clear definition of a refugee and establishes legal protection and minimum support in terms of basic human rights including the right to education to be accorded to them by state parties.

Right to education appeared when social rights become prominent in the 19th century when it was inserted in the Universal Declaration of Human Rights 1948 (UDHR), International Covenant of Social, Economic and Cultural Rights 1966 (ICSECR) and in the Convention on Right of Child 1989 (CRC). It is the role of the state to ensure that the best interest of a child is adhered to and guaranteed. Article 3(1) of the CRC provides that the primary consideration for all actions involving children must be in the best interests of the child. Any interpretation of what amounts to 'best interests of a child' must not be inconsistent with the objective of the CRC, particularly its general principles, and emphasising the fact a child is an individual who has rights and capable of forming his/her own views.

POSITION IN MALAYSIA

Bergstom (2010) opines that the right to education is a universal right which includes the right to compulsory and free education and it should be provided

to those who are not yet adults, not yet rational, not yet mature, those who are not generally ascribed to rights. Basic education helps children to mature and develop their own abilities in order to face the world in adulthood (Kundu, 2005). The importance of the right to education in Malaysia can be seen in the High Court case of *Jakob Renner (An Infant Suing Through His Father And Next Friend, Gilbert Renner) & Ors V Scott King, Chairman Of Board Of Directors Of The International School Of Kuala Lumpur & Ors* [2000] 5 MLJ 254 where the court laid down the principle that justice is in favour of providing continuous education for children whose educational needs are likely to be threatened. Though this case was discussed in light of children with disability and in need of special education, it highlights the importance of education for all children being in a group of affected persons. Thus, it is one of the state's functions to guarantee that education is available to all children living within its territory (Jover, 2001).

Malaysia adheres to the principles outlined by the three conventions which are in accordance to the provisions of the Malaysian Federal Constitution and relevant laws and policies. As a member of the United Nation, Malaysia has subscribed to the philosophy, concepts and norms set out in the UDHR. In respect of the right to education, article 26 of the UDHR provides that everyone has the right to education and elementary and fundamental education shall at least be free and compulsory.

Article 28 of the CRC and article 13 of the ICSECR share similar provisions which provides that all state parties shall make elementary education as compulsory and free to all. Malaysia however, has reserved the applicability of article 28(1) (a) of the CRC on the ground that this article is not consistent with the Federal Constitution of Malaysia, its domestic laws and national policies of the Government of Malaysia and with the *Syariah* law. The Malaysian Federal Constitution 1957 provides that the right to education should be guaranteed equally between persons without discrimination on grounds of religion, race and birth place¹. The primary legislation on education in Malaysia is Education Act 1996 (Act 550) which provides that the government may publish in the gazette making primary education compulsory (Professional Circular No. 14/2002: Implementation of Compulsory Education in Primary Level in 2003 dated 27 November 2002 and Guidelines for Implementation of Compulsory Education in Primary Level in 2003) following the principles under the UDHR and CRC. The same provision also provides that any parents who fail to enrol their children for the duration of compulsory education (6 to 12 years of age) shall be guilty of an offence and shall be liable accordingly. Nevertheless, the current legislations and policies in Malaysia in respect of the

right to education are not friendly towards irregular migrant children living in the country as the legislations have not explicitly nor implicitly guarantee this right to them.

The main obstacle faced by these children is lack of documentation or more importantly, their birth certificate. Many of these children were born from irregular migrant parents and the status of irregularity passes automatically to the children. As Malaysia do not grant automatic citizenship upon birth within the territory, these children will be considered irregular migrant unless their parents can provide relevant documents to the National Registration Department (passport, working permit, marriage certificate among others) as proof of their 'valid & legal existence'. As the result of the denial into public schools, these children receive informal education at home or from their respective communities. The more unfortunate situation is that the children are forced to join the job force at an early age to provide for their family and some may wonder aimlessly on the streets.

There are a number of barriers for irregular migrant children to get access to the right to education in Malaysia:

- (a) Some asylum-seekers fear the risk of being arrested as illegal immigrants and face the risk of being deported if they try to register their children and as such, many irregular migrant children do not have a birth certificate. Without this, the children are not allowed to receive education from public schools. (Taib, 2012);

¹Section 2 of the Human Rights Commission Act 1999 (Act 597) defines human rights as fundamental liberties as enshrined in Part II of the Federal Constitution, which includes article 12(1).

- (b) In 2009, the government announced that children who are born in Malaysia without birth certificates may acquire their birth validation from the Department of Social Welfare or their village headmen in order to attend public schools in Malaysia. However, it is believed that the awareness of this policy is low among the irregular migrant parents. In addition, this policy does not provide corresponding exemption for children to sit for official examinations (Child Rights Coalition Malaysia, 2012).
- (c) Community-based learning centres or schools run by NGOs (closely supervised/operated by UNCHR) provide good primary level education to migrant children (Lectchamanan, 2013; UNCHR Fact Sheet, 2014) but these schools often face lack of support either financially or physically from the government and Malaysian citizen.;
- (d) The lack of opportunities to pursue higher education has a significant impact on the children's motivation to learn. Many of the children will leave school at an early age to enter the labour force in order to provide for the younger siblings and families as a whole (Child Rights Coalition Malaysia, 2012).

Due to the law on immigration in Malaysia, children are also subjected to detention at the immigration depots. Suhakam (the Malaysian Human Rights Commission) reported that as of October 2013, there were 1406 children detained in 14

immigration depots where limited activities were conducted to accommodate the rights and needs of the children including access to education (Roundtable on the Alternative to Immigration Detention, 2013).

POSITION IN THE UNITED KINGDOM

The right of a child to education is protected and guaranteed under the Universal Declaration of Human Rights 1948 and under the United Nations Convention on the Rights of the Child 1989, in which United Kingdom is a signatory to these two Conventions. In addition to that, the UK has ratified the European Convention on Human Rights and incorporated Article 2 of the First Protocol of the Convention into its Human Rights Act 1998 which also laid down the right to education. The Human Rights Act 1998 which is applicable throughout the UK guarantees the right to education to every person. In the case of *Leyla Şahin V. Turkey* (European Court of Human Rights, Strasbourg, 2005), the Grand Chamber noted that:

“Article 2 of Protocol No. 1 guarantees everyone within the jurisdiction of the contracting states a right of access to educational institutions, however in order for that right to be effective, there is an additional requirement that the individual should be given official acknowledgement of the studies he has completed.”

The Children Act 1989 and the Children Act 2004 of the UK provide the same entitlements to refugee and migrant

children as its citizens which include the right to compulsory education and proper healthcare. Section 11 of the Children Act 2004 places a duty on relevant public bodies to perform their functions in order to safeguard and promote the welfare and best interest of children. Lord Hope in the case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 expressed that where children are involved, there is an evident conflict between the need to maintain a proper and effective system of immigration control and to protect the best interests of the children. He further said the best approach is to evaluate whether their best interests are outweighed by the strength of any other considerations.

The law relating to education has also been enacted in a number of legislations in the UK such as Education Act 1996 (applicable in England and Wales) and the Education (Scotland) Act 1980. It is stated in section 1 (1) of the Education (Scotland) Act 1980 that outlines the duty of each education authority to provide a sufficient and effective provision of school education. A similar provision is also stated in section 13 (1) of the Education Act 1996 that a local education authority has a duty to ensure that the children within their area of population shall receive efficient primary education which will contribute towards their spiritual, moral, mental and physical development. The UK has provided legal right to education for 'all children' in their domestic legislations which implicitly include undocumented children. However,

there is a wide divergence between these legal frameworks and the children's ability to access education in practice (PICUM, 2013). Some of the practical obstacles include requirement to show some form of identification upon application for admission into schools, the level of discretion enjoyed by schools at the local level, the migrant parents fear of being detected and the possible deportation, problems with extracurricular expenses, language problems, no recognition given on the children's completing their education and precarious living conditions (Sigona & Hughes, 2012). Though a child's best interest is a primary consideration, the need for the government to control its immigration policy must also be factored in and that may jeopardise the rights of these children (Coram Children Legal Centre, 2013). In the case of *SM and TM and JD and Others v SSHD* [2013] EWHC 1144 involving undocumented children of Jamaican parents who were born and lived in UK, the court allowed the immigration to decide on the welfare of the children. The court states that "Whilst your client, as a child, is obviously not responsible for the decisions made by the adult(s) in his life, their immigration status and history are relevant to the assessment of any justification. To grant your client ILR (indefinite leave to remain) straight away would be unfair to all those who come, and remain legally, would discourage the use of the lawful routes into the UK and undermine the Secretary of State's ability to manage migration in a manner which

she considers to be the best interests of society as a whole. The Secretary of State considers that the public policy consideration could only be outweighed in an exceptional case”.

Some of the barriers that may be faced by irregular migrant children in respect of education in the UK are (PICUM, 2013):

- (a) Administrative barriers. Since the UK legislations only implies the right to education for undocumented children, it gives rise to confusion for officials and undocumented families alike as to as to the children’s right of access to education. The fact that there is lack of national policy guidance and ambiguous national legislation do not help the situation.
- (b) Fear of being detected and consequently deported often discourages the undocumented families from enrolling their children in schools.
- (c) Language barrier tends to limit the children’s access to quality education and hinder their social integration as they are often segregated from other children and classed as children with learning difficulties. The government should address the problem differently as the act of segregating those children minimises their scholastic development.

The position in UK is more advanced in the sense that the domestic law provides the same entitlements to refugee and migrant children as its citizens namely

right to compulsory education, primary health care and other matters relating to the welfare of children.

CONCLUSION

There is still room for improvement with regard to right to education of irregular migrant children in Malaysia. The first step in rectifying this problem is to ensure they are protected in terms of status and rights. Malaysia should now consider withdrawing its reservation to article 28(1) (a) in providing free and compulsory elementary education to all children despite their immigration status. The next step is enacting a specific legal framework for refugees, where irregular migrants, asylum-seekers and refugees should be distinguished so that these three different groups can be treated according to their respective status and rights. This can be achieved by becoming a signatory party to 1951 Refugee Convention and its 1967 Protocol. The government plays a very important role in deciding the country’s policy when it comes to refugees, children of asylum-seeker or irregular migrant children specifically and ensure that their basic human rights are protected. There is also a need to review the prohibition against irregular migrant children from attending government schools. This is because despite various laws guaranteeing the right to education in Malaysia, there is still reservation in respect of the Constitution, national laws and national policies including the Syariah law. The existing educational projects run by UNHCR

in partnership with Non-Governmental Organisations should be continued and improved in terms of funding, facilities and human resources.

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Land Scams Involving the Power of Attorney in Land Dealings in Malaysia

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ABSTRACT

The Power of Attorney (PA) is a legal instrument or document that is created by the landowner (the Donor) in favour of the recipient of the PA (the Donee) as the Donor's attorney in land transactions. The recent statistics for 2009 – 2013 issued by the Commercial Crime Investigation Department (CCID), Royal Malaysia Police (RMP) indicate that the misuse of PA in land transactions is the most common *modus operandi* used in land scam incidents. A huge increase in land scam cases using the PA is very alarming primarily because such incidents could potentially compromise the security and legal ownership of registered lands. Thus, this paper attempts to analyse land scams involving the PA and to make some recommendations or suggestions that could prevent the occurrence of these cases in the future. The study will also scrutinise the provisions of the Power of Attorney Act 1949 in order to determine whether such a statute could provide some solution to this problem. The paper is largely based on socio-legal study that adopts a qualitative approach. It also involves semi-structured interviews with the Registrar, Land Administrator as well as officers at land offices in addition to literature review and content analysis. The study concludes that fraudsters employ several methods in land scam incidents using the PA. It is further observed that the Power of Attorney Act 1949 is currently very much deficient in handling or tackling such a crime in the country.

Keywords: Land Scam, Fraud, the Power of Attorney, the Power of Attorney Act 1949, Proposed Solution

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Land scam is hardly a novel issue in the land administration system in Malaysia. Statistics from the Commercial Crime Investigation Department of the Royal

Malaysia Police showed a total of 832 cases of fraudulent land transactions between 2005 and December 2013. This startling figure on land scams has triggered uneasiness among registered proprietors since the ownership of their precious lands may easily change hands without notice. Studies have demonstrated that the preponderant causes of such incidents are largely related to the owners' weakness, selfishness and greed. Additionally, the endless increase in land prices as well as the prevailing maladministration at land offices across the country are contributory factors to this predicament. (Othman, 2008; Shaari, 2009; Ismail, 2009; Ismail, 2011; Wu & Chung, 2011; Harun, Hassim & Hamid, 2013).

Land scams involving the use of the Power of Attorney (PA) in particular, have been found to be profoundly worrying because such incidents are likely to have a detrimental impact on the reputation and standing of the Malaysian judiciary. This is mainly due to the fact that any PA ought to be registered with the High Court first before it could be registered at land office to become valid and enforceable. The current standard operating procedure at almost all of the land offices throughout the country is that the officers in charge will simply accept any PA submitted to them so long as such document bears the signatures of the landowner (the donor) and the recipient of the PA (the donee), is noticeably witnessed by a Commissioner for Oaths or qualified lawyers and has been duly registered at the High Court. The validity of such PA will

not be queried or disputed by land officers when there appears to be an official seal of the High Court affixed to it (Othman, 2008; Ismail, 2011). This indicates that officers at land offices are neither properly nor adequately trained to detect defects on any instruments submitted to them as they will merely register transactions in land that are accompanied with PA without examining or even questioning the legality of the PA. In relation to this, it is submitted that land scams involving the use of PA in the country should be seriously dealt with and tackled before this problem becomes more serious in the future.

RESEARCH METHODOLOGY

This is a socio-legal study that adopts a qualitative approach. Data was collected through semi-structured interviews with the Registrar of Titles, Land Administrators as well as land officers in certain states, which recorded a significant increase in fraudulent land cases based on recent police statistics. The study then seeks to analyse and identify the pervasive methods of land scam involving the PA in the country. It is pertinent to highlight that the study is largely based on doctrinal research methodology as it is primarily concerned with critical analysis of the existing rules and procedures that are likely to govern the use of the PA in Malaysia. As such, the paper will critically examine relevant provisions of the Power of the Attorney Act 1949, decided cases as well as the secondary sources that include text books, scholarly articles from refereed journals and seminar

papers presented at international or local conferences. Apart from that, reference will be made to newspaper articles, periodicals and information gathered from reliable websites that reflect current developments on the subject matter. Last but not least, the study will propose potential recommendations and solutions that could perhaps curtail or even eradicate the occurrence of land scams involving the use of the PA in the country.

LAND SCAM BY THE POWER OF ATTORNEY (PA)

The Malaysian Powers of Attorney Act 1949 does not provide a definition of a PA. In New South Wales, the Power of Attorney Act 2003 defines 'attorney' in relation to a power of PA in section 3 referring to a person to whom the power is given. The Oxford Dictionary of Law (1995) defines the phrase 'Power of Attorney' as 'permission granted by the donor to the donee to act on the former's behalf'. In relation to this, the PA, which is an instrument of power of appointment, may either be made generally or for specific purposes only, and such power that is conferred upon the donee may either be revoked or is irrevocable. In general, any PA will remain valid and enforceable as long as it is not cancelled by the donor. In *R Thangaratnam d/o Vythilingam v Vinayagamoorthy a/l Rajaratnam & Ors* [2008] 3 MLJ 61, the appellant was the registered proprietor of a piece of land, and vide a letter dated 23 December 1983, the appellant had authorised her son (the

first respondents) to transfer the land to his name. The appellant then executed a power of attorney in Sri Lanka in favour of the first respondent and the PA was registered in the High Court of Malaya on 12 June 1984. However, on 19 March 1984, the first respondent transferred the land to the second respondent as trustee for the third respondent who was the son of the first respondent and the grandson of the appellant. As a result of the transfer, the third respondent became the beneficial registered proprietor of the land. The appellant nonetheless asserted that she had not permitted the first respondent to transfer the land to the third respondent and sought an order compelling the second respondent to retransfer the land to her. It was ruled that the letter dated December 23, 1983 had authorised the first respondent to transfer the land to him and the power of attorney (PA) was merely a tool to implement the transfer. Therefore, the first respondent was legally entitled to transfer the land to anyone he nominated.

MODUS OPERANDI OF FRAUDULENT LAND SCAM BY THE PA

Finding from interviews conducted by the researcher with officers and staffs at land offices and the Department of Land and Mines (PTG) regarding land scams using the PA indicated that the following as the *modus operandi*:

- (a) Use of the PA that has already expired and cancelled, or where the donor or the donee has already passed

away (Wan Mohd Anuar Wan Endut, Azran Amin Mazlan, interviews on 14 April 2013; Mohd Saufi Abdul Rahman, interviews on 22 April 2013). The status of such PA has been described in section 5 of the Powers of Attorney Act 1949 that provides any instruments executed by using the PA will no longer be valid when written notice of revocation of the PA by the Donor or renunciation of the PA by the Donee has been deposited with appropriate land office, or when either the Donor or the Donee is dead or insane, or when the Donor is declared bankrupt.

In *Jamaliah bt Haji Mahsudi Suing on Her Behalf and As Administratrix of the Estate of Salamah bte Hj Ali & Ors v Sivam a/l Munsamy & Anor* [1995] 5 MLJ 250, the ownership of a piece land was transferred to the second defendant by using a PA, which was found to be defective as one of the Donors had died three years prior to the granting of the PA. The court ruled that since the transfer of the land in favour of the second defendant was affected by means of a fundamentally flawed PA, the transfer would also be similarly flawed and ineffective. Almost a similar incident occurred in *Mohd Salim Said & Ors v Pheng Kee Tang & Anor and another Appeal* [2014] 6 CLJ 485. In this case, the court ruled that since the PA that was used to transfer the disputed land was a forged document due to the fact that the Donors and Donee were no longer alive when the PA was created, the instrument of

transfer purportedly signed by the deceased was a void instrument being a document of transfer that bore a forged signature.

(b) Forged PA. These cases occurred through applications for lost individual document of titles (grants), forged instruments of transfers and charge documents. Further, there are also cases where a PA seems to be properly registered with the High Court but unfortunately the PA turns out to be a forged document (Shahrul Natasha Halid, interviews on 19 June 2013; Muhammad Faisal A. Razak interviews on 4 July 4 2013; Nurul Aishah Mohamadon, interviews on 17 October 2013). The falsification of a PA document occurs when a person (a fraudster) uses forged PA for the transfer of land to himself or others without the knowledge of the registered owner of the land (Whaley & Likwomik, 2008).

In the landmark case of *Tan Yin Hong v Tan Sian Sang & Ors* [2010] 2 MLJ 12 the appellant was the registered owner of the land, which was charged to the third respondent bank as a security for loans made in favour of the second respondent. The first respondent had executed the charges in favour of the third respondent bank under a forged PA as the appellant had never signed the PA. It was decided by the Federal Court since it was never disputed that the charges created against the appellant were based on a forged PA and thus, the charges were liable to be set aside by the appellant.

In the case of *Peace Park Resort Sdn Bhd v Credit Sdn Bhd & Ors* [2010] 1 LNS 1139, a sale and purchase agreement of a piece of land was concluded between the plaintiff and the first defendant on 23 March 2006. Unknown to the aforesaid contracting parties, the second defendant had previously sold the land under a PA on 5 July 2005. The first defendant claimed that he had neither given the PA nor received any purchase price from the second defendant. It was ruled that the second defendant had fabricated the PA by making a testimony with lawyers who were not legally registered with the Bar Council.

(c) Fake Court Seal and Forged Signature. There were cases where PA had been fabricated by using fake court seal and forged signatures of either the Land Administrator or the Court Registrar (Kamarilah Shukorini Ismail, interviews on 23 April, 2013; Rokiah Draman, interviews on 14 May 2013). Therefore, it is submitted that during the presentation of important documents such as the PA or memorandum of transfers, these documents should be carefully and meticulously reviewed by officers at land offices. It is not disputed that there are many land transactions at land offices every day and the officers are merely required to examine whether such documents do comply with the statutory requirements of the National Land Code 1965, without the need to ascertain their authenticity. Further, officers at

land offices are now required to process any registration of land transfers within one day (previously the standard operating procedure was 30 days). For this reason, it is submitted that those who are directly involved with daily operation and administration of land dealings at land offices throughout the country should be more careful in performing and discharging their duties so as to prevent and avoid the potential of executing land transactions and related matters that are effected by using forged documents including PA. Ain (2008) argued that the clash of priority between the need to register and safety requirement was among the main factors that led to the lack of thorough and comprehensive verification of documents submitted to the land offices.

Land scam cases involving the PA were also reported in local newspapers. Various methods are used by scammers including the use of forged documents such as memorandum of transfer of land and charged documents (Tariq, 2014), fabrication of statement in PA (Wahid, 2011) and the use of forged PA in land transactions to third parties without the knowledge of the registered proprietor of the land (Adlan, 2012).

Most of the times, the registered landowners would only realise the occurrence of land scams when they make payment of quit rents or conduct land searches at land offices. In certain cases,

they would only come to know about such incidents upon the receipt of notification letters about transfers of their lands from land administrators, or even court order and letters from lawyers asking them to vacate their land (Mohd Zahir Abdullah, interviews on 25 February 2014).

OVERVIEW OF THE POWERS OF ATTORNEY ACT 1949

The Powers of Attorney Act (the Act) was specifically enacted to regulate matters relating to the PA. This specific piece of legislation is very short and brief comprising 15 sections and two schedules. Form I of the First Schedule relates to authentication of a power of attorney executed by an individual, while Form II of the same schedule is for authentication of a power of attorney executed by a company or corporation. As for the Second Schedule in the Act, it provides for the abolition or repeal of the previous ordinances and enactments on the PA. Under the National Land Code 1965 (the NLC), related provisions on documents, procedures and investigations of the PA are explicitly stipulated in sections 309 to 311. The Act gives more focus on procedural matters that ought to be complied so as to render any PA as valid and enforceable in law. In relation to this, it is argued that among the inherent weaknesses of the Act is its failure to define in definite term certain important terms such as 'donor', 'donee' as well as statutory powers conferred by any PA. Further, the Act does not provide a specific format that must be followed for the creation of a PA.

On the contrary, the Act gives a strong emphasis on authentication of a PA as it mandates the execution of any instrument purporting to create a PA in West Malaysia should be carried out either before a Magistrate, Justice of Peace, Land Administrator, Notary Public, Commissioner for Oaths, advocate and solicitor or bank officer carrying on the business of banking in Peninsular Malaysia and incorporated under local laws (section 3(1) (a) of the Act). Apart from that, any PA can be executed outside Peninsular Malaysia provided that it is authenticated by a Notary Public, Commissioner for Oaths, judge, Magistrate, British Consul or Vice-Consul, representative of the Britannic Majesty, Consular Officer of Malaysia, Malaysian Pilgrimage Commissioner for a PA executed in Saudi Arabia or advocate and solicitor of the Supreme Court in Singapore or Singaporean bank officer where the PA is executed in Singapore (section 3(1) (b) of the Act).

In addition, the Act does not statutorily mandate the donor and the donee to be physically present during the signing of the PA. The parties to the PA are also not required to understand substance of the PA and its implications. It is apparent that the presence of both donor and donee during the execution of the PA is very crucial in verifying and authenticating the true identities of the parties involved in the PA as it can eliminate any possibility of fraud or forgery. Further, by virtue of section 157A (1) and (3) of the NLC, any acts performed by a donee shall be regarded to be equally

valid and enforceable like those performed by the donor himself. According to Fara Wahida (interviews on 28 June 2013), the proprietor of the land often does not understand the legal implications of a PA, even more if the PA is written in English. In *Tan Pui Sim v Tan Chong Ton @ Tan Boon Seng* [2013] 1 LNS 912, the defendant, who had signed a power of attorney claimed that he did not understand its contents as it was prepared in English. In relation to this, it was proposed that it should be the responsibility of the lawyer to describe the essence of the PA so that both the donor and the donee have a clear understanding of the implications of such a document (Willmott & White, 2008). Muhammad Faisal (interviews on 4 July 2013) argued that lack of knowledge is among the major contributing factor for the occurrence of land scam through PA, in particular when it involves an elderly person.

In the case of *Household Realty Corp. v Thibeault; Walsh, Greenberg and Robinson, Third Parties* [1993] OJ No.2024, Justice Binks (Ontario court) reminded all lawyers who are involved in the execution of a PA:

'It is my opinion that any lawyer practicing in Ontario in obtaining a power of attorney has a responsibility to fully explain the nature of the document to the person executing it. The lawyers must be in a position to be able to testify, if necessary at a later date, that there was no doubt of the fact that the person giving the power was fully aware of all the consequences ...'

In short, it must be emphasised that lawyers are expected to explain in full the power of the PA in order to ensure a donor understands the implications of the power of a PA (Rolph, 2008). Apart from that, a donee should understand his or her responsibility and able to assume the tasks entrusted to him or her by a donor under the PA (Whaley, Cull & Hull, 2010; Tilse, Wilson, White, Willmott & M Cawley, 2013).

FINDINGS

The Act appears to be still lacking in ensuring and guaranteeing the elements of safety to the donor (landlords) in the execution of a PA and related procedures that must be complied with for such PA to be valid and enforceable in the court of law. In New South Wales, Australia, there exist two types of PA that introduced the 'General Power of Attorney' and 'Enduring Power of Attorney'. The first type of PA is commonly used for a short period of time such as when the donor goes abroad for a certain duration and the latter is usually employed when the donor loses his capacity to manage himself or herself due to physical problems like permanent disability as a result of an accident. Section 19 of the Powers of Attorney Act 2003 (NSW), which was introduced on 16 February 2004, requires any instrument for the execution of a PA to be accompanied with a certificate certifying that those who commit such testimony such as lawyers or Commissioner of Oaths to explain about the effects of PA to the donor before he or she signs the PA and to ensure the donor

really understands the impact of the PA that confers certain legal powers on the donee. It is therefore submitted that such requirements should be included in the First Schedule of the Act, in particular when it involves the elderly who often become victims of land scams. In addition, it is suggested the donee should statutorily be required to carry out his or her powers and duties in the best interest of donor. Failure to comply with such statutory duties would mean the donee is liable to be imposed with certain amount penalty as monetary compensation to the donor and any dealings that have been executed by the donee could be revoked, and subsequently a new donee may be appointed in his or her place.

Section 310(1) of the NLC statutorily requires the Registrar to review the information contained in the PA and to compare it with the original copy of the PA that is kept at the Registrar's office in order to verify the authenticity of any information stated in any instruments during the presentation process. By virtue of section 311 of the NLC, the Registrar is permitted to request a statutory declaration or other evidence upon oath or affirmation that the PA was still in force from an attorney or his principal. This power may be exercised if there arises any doubt about the validity of the PA, especially in the case where a PA can be repealed due to the death of the donor or has been declared insane or adjudged bankrupt. It is hereby submitted that the practice that has been adopted in Negeri Sembilan whereby during the presentation of any instruments under the

NLC by using a PA, such PA is mandated to be accompanied with a statutory declaration of the applicant or lawyer or attorney representing the applicant be extended and applied in other states of the country. Such a measure is perhaps effective to prevent the occurrence of fraud at land offices.

In addition, it is proposed that the PA should at least be witnessed by a lawyer, Land Administrator or Commissioner for Oaths before it can be used for any registration of land dealings. In the case of verifying the authenticity of the PA, it should be registered in the High Court and subsequently be registered at the land office. Once the PA is registered, any type of transactions may be carried out and land offices will process the transaction involving the PA without questioning the validity of the relevant PA. In addition, mutual cooperation with all embassies should be established and maintained in order to obtain samples of confirmation by a Notary Public or Commissioner of Oaths and also sample Power of Attorney from foreign countries. This will enable the registrar at the land office to make reference in the event of suspected cases of fraud and falsification of important documents such as the PA (Saidin & Abdul Rashid, 2008). Further, in order to prevent land scams involving the PA, issues relating to the lack of knowledge, experience and skills among officers and staffs at land offices ought to be properly addressed. Ain (2008) claimed that in-house trainings should be given by those who are skilled and knowledgeable in administrative and

legal works in order to expose the officers and staffs on security issues pertaining to handling documents that are purported to be registered at land offices.

CONCLUSION

Officers and staff at land offices throughout the country should be introduced and exposed to various ways and methods that have been and currently being used in land scam incidents. This is particularly significant in cases involving the use of PA so that they are aware and exercise more caution in registering any instruments for land transactions. It is without doubt that issues pertaining to land scams will become more complex and complicated in the future, in tandem with the country's rapid development towards a developed nation status and with the ever-increasing real property values. Accordingly, Land Administrator and other parties involved in land transactions should play a proactive role in tackling any possibilities to commit fraud through the use of PA.

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Experience of Domestic Abuse among Malaysian Elderly

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ABSTRACT

Domestic elder abuse is a social problem. In some countries, it had affected a large number of the elderly. Although this issue has gained prominence for over two decades, in Malaysia, the information on this is still scarce. Most of the elder abuse cases were not reported and concealed from public knowledge. Victims too, rarely report the abuses perpetrated by their own family members. This study aims to examine the experiences of the elderly in Malaysia who have sustained domestic abuse. Face-to-face in-depth interviews were conducted on ten (10) people aged 60 year and above were residing in *Rumah Seri Kenangan* (an old folks home) in Pengkalan Chepa, Kelantan. Each interview took an average of 15 to 30 minutes and was stopped when the information reached a saturated level. Observation on the physical characteristics of the elderly was done during the interview. The findings showed that majority of the elderly had experienced one or more abuses. The most reported forms of abuse were emotional and financial abuse. The main perpetrators were the adult children or their spouses. Through observation, the study found that the victims had similar characteristics namely physical disability and one or more chronic illnesses.

Keywords: Abuse, elderly, neglect, risks factors, perpetrator

INTRODUCTION

In Malaysia, an elderly person is also known as *warga emas* in the Malay

language. The United Nations defines an elderly person as aged 60 year and above. Malaysia's older population is ever increasing because of a longer life span due to the increase in quality of life, awareness on health as well as better medical facilities. At the same time, a decreasing birth rate has caused an aging population whereby the middle aged and older population

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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have grown disproportionately compared with the younger population. Based on the experience of other countries, Malaysia will face the risk of elder abuse problems in the future especially after having achieved the status of an 'old nation' (Esther, Shahrul & Low, 2006).

At present, there is no specific definition of 'elder abuse' (also known as senior abuse) in Malaysia which has been categorised as domestic violence (Mohd Yusoff, 2009). Elder abuse, specifically abuse of elderly parents, is admittedly a social problem (Mohd Anshari, 2007) and a crime against society (Mohd Yusoff, 2009). Although innumerable researches have been carried out on this issue, elder abuse in Malaysia is still very much concealed and has not become a public issue (Abd Manaf, 2002). Elder abuse is not openly discussed by social activists or local academicians. There is also inadequate research on elder abuse in Malaysia. Incidences of abuse have not been completely exposed because of several factors such as problems in obtaining data, difficulties in identifying abuse cases and the reluctance of the elderly to expose their cases although they are the victims. The Malaysian public assumes that elder abuse is a family problem. Indeed, and the abuse occurs under a cloak of secrecy (Mohd Yusoff, 2010). The attitude of certain people in society that accept abuse as long as it does not involve violence (Tengku Aizan *et al.*, 2010), is another reason why victims do not report these cases. The lack of awareness among the elderly about support

groups for abuse victims is another reason why abuse cases (Pang, 2000) remain unexposed. Moreover, elder abuse does not receive much coverage in the mainstream media in Malaysia (Mohd Yusoff, 2009). There is no specific agency that collects data on elder abuse cases so data have to be collected from various agencies such as the Social Welfare Department, the police and the Ministry of Health (World Health Organization, 2006).

Elder abuse can be categorised as institutional abuse and domestic abuse (abuse perpetrated by family members). Studies have linked several factors as the cause of domestic abuse. The perpetrators, victims and society all contribute to the occurrence of elder abuse. Elderly who are at risk of becoming abuse victims by their children or family members are those who have one or more physical disabilities that impede them from being independent and depend on other parties such as their children or guardians (Dolan, 1999); this includes those with chronic ailments (Lachs, *et al.*, 1997). Emotional abuse is rampant among the elderly who are dependent on the abuser compared with the elderly who suffer other types of abuses (Amstadter *et al.*, 2010).

The types of abuses experienced by the elderly are physical abuses, sexual abuses, financial abuses or exploitation, neglect and abandonment by family members. In domestic abuse, potential abusers are adult children, guardians of the elderly or close family members. Among the main abusers

are the adult sons, spouses of the elderly (Dolan, 1999) and daughters in-law (Soeda & Araki, 1999).

In Malaysia, the extent of the elder abuse problem is yet to be clearly identified and facts about elder abuse have not been made public. Hence, this study intends to examine the abuse experiences faced by the elderly in Malaysia. This study attempts to identify risk factors that lead to elder abuse as well as the characteristics of abuse victims. Although there are numerous risk factors concerning abuse, this study looks into factors related to physical disabilities and chronic diseases only. The elderly selected for this study are residents of *Rumah Seri Kenangan* in Pengkalan Chepa, Kelantan, which is an institutional residence under the auspices of the Department of Social Welfare, Ministry of Women, Family and Community. The abuse experience studied is domestic abuse perpetrated by adult children or family members before the elderly became residents at the institution.

OBJECTIVES

This study aims to explore the experience of domestic abuse among the elderly who reside in *Rumah Seri Kenangan* in Pengkalan Chepa, Kelantan. It intends to identify risk factors as well as characteristics of these elderly victims. The types of abuse studied are domestic abuse namely physical abuse, financial abuse, sexual abuse, psychological or emotional abuse, neglect and abandonment or forced isolation perpetrated by adult children, guardians or

family members when the elderly were still living with the family members or before they became residents of the institution.

METHODS

This study was carried out at *Rumah Seri Kenangan* in Pengkalan Chepa, Kelantan by examining the abusive experiences of the elderly living here. Ten elderly people aged 60 year and above were selected as subjects of the study. The two methods used were the *in-depth interview* and *observation* methods. The characteristics of the elderly, who were the subjects of the study, were pre-determined and referred to marital status, number of family members and the ability to communicate well. The interview relied on questions that were pre-formulated or arranged in a semi-structured format. However, it was an open interview process whereby the researcher was bound by the questions during the interview. The main question adduced was when and why they were in *Rumah Seri Kenangan*. All the answers given by the participants were recorded. The answers were reported *ad verbatim* so that the actual meaning is intact. In circumstances that involved informal language or local dialects, the translated meaning is stated in bracket. The observation method was used during interviews with the participants. The physical characteristics of the elderly and their feelings when giving information during the interview were noted in a record book. The observation was intended to get a better understanding of the characteristics of the elderly who had experienced abuse.

RESULTS AND DISCUSSION

The Participants' Profile

All the participants in the study were Muslims, Malays and consisted of six females and four males. Gender and race were not the criteria for selecting the subjects for this study because the main criteria was that the elderly must have been married and must have either children, siblings or close family members. Additionally, participants should be able to communicate well or be

capable of legible speech. The participants in this study were between 60 and 82 years old. All the participants lived alone without their spouses due to several factors such as death, divorce or just living apart. Only one participant had a surviving spouse who was living in *Rumah Seri Kenangan*. Once in a while he would go back to his home. Nine participants had at least two children and one participant, Participant 8, had 11 children (Table 1).

TABLE 1
Participant's Profile

Participant	Gender	Race	Age	Marriage Status	No. of Children
P1	F	M	60	Living apart	2
P2	F	M	80	Widowed	5
P3	F	M	60	Widowed	2
P4	M	M	60+	Divorced	3
P5	F	M	70	Widowed	0
P6	F	M	78	Divorced / Widowed	2
P7	F	M	70+	Widowed	2
P8	M	M	61	Divorced More than Once	11
P9	M	M	64	Divorced	2
P10	M	M	70+	Married	4

Source: Interview

Mode of Entry into Rumah Seri Kenangan

Rumah Seri Kenangan is a residential institution made available by the Social Welfare Department for the elderly who fulfil certain entry conditions. The entry into this institution is usually through voluntary application by the elderly or based on recommendations from the Social Welfare Department. When a report is made, the officer from the District Social Welfare Department would carry out investigations and make recommendations to the State Welfare Department on whether to place the elderly seeking protection at *Rumah*

Seri Kenangan. In this study, five residents had been staying at *Rumah Seri Kenangan* for less than a year, one had been a resident in the institution for more than 10 years. The study found that four participants had entered the institution voluntarily based on their own application while two others were there based on a recommendation by an officer from the District Social Welfare Department. Four participants were sent there by their family members such as their children, grandchildren or nephew and nieces that the elderly had cared for since young (Table 2).

TABLE 2
Period of Stay and Mode of Entry of Participants into Rumah Seri Kenangan

Participant	Period of Stay at RSK	Mode of Entry into RSK
P1	More than a year	Own application
P2	3 months	Department of Social Welfare
P3	More than a year	Own application
P4	More than 10 years	Own application
P5	6 months	Sent by family member
P6	6 months	Sent by own children
P7	3 months	Sent by own children
P8	1 month	Department of Social Welfare
P9	7 years	Own application
P10	6 years	Sent by grandchild

Source: Interview

Reasons for Staying in Rumah Seri Kenangan

There are several reasons for the elderly to stay in *Rumah Seri Kenangan*. Entry based on recommendations from the Social Welfare Department is usually because the elderly face problems related to caregiving and physical disabilities or chronic diseases. As for voluntary applications, the elderly usually had their own reasons. In this study, all participants who took residence at *Rumah Seri Kenangan* had problems with their family members. Among the

problems were the absence of children or family member who is willing to care for elderly with health problems and physical disabilities, reluctant or not willing to continue living with the children because they have been offended by their children or by their in-laws (either son or daughter in-laws) and a crisis occurred with their children. There was one participant who did not know why the grandchild sent him there. He still had a wife but nevertheless chose to continue living in *Rumah Seri Kenangan* (Table 3).

TABLE 3
Reasons for Staying in Rumah Seri Kenangan

Participant	Reasons for Staying in RSK
P1	Health problems and physical disabilities
P2	Problems related to care giving
P3	Crisis with children
P4	Physical disabilities/ Feeling offended by the children
P5	Family members do not want to care for them
P6	Do not wish to inconvenience children and their spouses
P7	Uncomfortable with the care given by the in-law (son or daughter in-law)
P8	Health problems and physical disabilities
P9	Crisis with the wife/ abandoned by the wife and children/ caregiving problems
P10	Do not know why he was sent there by the grandchild

Source: Interview

Participant 3 explained why she chose to live in *Rumah Seri Kenangan*:

That child...there was a crises with that child that is why I came here. Well, I am easily offended. I am old now. Hence, if the child does not want to take care of me let me shelter with society then.

Another participant stated that the reason for staying in *Rumah Seri Kenangan* was because he had an altercation with his wife and she chased him out of the house. Participant 9 said:

I had some money after my father sold the land. I have some money but not much, a little my father gave me and I gave it to my son so my wife got angry and we quarrelled. Then one night... we went to bed. Well, there was some misunderstanding. After that, she chased me out of the house.

Participant 4 had chosen to leave the son's home quietly without the son being aware of it. He did this because he was offended by his son's frequent admonishment.

I was not comfortable. I left quietly. No quarrels but I was offended by what

he had said. It is normal but the way he talked sometimes is direct. "Father, you just watch the television all day". I was hurt by that.

Participant 8 explained how he came to be in *Rumah Seri Kenangan* although he did not voluntarily apply for it.

Nobody suggested I come here. It is fine to stay here as I cannot see in one eye. I came because some chronic ailments. I went to the hospital and they sent me here because I have problems with my lungs and heart and swelling here and there. I am afraid I might become paralysed.

Experience of Abuse

All the participants had experienced a situation that could be categorised as 'abuse', either intentional or unintentional and irrespective if the abuse was mentioned to other parties or not. Almost all the participants had experienced emotional abuse due to the attitude of their children or family members. Four participants had said that family members had financially swindled them (Table 4).

TABLE 4
Types of abuse experienced by the participants and relationship with the perpetrator

Participant	Type of Abuse	Abuser/ Perpetrator
P1	Financial/emotional	Brother
P2	Financial/ Neglect	Brother and nephew/niece
P3	Emotional	Children
P4	Abandoned by family members/ emotional/ property	Wife and Children
P5	Emotional	Nephew/Niece
P6	Emotional / Neglect	Son and daughter-in-law
P7	Emotional / Neglect	Daughter and son-in-law
P8	Emotional / Neglect	Wife and children
P9	Emotional / Financial	Wife and children
P10	Emotional	Wife and children

Source: Interview

Types of abuses experienced by participants could be seen from the results of interviews as shown below.

Financial exploitation

Participant 1 explained how her brother controlled all matters pertaining to finance and property inherited from their mother. The inheritance was not divided equally among the siblings.

As for now my brother,...my late parent's inheritance is there, leaving behind some land and property. The house, well, is only a low-income house. And the land is about 4 hectares, so I have about more than a hectare. My sister is in Melaka, and have 3 other younger siblings, my brother is privy to them but it has been more than 10 years now... because we have plans to sell, from just leaving it that way, it would be better we sell it so that we could use the money. Because my brother holds the trust for the land. If we were to ask him, he would say, "What do you want to do with the money?", We would then ask what he would do with the money. You have everything, including money. Of course, we need money. We do not know, may be soon we would sick or something, we would need money too.

When before, when our late mother was around, she took all the jewellery, approximately thirty thousand (ringgit) or more. She said this division was for daughters only, there were 3 daughters. She said, "this for whom and whom.

So, err..this thing I will hold it in trust. When we ask him about it, he would say that someone had burgled his car and took the jewellery. You all imagine can you, he said ...impossible to leave it in a drawer; madness! You are a police officer, right? Would he leave it in the drawer? He said someone broke into his car. Nonsense we say, unless you would go and sell it."

(verbatim transcription of interview data)

Participant 2 explained about the rent collection on his house that was accrued to her while she was staying in *Rumah Seri Kenangan*. All responsibility pertaining to collection of rent was handed over to her brother. In the beginning, her brother had handed over all the dues but as time went on she did not receive any of the collected rental monies due to her from her brother.

Money? There is no money, I am not holding any money, my elder brother lah. There are some working people living there. You have been getting the money for a long time, haven't you? I do not know who has taken the money. This boy has a lot of siblings. He has not given any money. Only for Hari Raya. Nothing after that.

Participant 4 said that his pension gratuity enabled him to purchase two houses but both the houses were in his wife's name. When he became paralysed, they separated and the wife carried on living in the house.

There was some (money) but it's all finished now. Was (the money) given a lump sum. Bought two houses. My wife is staying there now. In my wife's name, both the houses. What a waste.

Participant 8 explained how the proceeds from his business were given to his wife. However, his wife left him for another man and he finally divorced her.

I had left the money in her name. How stupid of me. Because of her, I had trusted women. The hundred and eighty thousand is mine".

Another participant, who also had experienced financial abuse perpetrated by his child, said:

Had put the money in his account (child). If this case could be taken to court, I would do it because I am really angry with my child. It is as if I did not know anything about it (Participant 9).

Emotional abuse

Several participants narrated the emotional abuse they had undergone. Most of their out-pouring did not clearly mention that they were emotionally hurt but their narration indicates that they had chosen to live in *Rumah Seri Kenangan* because they were neither wanted nor appreciated by their children's families or their family members. Participant 5, in expressing her feeling, said:

People do not want old folks. Now I am old, nobody wants to accept me so it is better to live here, Praise to Allah (Alhamdulillah). My prayers are complete; my food is taken care of. I

am old now; whatever I do is not right. They are young so we do not see eye-to-eye.

Participant 8 explained that he is mentally tired and confused when thinking about his household.

When I think about my household, I get very anxious. If only I do not remember Allah the Almighty, I would get all confused. I am 61 years old now but because of my mental stress, I look 92. I do not mean to dig up matters but looks like I am a very unlucky man and husband. I am sad and I have not seen happiness. I do not know what happiness is.

The out-pouring of participant 4 about his feelings and emotions of being abandoned by his children him can be seen in his explanation below.

Sometimes we fight among ourselves, I feel hurt. There is tension in the air. I do not know, the children should come looking for me since I had left the house. I am depressed because it is as if I have been abandoned. That is why the children do not come to see me. I do not know, I feel that I have been abandoned.

Participant 6 felt hurt by the actions of his son and daughter-in-law who gave excuses for not wanting to care for her such as their pay was inadequate, no one to take care of her and a form of retribution because his mother (Participant 6) never took care of him when he was a child.

He said he would get a maid but could not afford one. He drives a taxi. He feels sad too. He says it is difficult; she (the wife) has to go and teach in the morning. My son did say "Mother did not care for me, so why do I bother". I do not want to stay with him (son), stressful. Daughter-in-law, well., she is only a daughter-in-law. She said that even when her mother comes here she does not give any money to her."

Most of the participants in this study chose to live in *Rumah Seri Kenangan* because they did not want to inconvenience or create problems for their children's family. Participant 8 said:

I have children. He said he has to think about it, he means me of course. Firstly, I want to go to my daughter's, her husband is my son-in-law. So, no matter

how good I am because of me they would fight. Hence, when I think about their household, I am stressed and depressed.

From the interviews recorded, none of the participants mentioned that they had been physically abused by their children or family members.

Disability and Chronic Diseases

Based on the observations during the interview, it was found the majority of the participants had physical disabilities. Three of them were wheelchair-bound while three had problems related to communication, eyesight and hearing. Out of ten (10) participants, seven (7) had chronic ailments such as diabetes, high-blood pressure, heart problems and asthma. Most of them were on a daily medication (Table 5).

TABLE 5
Physical Disabilities and Ailments faced by Participants

Participant	Physical Disability	Type of Disease Suffered
P1	Amputated leg and on a wheelchair	Diabetes
P2	Communication problem	High-Blood Pressure / Diabetes
P3	Eyesight problems (blind)	None
P4	Paralysed/ Communication problem/ on a wheelchair	None
P5	Hearing	High-Blood Pressure
P6	None	Asthma
P7	None	High-Blood Pressure
P8	Eyesight (blurred)/ wheelchair	Lungs/Heart/ High-Blood Pressure
P9	None	Diabetes
P10	None	None

Source: Interview

The findings of this study had conclusively shown that elderly in Malaysia are not exempted from becoming victims of domestic abuse. Most of the

elderly did not reveal their true feelings but rather chose to isolate themselves from family members by applying to become residents of the institution. Most of them

had decided to continue living in *Rumah Seri Kenangan* until their demise rather than going back to live with their children. Their feelings were rather fragile. What their children do and say could hurt their feelings and they repress their emotions. To avoid these situations from continuing, most of these elderly take the initiative to live in *Rumah Seri Kenangan*. There are private elder care centres for those who could afford them.

This study believes in the Malay saying that 'parents are able to care for a number of children but conversely, several children are not capable of caring for their mother or father'. The perpetrators of emotional abuse may not realise that their actions have an effect on their parent's emotions. On the contrary, in cases of financial abuse, an absence of intention cannot be a legitimate reason for the occurrence of such an act. It is difficult to accept the fact that a child or family member of an elderly could commit financial abuse towards the elder without realising it.

The findings of this study are consistent with a study that found sons and daughters-in-law (Soeda & Araki, 1999) to be the main perpetrators of abuse compared with other individuals. The majority of the elderly in this study had physical disabilities that forced them to live with their children. In line with earlier studies (Lachs *et al.*, 1997; Dolan, 1999), the present study shows that disability and chronic disease factors could become risk factors in cases of elder abuse.

CONCLUSION

The findings of this study show that domestic elder abuse exists in Malaysia. Without an in-depth study involving the elderly, these facts would be difficult to substantiate since elder abuse is still not a public issue. Cases involving elder abuse have not been exposed widely to the Malaysian society. Only through in-depth interviews with elderly could the emotions and feelings of the elderly be understood. For those who are not courageous enough to take any action, they would continue to bear the burden of their emotions in silence. However, for those who unable to deal with emotional issues associated with living with their family would choose an old folks home as a centre of refuge. The study showed some participants wished to continue living in this institution until their last days. It was disappointing to find the elderly who have had many children whom they had laboured and cared for many years only to spend their last days in an elder care centre. Based on the findings of this study it is hoped that relevant authorities take appropriate steps to manage this social issue. There is a need for more studies and research in this area via research grants or funds. Awareness programs aimed at the public and elderly should be initiated and intensified. Education on the rights of the elderly and societal obligations, especially the children, needs serious consideration and implementation so that elder care centres and *Rumah Seri Kenangan* do not become centres of refuge for the elderly abandoned by their own children.

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Incorporating the Concept of Good Faith in Australian Contract Law: Implication or Construction

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ABSTRACT

Good faith is arguably the most controversial concept in Australian contract law despite no high court decision deciding its application. The case of *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 introduced the concept of good faith for the first time by way of *obiter* comment by Priestley J. In this case, it was argued that good faith is implied by ‘Implication’. The objective of this paper is to analyse the issue of incorporating the concept of good faith in Australian contract law either by way of ‘Implication’ or ‘Construction’. There are two types of implication of a term; ‘implied by fact’ and ‘Implied by law’. This is a library-based research paper and uses a qualitative approach to compare both approaches in implying the concept of good faith. The paper concludes that good faith is easier to identify from the term ‘implied by law’ which is based on the legal incident of a particular class of contract.

Keywords: Good faith, implication, construction, contract law, Australia

INTRODUCTION

Good faith is arguably the most controversial concept in contract law. This is because good faith is a nebulous

concept in the contract law with no definitive definition of the concept (Hird, Howells & Brownsword, 1999). Despite being a meaningless concept, good faith is considered important to both contracting parties, as it denotes that all parties to the contract owe a duty to each other beyond those expressly provided by terms of the contract. In this context, the contracting parties are expected to take into account other parties’ interests when exercising

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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their contractual rights. In the absence of express terms, good faith is treated as an implicit expectation of the parties whereby the duty of good faith is achieved through the duty of cooperation and fairness. In addition, good faith aims to prevent unfairness to the parties to the contract.

Good faith has many meanings and some of which are complex, contradictory, and inconsistent with each other. In some cases, the definition depends on the context of the case or the circumstances. This is illustrated by Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd* which held that 'the concept of good faith acquires substance from the particular events that take place ... the standard must be fact intensive and it is best determined on a case by case basis'¹. There is no guide for the definition of good faith because of its protean nature. Peden suggested that the most appropriate meaning of good faith is a requirement 'to have regard to the interests of the other party including the obligation of loyalty to the contract and honesty' (Peden, 2002). The requirement 'to have regard to the interests of the other party including the obligation of loyalty to the contract and honesty' does not require the parties to behave with 'unreasonableness' or 'unconscionability' (Peden, 2002). Sir Anthony Mason suggested that good faith embraces duty of cooperation, loyalty and having regard to the interests of the parties (Mason, 2000).

Despite having no definitive definition, the concept of good faith has been

mentioned in many specific contracts including insurance contracts, employment contracts, and joint venture and franchise contracts. It is an important element to effectuate the insurance contract by way of disclosure of the insured and the insurer. There are more than 154 Federal acts that mention the term good faith. In the legislation, there are express and oblique expressions for the concept of good faith. Express means a statutory obligation to act in good faith and oblique means good faith is a factor that has to be taken into account. An example of express good faith is the *Insurance Contracts Act 1984* (Cth), section 13 in which it is stated that:

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

By virtue of the above, there is an implied provision to the effect that the parties must act towards each other with the utmost good faith in respect of any matter arising under or in relation to the policy. That requirement has been interpreted to mean that the parties must act with fairness and honesty. An example of oblique good faith is found in s 22(1) of the Australian Consumer Law as prescribed in schedule 2 of *Competition and Consumer Act 2010* (Cth). This section provides a list of factors, which the court may have to consider for the purposes of determining

¹(1999) 153 FLR 236,263.

unconscionable conduct in connection with goods and services in s 21. One of the factors needed to be taken into account is good faith: i.e. ‘To the extent to which the supplier and the customer acted in good faith.’

The above evidences that good faith is an important concept in contract law. Despite its existence, it has been argued that good faith should be incorporated by way of ‘implication’ or ‘construction’. Both methods are dissimilar in incorporating the good faith in contract law. This article discusses both methods by referring to the case of *Renard Constructions (ME) Pty Ltd v Minister for Public Works*² which paved the way for the emergence of the concept of good faith in Australian contract law.

THE POSITION OF GOOD FAITH IN AUSTRALIA

The concept of good faith was first judicially considered in 1992 by Priestley J in NSW Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works (Renard)*.³ Priestley J was clearly of the opinion that the appropriate course was towards the development of a general principle of good faith and fairness.⁴ His Honour stated that:

...people generally, including judges and other lawyers, from all strands of

²(1992) 26 NSWLR 234.

³(1992) 26 NSWLR 234.

⁴Despite Priestley J’s strong support for good faith, it should be noted that his comments were obiter.

*the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.*⁵

His Honour also reviewed the influence of the *Uniform Commercial Code* and *Restatement (Second) of Contracts* of US case law, and considered that there were strong arguments ‘for recognition in Australia of [such] a duty’.⁶ There are two means by which a general term of good faith is recognised in contract law: implication or construction. There are two types of implication: term ‘implied in law’ and term ‘implied in fact’. The term implied in law’ is based on the test of necessity in a particular class of contract while the term ‘implied in fact’ is based on the judge’s view of the actual intention of the parties. In *Renard*, it was argued good faith can be implied in both terms (namely implied by fact and implied by law). However, in practice, there may be some overlap. In *Renard*, Priestley J said:

Although the authorities discussed by Hope JA in Castlemaine Tooheys seem to require a sharp distinction to be drawn between implication ad hoc and by law, assigning the former to the fact of particular contract, and the

⁵(1992) 26 NSWLR 234, 268.

⁶(1992) 26 NSWLR 234, 268.

*latter to the legal incidents of contracts of different classes, consideration of the contract in the present case shows there may be a good deal of overlap between the two categories.*⁷

The New South Wales Court of Appeal in *Burger King Corporation v Hungry Jack's Pty Ltd*, has held that:

*There ... appears to be increasing acceptance ... that if terms of good faith and reasonableness are to be implied, they are to be implied as a matter of law.*⁸

There are instances in which the concept of good faith is not accepted, especially in commercial contracts where the parties have the freedom to decide on the terms of their contract. In *GSA Group Pty Ltd v Siebe Plc*, Rogers CJ commented that:

*Against a trend toward a general obligation of good faith, fairness or reasonableness, there have been judicial comments to the effect that the court should be slow to intrude into the commercial dealings of the parties who are quite able to look after their own interests. The courts should not be too eager to interfere in the commercial conduct of the parties, especially where the parties are all wealthy, experienced, commercial entities able to attend to their own interest.*⁹

⁷(1992) 26 NSWLR 234, 260.

⁸[2001] NSWCA 187 [164].

⁹(1993) 30 NSWLR 573, 579 (F).

This is in contrast to the position pertaining to relational contracts such as franchising where the concept of good faith is receiving a particular attention. In the context of franchising, good faith is now considered to be an implied duty owed by the franchisor to franchisee to curb unethical conduct where there is an imbalance of power between them. In *Far Horizons Pty Ltd v McDonald's Australia*, Byrne J emphasised the need for an implied term of good faith to ensure a successful relationship between the franchisor and franchisee. His Honour made the following comments:

*I do not see myself as at liberty to depart from the considerable body of authority in this country which has followed the decision of the New South Wales Court of Appeal in Renard Constructions (ME) Pty Ltd v Minister for Public Works. I proceed, therefore, on the basis that there is to be implied in a franchise agreement a term of good faith and fair dealing which obliges each party to exercise the powers conferred upon it by the agreement in good faith and reasonably...*¹⁰

The competing argument towards the recognition to the concept of good faith indicates the status of good faith in Australian contract law is still not clear. To date there has been no High Court decision to provide comprehensive guidance on this issue. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*, the Court held that: 'Whilst the issues respecting the existence and scope

¹⁰[2000] VSC 310 (18 August 2000).

of a 'good faith' doctrine are important this is an inappropriate occasion to consider them'.¹¹

IMPLICATION OR CONSTRUCTION

The issue of incorporating good faith in contract law is a debatable one (Carter & Stewart, 2002)) either by way of implication or construction. Both methods are dissimilar in terms of incorporating good faith. In the context of implication of a term, the judge may imply a term into the contract to overcome an oversight on the parties either through inadvertence or poor drafting or may have failed to incorporate terms to cover a particular situation which had they thought about it, they would certainly have made provision for. In the context of 'principle of the construction', the judge interprets the meaning of a term in a contract by giving the term a legal effect to give effect to the parties' intention. The issue of implying good faith was raised in the High Court of Australia in *Royal Botanic Gardens and Domain Trust v South Sydney Council*¹². The Court did not decide whether good faith should be implied but nevertheless acknowledged the importance of the issues in respect to the existence and scope of a good faith doctrine.¹³ At this stage, the High Court has not decided the method of incorporating good faith either as an 'implication of a term' or based on the 'principle of construction'.

¹¹ (2002) 240 CLR 45, 63.

¹² (2002) 186 ALR 301.

¹³ (2002) 186 ALR 301 [40].

In many instances, the duty of good faith is conceived as an implied term (Woo, 2001). The term 'implied in law' is based on the legal incident of a particular type of contract while the term 'implied in fact' is based on the test of necessity. There has been some debate and some confusion as to whether the implied duty of good faith, if it exists, is an 'implied term in law' or an 'implied term in fact'. In contrast, Peden argued that construction is the best approach for incorporating good faith in a contract. The rule of construction consists of an interpretation and construction process (Peden, 2000). Interpretation describes the process whereby courts determine the meaning of words while construction describes the process of determining their legal effect. The main requirement is to give effect to the parties' intention to construe the contract as a whole and to avoid an unreasonable construction where possible.

Peden also emphasised that the principle of construction is based on the theory of cooperation (Peden, 2003) and 'that any other approach can lead to illogical or inappropriate reasoning' (Peden, 2000). The duty of cooperation has long been part of the law of contract where there is a necessary standard of fairness and cooperation in the performance of contractual obligations.¹⁴ This duty to cooperate is usually traced back to Lord Blackburn's statement in *Mackay v Dick* where it was held that:

As a general rule ... where in a written contract it appears that both parties

¹⁴ See *Butt v McDonald* (1896) 7 QJL 68,70-71.

*have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agree to do all that is necessary to be done on his part of the carrying out of that thing, though there may be in express words to that effect.*¹⁵

It is clear that cooperation is imposed to the extent that it is necessary to make the contract workable and the contract would come to a complete halt if the act in question was not performed (Burrows, 1968). The courts assume that parties intend their bargain to have legal effect and they would therefore intend to co-operate to ensure that this happens, unless they express a contrary intention in their contract (Peden, 2001). Therefore, to imply an obligation of good faith is an unnecessary step where the same result is achieved by considering the parties' intentions in construction of the contract to ensure co-operation (Peden, 2001).

Implication In fact

Implication in fact is based on the judge's view of the actual intention of the parties drawn from the surrounding circumstances of the particular contract, i.e. its language and purpose. When a judge is asked to imply a term in a contract, the parties' presumed intention must be determined as accurately as possible. The earliest test used to determine this came to be called the 'officious bystander' test. The

¹⁵(1881) 6 App Cas 251,262.

'officious bystander' test was developed by Mackinnon LJ in *Shirlaw v Southern Foundries*¹⁶, where Mackinnon LJ said that:

*For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'*¹⁷

In ascertaining the parties' presumed intentions and identifying an appropriate term to be implied in a contract, the Privy Council held in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*¹⁸ that for a term to be implied, the following conditions must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious as to go without saying; (4) it must be capable of clear expression; and (5) it must not contradict any express term.¹⁹

¹⁶[1939] 2 KB 206

¹⁷[1939] 2 KB 206, 227.

¹⁸(1977) 180 CLR 266

¹⁹(1977) 180 CLR 266, 282-283.

The leading authority for condition (3) is *The Moorcock* case²⁰, in which the defendant had agreed to allow the plaintiff to load his vessel at the defendant's wharf on the River Thames. However, the plaintiff's vessel suffered damage when resting at the defendant's jetty during low tide. The damage to the vessel had been occasioned by a ridge of hard ground beneath the mud and the plaintiff claimed compensation. The English Court of Appeal said that a term had to be implied into the contract imposing an obligation of the defendant to see that the bottom of the river was reasonably fit, or to exercise reasonable care in ascertaining its condition and to advise the plaintiff of its condition. Bowen LJ held that:

*In business transaction such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in contemplation of both parties that he should be responsible for in respect of those perils or chances.*²¹

The parties are clearly expected to know that the vessel will rest on the bottom

at low tide, and therefore the contract cannot be performed unless the ground is safe for the vessel.

Implication in fact gives little scope for good faith because it is difficult to determine the parties' intention. This is because when the express intention is difficult to deduce, there can be no other conclusion than that it is the court that is imposing its views of what was intended, which is contrary to the intention of the parties. Courts have recently moved away from implying terms of good faith in fact to implying them in law (Peden, 2003). This is partly because of the difficulty in satisfying the legal test for implication in fact.

Implication In law

Implication in law is the implication of a term into a contract as a necessary incident of a specific type of contract with reference to the circumstances of the case. In *Simonius Vischer & Co v Holt & Thompson*,²² Samuels JA commented 'the imposition of terms as a matter of law amounts to no more than the imposition of legal duties in cases where the law thinks that policy requires it'.²³ The term 'Implied in law' relate to obligations that arise within the contract irrespective of the intentions of the parties. The court is reluctant to imply new terms in law. This is partly because legislation covers many important areas and partly due to the fact courts are wary of creating new obligations that will catch a vast number of contracts (Peden, 2001).

²⁰(1889) 14 PD 64.

²¹(1889) 14 PD 64, 68.

²²[1979] 2 NSWLR 322,

²³[1979] 2 NSWLR 322, 348.

The test of necessity was introduced in the decision of *Liverpool City Council v Irwin*,²⁴ in which the landlord and tenant disputed an obligation with respect to the common areas of the stairs and lift. The express term of the contract between the parties contained a list of obligations by the tenant, however, none by the landlord. The House of Lords held that the landlord was under an implied obligation to take reasonable care of the common area. The House of Lords was prepared to imply the term in law in the class of contract in question, namely tenancies in high-rise apartment blocks. Lord Wilberforce held that ‘...to leave the landlord free of contractual obligation as regards these matters, and subject only to administrative or political pressure, is, in my opinion, inconsistent totally with the nature of this relationship. The subject matter of the lease (high rise blocks) and the relationship created by the tenancy demand, of their nature, some contractual obligation on the landlord’.²⁵ The underlying concern of the above case reveals that the test for implied term at law is not whether it is necessary for the existence of the contract, but whether it is necessary to the fair functioning of the agreement. An example of the kind of contracts in which terms are implied are relational contracts such as distributorship, partnership, franchise arrangements, and joint ventures. A relational contract is a type of contract, often a long-term one, where

²⁴[1977] AC 239,254.

²⁵[1977] AC 239,254, 255.

there is a need to maintain the relationship because these types of contracts are often exposed to uncertainty and unforeseen factors that cannot readily be provided for in advance due to the long engagement. In *Bobux Marketing Ltd v Raynor Marketing Ltd*, Thomas J commented that ‘...the norms of the ongoing relationship, of necessity, tend to supplement the express contractual obligations. Good faith is required to ensure that the requisite communication, cooperation and predictable performance occur for the advantage of both parties’.²⁶

Many cases have shown support for implied good faith by way of implied ‘term in law’.²⁷ It is easier to identify good faith from the term ‘implied by law’ based on the legal incident of a particular class of contract such as in a relational contract. To satisfy the requirement of term ‘implied by law’ is less controversial as it does not pertain to what the parties intended but what the court or legislature think is necessary for the fair functioning of the contract.

CONCLUSION

It is interesting to trace the emergence of an obligation to act in good faith since Priestley J first raised the concept of good faith in *Renard*. Despite no High Court decision

²⁶[2002] 1 NZLR 506.

²⁷In *Burger King Corporation v Hungry Jack’s Pty Ltd*, [2001] NSWCA 187, the New South Wales Court of Appeal stated that ‘...There also appears to be increasing acceptance ... that if terms of good faith and reasonableness are to be implied, they are to be implied as a matter of law. We consider that to be correct’.

pronouncing its application, status, and definition of good faith, it continues to be an important concept in Australian contract law. The issue of implying a general term of good faith is still a dilemma in Australian contract law. Both method of ‘implication’ and ‘construction’ are dissimilar in their approach to incorporating the concept of good faith. The current cases prove that good faith is increasingly recognised as a term ‘implied by law’ not as a term ‘implied by fact’. This article has argued and concluded that it is easier to identify good faith from the term ‘implied by law’ based on the legal incidents of a particular class of contract compared with the test set by *BP Refinery* to determine the term ‘implied by law’ whereby it is difficult to ascertain the intention of the parties.

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Examining the Policy of Mandatory Premarital HIV Screening Programme for Muslims in Malaysia

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ABSTRACT

One of the procedures introduced by the Government of Malaysia for Muslims before the solemnisation of their marriage is mandatory premarital HIV screening. The purpose of this procedure is to have an early detection of HIV infection which could reduce the possibility of sexually transmitted diseases to the offspring. This paper examines such a policy and reveals significant loopholes in the policy and its implementation. There are two types of methods employed in this study: library research and field research. Library research is used to examine the existing policy and its related issues such as social and medical issues. The finding is supported by field research in which semi-structured interviews were carried out with several respondents from the related institutions. The findings of the research revealed significant weaknesses in the current policy from both procedural and administrative aspects. These include a general lack of coordination in governing the screening programme, the absence of standard procedures in its implementation and the absence of guideline in maintaining confidentiality, among others.

Keywords: Mandatory, premarital, HIV Screening, weaknesses

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

The mandatory premarital HIV testing especially when accompanied by a requirement that people are HIV negative in order to marry is highly controversial. The opponents of this mandatory test argue that the policy infringes the internationally

guaranteed human rights especially the right to marry and raise a family, as stated in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) 1966 and Article 12 of the Universal Declaration of Human Rights (UDHR) 1948 (Mekonnen, D. R., 2011; Durojaye, E., 2013). Critics of this mandatory testing argue that it stigmatises the families of HIV-positive patients (Johnson Jo. 2006 ; French, H. 2015) and neglects the need for informed consent, confidentiality, adequate treatment and access to proper HIV counselling (Arulogun, O.S. & Adefioye, O. A., 2010; Chattu, V. K., 2011).

In contrast, a number of arguments have been put forward by proponents of mandatory premarital HIV testing. They favour mandatory testing as a way to identify serodiscordant couples in order to prohibit them from marrying. This promotes access to treatment as people get to know their status early and seek treatment which can prolong their lives (Uneke *et al.*, 2007; Kassaye, T. (2011). According to Kassaye, T. (2011) and Chattu, V. K. (2014). Mandatory HIV screening, they argue, benefits individuals, women, children, and society because early detection and treatment of HIV have been medically proven to be a successful way to improve not only the survival but also the quality of life of HIV-positive patients. What is most important is that early detection and treatment leads to reduction in HIV transmission to partners and offspring (Marks, *et al.*, 2005).

A growing number of national governments, states and religious communities have adopted mandatory premarital HIV screening policies. The countries of Bahrain, Guinea, United Arab Emirates, and Saudi Arabia for example, have enacted national laws and policies mandating premarital HIV testing. Local governments and legislatures in some states in India, districts in China, Ethiopia, and the Democratic Republic of the Congo have introduced similar laws or regulations. Churches in some African countries such as Kenya, Ghana and Nigeria have also adopted mandatory premarital HIV testing practices. (Open Society Foundation, 2010).

In Malaysia, the meeting of the Fatwa Committee National Council of Islamic Religious Affairs Malaysia held on 23rd to 25th June 2009, decided that the test is mandatory among Muslims to prevent greater harm to the spouse and descendants (National Fatwa, 2009). In consequence, a Cabinet meeting (AIDS and HIV Committee) chaired by Deputy Prime Minister agreed to make premarital screening a compulsory test for the prospective husband and wife. The fatwa (religious edict), however, has its share of critics, comments, and initial opposition from the Malaysian Ministry of Health (MOH) and Non-Governmental Organisations (NGOs) (Kamali, M. H., 2001; Mahathir, M., n.d).

In light of the above, this study examines this mandatory HIV screening policy for prospective Muslim couples

since its implementation. The focus is on crucial issues relating to the weaknesses of the policy and its procedure and formality. This research also proposes recommendations to improve existing policy and its implementation.

METHODOLOGY

This is a qualitative research, in which the mandatory premarital HIV screening procedures and formalities for Muslim couples are studied and analysed. The study employs library research method to examine the existing pre-marital HIV screening policy and its related issues such as social and medical issues. Books, journal articles, procedures/guidelines and relevant websites were referred to and reviewed to provide insights and information relating to the research topic. This research also employs a semi-structured interview in which several important respondents from related institutions were selected. The selected respondents were registrars from selected States Islamic Religious Department (hereinafter called SIRD), and several medical and health officers from hospitals and the Ministry of Health. This interview method is important to examine the current practice and identify loopholes or weaknesses. This paper looked at four states in Malaysia namely the . Federal Territories, Johor, Pahang and Kelantan. The justification for choosing these states is to highlight differences in certain rules and applications with regards to HIV screening. Additionally, laws relating to mandatory premarital HIV screening from

other Islamic countries are analysed to determine whether their practices would be applicable in Malaysia.

RESULTS AND DISCUSSION

This research found a number of significant issues related to the policy of mandatory premarital HIV screening for Muslim couples in Malaysia that reflects weaknesses in the policy and its implementation. The following section will analyse these in depth.

Lack of Coordination

Mandatory premarital HIV screening among Muslims has been made a national policy by the Malaysian government. According to the policy, the prospective husband and wife are required to undergo premarital HIV screening in any government hospitals/clinics that are directly under the Ministry of Health (hereinafter called MOH) and respective State Health Department (hereinafter called SHD) (Practice Direction of Marriage, Divorce and Rujuk, n.d; Circular Note of Ministry of Health (MOH), 2007). Couples are required to fill and submit the HIV screening form which is available at the Islamic Religious Department. Upon screening, the couples have to submit the form/certificate disclosing their HIV status to the Marriage Registrar in the respective State Islamic Religious Department (hereinafter called SIRD). Before granting permission to marry, the Marriage Registrar informs the HIV status of the applicant

to his/her partner and parents (the extent of disclosure varies from state to state) (JAKIM's Practice Note of Marriage, Divorce and Rujuk, n.d).

Interestingly, this mandatory programme is supported by fatwa (religious edict) from both the National and the State Fatwa Council (Johor's Fatwa, 2001; National Fatwa, 2009; Perlis's Fatwa, n.d.). The Johor State Fatwa Council was the first in Malaysia to have issued HIV mandatory screening followed by three other states of Malacca, Perlis and Selangor.

The issue is there are several bodies involved in the implementation of this policy namely JAKIM/ SIRD, MOH and SHD. This research found that there is lack of coordination among these agencies and most State Health Department in Malaysia oppose the idea of disclosing the HIV status of the couples to the marriage Registrar on the grounds of confidentiality. Thus, there is no standard procedure applied throughout Malaysia in the implementation of the programme. The three states of Pahang, Kelantan and Johor require the consent of the applicant to undergo HIV screening and the consent to submit the result to the Qadhi (for the state of Pahang), Religious Officer or Marriage Registrar (for the state of Kelantan) (Idris, M. N., personal Communication, 21st of May 2012, Mohd Noor, M. A. A., personal communication, 2nd of May 2012). On the other hand, in the other states, the medical officer is only required to state that the applicant has undergone the HIV screening without

revealing the result. This means that the result will not be disclosed to the Qadhi or Marriage Registrar.

Therefore, it is suggested that an immediate solution should be reached to improve coordination between the agencies involved to ensure standard implementation of such policy. The MOH and JAKIM should take the lead in promoting coordination by having regular discussions and cooperative agreement. Through discussions, exchange of ideas takes place which also promote coordination among different agencies. The authority and responsibility of each agency should also be clearly defined to avoid confusion.

Disclosure of HIV Status and the Issue of Confidentiality

Disclosure is crucial in the HIV debate because of its links to confidentiality and privacy as human right issues and its potential role in prevention of the disease. Disclosure is also considered a crucial step toward ending the stigma and discrimination against people living with HIV and AIDS. Much has been written about the stigma associated with disclosure of HIV-positive status (Stutterheim SE *et al.*, 2011; Mutumba, M., *et al.*, 2015). Fear of stigma is thought to discourage disclosure and disclosure has often been considered a proxy measure for stigma (Obemeyer, C. M. *et al.*, 2011).

In the case of premarital HIV screening in Malaysia, at present only the Islamic Religious Department of Pahang, Johor and Kelantan require such disclosure and not

other states (Zainal Abidin, M.Y., personal communication, 17 April 2012). However, for these states, there are slight differences in the requirements. For example, in the state of Kelantan, HIV status can be disclosed to Islamic Religious Affairs officers or a marriage registrar namely the Head of Registrar, Senior Registrar, Registrar and Assistant Registrar while in the state of Pahang, the disclosure can only be made to the District Qadhi.

The other issue is the different way of submitting the result to the Registrar/Qadhi. In normal practice, the couple will present it to the Registrar after getting the result from the medical officer. However, in cases when the result is positive, the doctor or the staff submits it directly to the Registrar (Salehuddin, N. Z., personal communication, 11 May 2012).

This research found that there was no standard procedure or guideline on how to maintain the confidentiality of all HIV related information. One of the issues concerns if the Registrar/Qadhi reveal the HIV result to others, such as to other officers, wali (guardian) of the bride to-be or parents of both parties. If one of the partners turns out to be HIV positive and the marriage is cancelled on that account, there is a high possibility that it may result in the breach of confidentiality as it may no longer be possible to maintain such secrecy. Since the process of marriage in the Malay culture is initiated at the family level, it is difficult not to inform the concerned families regarding such an issue. Another overlooked fact is that for

Muslim marriages, the women must obtain consent from their *wali* (guardian) to marry, who will almost certainly want to know the results of the HIV test. The result will then definitely be shared and known among family members. Thus, the issue at hand is ensuring confidentiality is maintained.

Thus, it is submitted that related agencies, particularly SIRD and JAKIM, should improve the policy by providing specific guidelines and standard procedures to ensure confidentiality of information in the interest of the bride and bridegroom. They should also provide courses or training for relevant religious officers to understand and respect individual right and privacy. Parents and families involved should also be informed on the importance of maintaining confidentiality to safeguard the reputation of the bride and bridegroom. The authors also suggest direct submission of the result to the Registrar is preferable, particularly when the result is reactive or positive. This is important to avoid fake results.

Statutory Requirement

At present, the requirement of pre-marital HIV screening programme is only a part of the procedures for the application of marriage and not a statutory requirement. Even though this mandatory programme is supported by fatwa (religious edict) from both the National and State Fatwa Council, it can still be questioned, reviewed, and challenged as those fatwa have not been gazetted (Tapah., S., 2004; Mohamed Adil, M. A., 2010).

According to Idris, M. N., Assistant Director, Islamic Family Law Division, Islamic Religious Department of Pahang, there was a case in Pahang whereby this mandatory screening programme was challenged by the applicant. The case however, was successfully settled outside the court after having discussed with the State Health Department and Islamic Religious Department of Pahang (Idris, M. N., personal communication, 1st of May 2012 at 12.30 pm).

Hence, in order to avoid the pre-marital HIV test from being legally challenged in court, this research proposes that the test should be made a statutory requirement to ensure that every person respects and abides by the law. Good examples can be seen in some of the Arab countries in which the requirement of submitting medical certificates for registration of marriages is made part of their law. In article 10(2) of the Iraqi Personal Status for example, it is stated that the document to be submitted for registration must be supplemented by a medical report confirming that the couple are free from communicable diseases and health impediments.

The Bahrain, Qatar, and UAE Codes of Personal Status include the requirement that the couples intending to marry must submit medical certificates for the registration. The medical test covers both physical and mental diseases and disorders and be regulated by detailed directives under the authority of government health agencies (Welchman, L., 2010). The UAE Law of Personal Status requires attestation

from the “appropriate committee established by the Ministry of Health” that the parties are free of “conditions on the basis of which this law allows a petition for judicial divorce”. Interestingly, in Bahrain, a fine is stipulated for those violating the requirement on medical tests for certain “hereditary and contagious diseases”. Another good example is the Tunisian Code of Personal Status which requires a pre-marriage medical certificate, as it is a guarantee against any venereal disease in order to protect the physical and mental health of the woman, her children and her husband (Tunisian Code of Personal Status, 1956).

Effectiveness of the Screening Programme

The effectiveness of the screening programme, especially during the “window period” is questionable. The “window period” refers to the early months of infection when the disease cannot be detected by using standard HIV tests. This is considered as one of the potential pitfalls of the mandatory HIV testing. Although the most frequently employed HIV tests detect HIV antibodies as well as the antigen, they cannot detect a more recent infection within three weeks of exposure. In consequence, false positive antibody results or false negatives are possible in this screening. If the result is negative, the infected person is still able to pass on the virus to his or her partner (Ganczak, M., 2009).

A good example is the high-risk group. Even though the result will turn non-reactive, it cannot be relied on as the HIV

virus fully develops only after six months (Saidon, F. (Dr), personal communication, April 11th 2012; Abdul Manan, L., personal communication, 10 April 2012, Mat Ail, M., personal communication, 2 May 2012).

The issue here is that the Islamic Family Law Enactment/Act in Malaysia provides at least seven days before the date of marriage for the application of marriage to be submitted together with the HIV result and other requirements. This is stated in Section 16(3) of Islamic Family Law Federal Territories Act, 1984, which is equivalent to other State enactments. Thus, the question is if the HIV result turns out to be reactive/positive, will it be possible to postpone the marriage ceremony as marriage preparations have been completed?

Moreover, the mandatory testing for HIV before marriage does not really serve the purpose of preventing the spread of the disease because it does not consider extramarital relations. As the compulsory HIV test for Muslims aims to prevent the transmission from spouse to spouse or to future offspring, unfortunately it will only be useful at that time and does not guarantee one or both parties will not be exposed to future risks of HIV.

Thus, it is suggested that to ensure the effectiveness of this screening programme, Section 16(3) of Islamic Family Law Enactments should be revised to avoid such "window period." Another recommendation is to emphasise not only the pre-marital HIV test, but also periodical marital HIV tests, especially for high-risk groups.

Research on Cost Effectiveness

The study found that since the implementation of this programme in Malaysia, its cost-effectiveness is not proven as no analysis to the effect has been performed. A research by Khabir, B. V., *et al.*, in 2007 evaluated a premarital screening programme in Johor over three years. However, the authors focused on the effect of the screening programme vis a vis the number of marriage applications and public awareness of HIV. The financial costs of the programme as well as the negative events related to the screening were not discussed.

In this regard, according to the recommendation of Centres for Disease Control and Prevention (CDC) of The United States (1993), for the hospital to adopt a policy of offering voluntary HIV counselling and testing, the HIV prevalence in the general population rate must be 1% or AIDS diagnosis rates of 1 per 1000. However, in Malaysia, based on the research done in 2009, a total of 179,268 Muslim men and women were screened through this programme out of which 67 were confirmed to be HIV-positive. This means the HIV prevalence was only 0.04% (Malaysia UNGASS Country Report, 2010). Moreover, premarital screening in Johor between 2000 and 2004 reported HIV prevalence of only 0.17% (Khabir, B.V., *et al.*, 2007). This low prevalence of HIV among Malaysia's general population raises sufficient doubt about the cost-effectiveness of the current pre-marital HIV screening programme for Muslim couples.

A research conducted in eight areas of the USA also concluded that mandatory pre-marital HIV screening would be more expensive than other HIV prevention programmes and has a limited impact on the disease. The authors proposed alternatives which are more effective and economical such as HIV screening for pregnant women or treating the HIV affected foetus (Petersen, L., R., *et al.*, 1990).

Thus, it is suggested that as mandatory screening is done in a low prevalence population, a thorough study should be undertaken to assess its cost-effectiveness. As healthcare funds are limited, it may be better used for screening target populations with high risks as well as having a more effective health education. Additionally, the funds should be channelled to other programmes proven to be effective.

Professional Counsellor

Counselling can be a powerful means of helping people if accompanied with appropriate strategies. In this regard, professional counsellors are important as they are well-trained in counselling strategies and ethics in dealing with patients, especially when confronted with such a dangerous and infectious disease. Unfortunately, this research found that the implementation of the counselling programme at State Islamic Religious Department (SIRD) does not follow the procedures prescribed under the Malaysian Counsellors Act 1998. The main loophole is the absence of professional counsellors

registered under the Malaysian Counsellors Act 1998, especially those trained in dealing with HIV patients.

The officers in charge of counselling at SIRD are religious officers who have no qualifications as professional counsellors which is a violation of the Malaysian Counsellors Act 1998. The Act defines counselling as “a systematic process of helping relationships based on psychological principles performed by a registered counsellor in accordance with the counselling codes of ethics to achieve a voluntary favourable holistic change”.

The above provision clearly states that counselling is a systematic process based on a psychological approach and counselling codes of ethics. This brings into question the qualifications of the SIRD religious officers to serve as counsellors. The Act also requires that counselling should be performed by a counsellor registered under Section 26 and 27 of the Malaysian Counsellors Act 1998. In addition, Section 24 of the Act further states that any person who does not hold a valid practicing certificate is not allowed to practise as a counsellor.

To overcome this problem, the state government should create the post of counsellor at every State Islamic Religious Department (SIRD). This professional counsellor will be responsible in dealing with couples who are HIV positive (either both or one of them) but still want to proceed with their marriage. However, since it involves Muslim marriage, counsellors should be well-versed in the

Islamic perspective of counselling. In this regard, it is suggested that the local Islamic Universities such as the International Islamic University of Malaysia (IIUM), Islamic Science University of Malaysia (USIM) and University of Sultan Zainal Abidin (UniSZA) should introduce a Master's Programme in Islamic counselling. Candidates should already possess a Bachelor of Islamic Studies degree and must complete two years of counselling for their Master's programme. Graduates of this Master of Islamic Counselling can take up the post of counsellor at SIRD.

Other suggestions include increasing capacity and skills in counselling. For this, regular courses on counselling should be provided for the officer in charge so that they can develop their counselling and psychological skills because dealing with patients with such a dangerous disease is not easy. They should know, for example, how to approach the HIV issue in order to reduce tension and restore hope among the patients.

CONCLUSION

Given the significant loopholes in mandatory premarital HIV screening programme among Muslims in Malaysia especially its medical and social consequences, governments and HIV programme implementers should take immediate steps to resolve the issues. The most important recommendation is to have a good coordination and collaboration between Islamic agencies involved

namely JAKIM, SIRD & National/State Fatwa and MOH & SHD as well as a standard policy and procedure in terms of implementation. Furthermore, this mandatory HIV screening should conform to the "Three Cs" as suggested by United Nations: consent, confidentiality and counselling. The agencies involved should also adhere to international human rights standards. An individual's right to privacy and individual security for example must not be compromised. The issue of cost-effectiveness is another important thing that should be emphasised to ensure that this mandatory testing will guarantee a sustainable reduction in HIV transmissions. Thus, it is a duty of the government and relevant agencies to ensure that this mandatory testing does more good than harm.

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The Effectiveness of *Sulh* on Matrimonial Asset Division after Death of Spouse

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ABSTRACT

Distribution of matrimonial assets to a deceased's spouse is often fraught with difficulties taking a long time for settlement. This is due to the current provision relating to division of matrimonial asset based on the parties' contribution to determine the appropriate proportion to the deceased's spouse. Lack of evidence especially in proving the contribution of parties has caused difficulties for courts to reach a decision. This paper is aimed at examining the effectiveness of *sulh* with regards to the distribution of matrimonial asset upon the death of spouse. It uses qualitative method by collecting information from unreported cases within the period of 2000-2012 from six zones representing Syariah Courts in Malaysia. Analysis is made based on several variables such as types of matrimonial property, factors for consideration and proportion of distribution of assets. The findings show that *sulh* is an effective method to resolve issues relating to the contribution of parties in division of matrimonial asset due to death of a spouse. The findings also revealed that exclusive ownership of matrimonial assets, especially matrimonial home, by the deceased's wife could provide adequate security and protection for her upon the death of her husband. Therefore, this study suggests the use of *sulh* as a mode of dividing matrimonial assets should be widely practised to prevent a costly and lengthy litigation process.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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Keywords: Effectiveness, Matrimonial Asset, Spouse's death, *Sulh*, Syariah Courts

INTRODUCTION

Managing a dispute involving the division of matrimonial asset upon death of a spouse via a litigation process in the Malaysian

Syariah Court is common. Longer litigation procedures and complication in evidential process are problems faced by the courts in handling the case which can be prevented by the application of *sulh* or mutual agreement of parties; this encourages shorter litigation process and fair distribution of assets to the parties. Matrimonial property or matrimonial asset, commonly known as *harta sepencarian* is defined as a property jointly acquired either directly or indirectly by a husband and wife and its acquisition made by both parties during the course of their marriage (Islamic Family law Enactment (Selangor), 2003). Though there is no specific provision regulating the division of matrimonial property upon death of a spouse, previous case law indicates that the court invoked the law of division of matrimonial property as provided under section 122 of Islamic Family law Enactments/Act. The law provides several factors that the court must take into account in determining the division. The factors are direct or indirect contribution of parties in acquiring the asset, interest of minor children and debt of spouse in acquiring the asset. However, the provision relating to distribution of matrimonial assets in Malaysian Syariah Courts is not practical and do not complement the actual mode of division of assets which is solely based on the contribution of parties. The provision should focus on distributing the asset on a fair and equitable basis and address holistic needs of all parties involved. Thus, this study was conducted to fill in the gap. It was

hoped that the findings could provide some suggestions on resolving issues related to the division of matrimonial property, especially on the effective method to be used in division of matrimonial asset upon death of spouse. Thus, this paper examines the effectiveness of current law through court practices and the use of *sulh* as an effective mechanism in dividing the assets to a deceased's spouse.

LAW ON THE DIVISION OF MATRIMONIAL ASSET UPON DEATH OF SPOUSE

Many studies have examined the concept of *harta sepencarian* on its origin and interpretation as well as the impact of the principles of law in the practice of division of property. This implies that the custom of division of *harta sepencarian* among the Malays has a significant impact in the enactments of the law. Researchers examining originality of the customs of division of matrimonial asset in Malay society imply there was very few studies conducted on this topic. Norliah I (2004) examined the adequacy of legal statutory provisions related to division of matrimonial property under the civil law including the division of *harta sepencarian*. However her study did not touch on the adequacy of the implementation of the statutory provisions, specifically on division of *harta sepencarian*, by using content analysis on decided cases.

Though there is no specific provision regulating the law on division of matrimonial property upon death, the case

law highlights that this has been practised by the Malaysian Syariah court. The deceased husband or wife has rights to claim the asset and the practice has been recognised for years since independence. However, the law is settled as a gazetted fatwa of Selangor regulating that a matrimonial property to be given to an eligible party prior to the distribution of the deceased's estate according to *faraid* rules. This indicates an improvement to the law in order to safeguard the interest of the deceased's spouse and her or her children as regards to the matrimonial asset.

Section 122 of the enactments has extensive application when empowering the court to order the division of *harta sepencarian* upon the death of spouse. The above provision clearly indicates the court has the power to order the division of matrimonial assets acquired during marriage upon granting a pronouncement of *talaq*. The section particularly highlights two subsections: a) subsection (1) where the court orders the division between the parties of any assets acquired by them during their marriage by their joint efforts and b) subsection (3) where the courts order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage. For division of the first category the court shall incline towards equality of division. The division, however, is subject to certain factors which the court has to take into account such as the extent of the contribution made by each party in the form of money, property or work towards

acquiring the assets. Additionally, any debts owing by either party which were contracted for their joint benefit will also be considered. The needs of minor children, if any, from the marriage will not be ignored as well.

As regards to the second category of assets or assets acquired by the sole effort of one party to the marriage, the court may divide the assets in proportion as it deems reasonable, subject to certain factors. In addition to the extent of contribution made by those who did not acquire the assets to the welfare of the family by looking after the home or caring the family, the court will also consider the needs of minor children from the marriage, if any. In any case, the party by whose effort was acquired the asset shall receive a greater proportion.

Section 122 of the Enactments describes the term assets as assets of joint and sole effort. The statutory and judicial definition of *harta sepencarian* have made clear on the concept of matrimonial assets which was founded on the basis of effort and contribution of parties during their marriage. In *Ahmad Fikri Bin Mahmud v. Habibah Binti Muhamad* (2007) the court refused to consider the disputed asset as *harta sepencarian* since the plaintiff failed to prove his contribution in acquisition of the assets. Thus, contributions remain the sole criteria to proof the existence of joint and sole effort of parties for entitlement of assets.

The contribution is a predominant criterion in differentiating assets into joint or sole effort asset. Homemaker's

contribution to household chores is recognised as a factor to determine the share of sole effort asset that enables the homemaker to get her share out of the assets that she has not acquired. The law guides the court in determining the proportion of share by providing the specific quantum of half, 1/3 or greater proportion thus, implying that the law is not too rigid. The court has discretion in allocating the proportion of share either at half, 1/3 or 1/6 subject to the circumstances of a case. However, the courts are very much inclined to the contribution in the acquisition of asset as sole criteria in determining the proportion.

SULH AS AN AMICABLE SETTLEMENT IN DIVISION OF MATRIMONIAL ASSET

Elements of generosity and kindness appears when parties forgo each other's rights wholly or partially of the asset in determining the proportion of share. This kind of settlement is normally achieved through the application of gift or *sulh* of parties. In the Malaysian Syariah Court, *sulh* methods has been implemented since 2002 when the court gives primary attention to dispute settlement instrument through conciliation. (Ali, 2008). The concept of dispute settlement inside or outside the court through *sulh* or mutual agreement is an essential method in dispute settlement involving ancillary claim.

The *Sulh* is described as the result or finding from a conciliation or mutual consent of disputed parties achieved

through the mediation process (Ali, 2008). It (*Sulh*) is defined in *Majallah al Ahkam al Adliyyah* as an agreement which ends the dispute voluntarily and mutually pleasing each other and executed depending on the claim and application enunciated by the disputing parties. The *Sulh* is commonly used in dividing matrimonial property even in the normal litigation proceedings. The parties to any proceedings, at any stage, hold *sulh* to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with *Hukum Syarak* (Selangor Syariah Court Civil Procedure, 2003).

Data obtained showed that each party agreed to accept the proportion, waive their rights and in some circumstances, agreed to transfer whole interest of the property to the other spouse or children as a gift. However, there was no literature available on the effectiveness of the law practised through the Syariah Court.

Philanthropy is defined as altruistic concern for human welfare and advancement, usually manifested via donations of money property, or offering work to needy persons, endowment to institutions of learning and hospitals, and by generosity to other socially useful purposes. It also identified as an activity of donating to such persons or purposes in this way and to devote one's later years to philanthropy (Thesaurus, 2015).

It has been observed that *sulh* is a preferred method for settlement in the division of matrimonial property and other

ancillary matters such as *mut'ah* (*Abd Ghani Abdullah v. Norhanita Abd Hamid*; 10200-017-19-2001 (Selangor), arrears of maintenance and maintenance. In the case of *Abd Ghani Abdullah v. Norhanita Abd Hamid*; 10200-017-19-2001 (Selangor) for resolution pertaining to *harta sepencarian* and *mut'ah*, the court declared that two houses and a furnished matrimonial home valued at RM150,000 located in Kajang, Selangor to be transferred to the defendant. During the divorce proceedings, the court established that there was an agreement concluded related to matrimonial property and *mut'ah*; however, the agreement could not be recorded as the value of the asset exceeded RM100, 000. The cases showed that the court was in favour of invoking *sulh* as an amicable settlement to guarantee fair division of *harta sepencarian* to both parties. In the practice of *sulh* (*Sulh* Work Manual Jabatan Kehakiman Syariah Malaysia and Circular of Chief Judge MSS 1/2002, *Sulh* Work Manual, Pekeliling Ketua Hakim MSS 9/2002; Jabatan Kehakiman Syariah Malaysia Practice Direction 3/2002) a meeting involving the disputing parties and a *sulh* officer will be held within 21 days of the registration of case. The agreement is effective after it is endorsed and enforced by the court. Failure to reach an agreement will lead the case to be litigated in normal proceeding.

MATERIALS AND METHODS

Using data from 38 unreported cases, the paper attempts to examine methods of settlement used and the effectiveness of

the law through examining the approach and practice of the court. Data showed the *sulh* is the most preferred method to settle disputes in division of matrimonial asset after death. Using provision related to law of division in Section 122 of the enactments, the paper will examine the law and other legal provisions governing the principles, application and interpretation of law in the division of matrimonial asset.

The statutory analysis will focus on significant developments in the codified law and improvements in the existing law as well as strengths and weaknesses for further improvement of the law. Case law analysis was conducted to depict the extension of the law for improvement of statutory provisions. This discussion is mainly confined to factors and variables that the court commonly applies when determining the share of property. Variables such as contribution, proportion determination and type of matrimonial assets will be examined. The study adopted field work research by analysing case studies of unreported cases which are carefully selected from six Syariah Courts to represent all the states in Malaysia. The states are: Selangor which has a high population density and represents the Western Region, Penang with a high population density as well representing the northern region, Johor representing the Southern Region, Kelantan representing Eastern Region and Sarawak representing the population of East Malaysia. Cases from the state of Perak are also included as it has a similar law; however, the proportion of assets is equal in this state.

Data showed that in practice, the division of *harta sepencarian* upon death was made via *sulh* where the parties agreed on assets divisible as *harta sepencarian* and proportion entitled to the parties. In order to explain the practice of matrimonial asset division upon death of a spouse, elaboration and commentary of some unreported cases to understand the court's approach in dividing asset as well as factors used to determine the division and whether any expansion on the law have been factored in.

RESULTS AND DISCUSSION

Result of data analysis on the practice of *sulh* in dividing the matrimonial asset is discussed as follows:

Division upon Death through Sulh Proceeding

The study explains that the litigation process of the claim in the division of assets upon death is shortened by spousal agreement during the lifetime of the parties. Proving the extent of contribution and involvement of many parties causes delay and prolongs court proceedings. The party involved in the claim varies from one case to another. For example, the litigation could be between children and wives of deceased, children of deceased and siblings of the deceased. Others involved the deceased's sibling when the deceased has no children and some cases involved parents of the deceased and children and wives of the deceased (*Aminah Binti Abdullah v. Noriah*

Bt Ahmad, Zulkifli Bin Daud and 19 others – 03100-017-0011-2003, Kelantan). The defendants were the deceased's second wife and his children from his first and second wife and other divorced wives. There were cases where the parties involved were the children of deceased and a sibling of the deceased (*Mek Yam Binti Mat Jusoh v. Mat Dohim Bin Seman and Mek Embong Bin Seman*; 03100-017-0070-2003, Kelantan). In addition to the deceased's spouse, heirs of the deceased are parties involved in the claim when the property of the deceased which was previously considered matrimonial property, are subject to distribution according to *faraid* i.e. rules pertaining to share allocation of deceased's estate to deceased's heirs as prescribed by *Hukum Syarak*.

Sulh appears to be a practical method and a form of amicable settlement for the division of a deceased's estate. The agreement on proportion of share promotes a peaceful solution between the deceased's spouse and heirs after both parties have been granted an agreed proportion as regards to matrimonial and inheritance property. *Sulh* has been considered effective in resolving issues of proving cases related to contribution in a litigation process.

In the case of *Aminah Binti Abdullah v. Noriah Bt Ahmad, Zulkifli Bin Daud and 19 others* in Kelantan (03100-017-11-2003), the court held that upon parties' agreement, a land lot situated in Bachok, Kelantan be declared as *harta sepencarian* where half share of the land was granted to the plaintiff while the other half was to be

divided among the defendants according to the law of inheritance. The plaintiff claimed an equal share due to her direct and indirect contributions. Her contribution to the acquisition of the estate was made by assisting the deceased husband in a food business where she claimed that the deceased managed to acquire some assets from proceeds of the business.

The terms of settlement are also considered in determining equal shares to both the deceased's wives. This was illustrated in the case of *Che Su Binti Hj Md Yusoff v. Fauziah Binti Mad Isa and anor* (08100-017-0165-2010, Perak) where the court held that based on an agreement by the parties, movable assets consisting of monies saved in several accounts and shares valued at RM463,000 and half share of land registered in the deceased name be pooled under the estate of the deceased. An agreement was achieved on Amanah Saham Bumiputra (ASB) shares valued at RM328,000 where RM100,000 was given to the deceased's second wife, who was the step mother while the defendant's mother was given RM100,000 as the administrator of the deceased's first wife who died before the deceased's death. The balance was divided according to the *faraid* principle among the deceased's heirs. However, half of land and monies amounting to RM135,000 were divided according to *faraid*. Transfer of the whole asset comprising three lots of land situated at Alor Gajah and one fourth of Amanah Saham Nasional (ASN) shares amounting to RM89,000 given to the plaintiff as

ordered by the court (*Timah Bt Dalip v. Abdul Malek B Md Aris and another*; 01100-017-0162-2007, Johor). As regards to lots of land in FELDA land Settlement where the acquisition was made through the joint effort of the husband and wife, as agreed, half portion was ordered by the court to be granted to the wife (*Asmah Bt Ali v. Siti Mariam Bt Ismail and anor*; 01100-017-0271-2005, Johor).

It was also observed that in several cases, one third of the matrimonial assets was allocated to the wife before execution of *faraid* to the deceased's heir. This was illustrated in the case of *Yuslinda, Liza Suriani & Abd Rashid B. Mohamad v. Norsidah Dakin* (10200-017-04-2001 (Selangor) whereby the plaintiff, heir of deceased's husband claimed all assets consisting of immovable property such as a house located in Klang, three land lots at Mukim Kapar, Selangor and a land lot at Telok, Selangor be regarded as deceased's estate. The claim also included movable property consisting of savings in the account amounting to RM30,000 and EPF (Employee Provident Fund) amounting to RM2,000. However, the defendant, the deceased's wife, disagreed with the claim and asked for the assets to be regarded as matrimonial property on the grounds that the asset were acquired during their marriage and the defendant-wife had made the financial contributions in the acquisition of the assets. The court held that the plaintiff and the defendant had agreed that the estate be distributed among the heirs. However, prior to

distribution, the court ordered 1/3 of share of matrimonial property to be awarded to the defendant.

It was observed that in the majority of cases the matrimonial assets were commonly fixed to half and one third share. For example, in the case of *Faridah Binti Abdul Wahid v. Nor Azura Bt Zawani & anor* (08100-017-0076-2009, Perak). The court held that a house and a land situated at Perak be declared as *harta sepencarian* and half share be given to the plaintiff i.e. deceased's wife and the other half to be distributed among the heirs according to *faraid*. As regards a car, which was registered under the sole name of the plaintiff, the court ordered that the car be transferred to the plaintiff and in exchange the plaintiff was ordered to pay RM5,000 to be divided among the heirs. However, ASB shares amounting to RM8,000 was to be given to the plaintiff. In another case in Perak, in the case of *Saayah Binti Hassan v. Non Bt. Ali* (08700-017-0006-2008), the plaintiff was the ex-wife of the deceased who died in 2006. They were married in 1955 and later divorced in 1969. The defendant was the second wife of the deceased husband. The plaintiff claimed that during their marriage they had acquired two land lots situated at Matang, Perak and requested that these assets be declared as matrimonial property. The court allowed the plaintiff's claim and by agreement of parties ordered that the lands be divided 1/6 to the plaintiff, 1/6 to the defendant and 1/6 to each of four other defendant's sons and daughter with the deceased husband. Thus,

it is clear from the foregoing that *sulh* is an amicable settlement in the division of assets upon death of a spouse.

Matrimonial Home

Matrimonial home is among the most frequent assets divided upon death of a spouse. The division of matrimonial home may vary in proportion and subject to the parties' mutual agreement. However, the case is treated differently in the absence of the spouse due to death. The transfer of the matrimonial home to a deceased's spouse was illustrated in *Amienadzariza Jamali v. Abu Bakar Mohd Yusof* (10200-017-0315-2005, Selangor) whereby the court ordered, by agreement of the defendants, to transfer a double-storey terrace house situated at Shah Alam to the plaintiff. The court also ordered to omit the sole name of the deceased in the title. The plaintiff agreed to bear the bank's mortgage instalments and maintenance expenses of the house. In another case, the equal share of division of matrimonial home to the deceased's wife was also ordered by the court. This was illustrated in the case of *Syarikin Bt Ab.Rahman v. Awang B Redan & 4 anor* (1220-17-17-2000, Selangor) where the court ordered a matrimonial home situated in Shah Alam owned by the deceased husband to be divided in equal share with the plaintiff and among the heirs of the deceased.

However, the determination of shares out of net proceeds of sale of a matrimonial home was also considered as part of the division. This was illustrated in the case of

Mariam Abu Bakar/ Ibrahim Abu Bakar v. Dato' Zorkarnain B. Abd. Rahman (10200-017-38-2003, Selangor) where the court, based on the agreement of both parties, ordered that the defendant be entitled to two thirds share out of net value of the matrimonial assets consisting of a house, a land and three units of apartments amounting to RM810,000. Therefore, RM220,000 earned by the deceased after deducting RM50,000 received as the proceeds of sales of the apartments was the deceased's share which was subject to *faraid* rule. The court ordered the value paid in cash and distributed based on *faraid* to legal heirs of the deceased.

It is observed that greater share is allocated to a deceased's spouse after the court takes into account the debt of the assets. This was explained in the case of *Md Isa Jamaluddin B. Jamaluddin v. Abd Wahab B. Awang & Anor* (10200-017-179-2005, Perak) where the court held that the plaintiff was entitled to 70% of the current value after deducting what is owed to the bank on a housing loan (for a house in Cheras) and the balance (30%) was to be distributed among the heirs. However, 90% of the value of a house situated at Pasir Gudang, Johor Bahru (after deducting the loan balance) was to be given to the plaintiff and the rest (10%) of the share was to be distributed among the heirs. The defendants agreed to award greater share to the plaintiff due to his immense liability and greater contribution to the instalment of both houses.

Upon the death of a spouse, a matrimonial home which is originally *harta sepencarian* is subject to division under the *faraid* rule. Nevertheless, sharing of the matrimonial home with the deceased children might cause inconvenience to the wife. At the same time, acquiring new property causes hardship especially to a non-working wife due to escalating property prices. Joint tenancy of matrimonial home is a practical solution to overcome the issue.

Consideration on the Usage of Asset

The division of property also took into consideration the continuation of usage of assets by the deceased's family. This was explained in the case of *Faridah Binti Abdul Wahid v. Nor Azura Bt Zawani & anor* (08100-017-0076-2009, Perak) where the court ordered the interests of a car loan to be transferred to the plaintiff, the defendants' mother. This shows that the division may not be necessarily in the form of determining a specific share. For a just and fair division, the transfer of vehicle took place after taking into account the need of the parties to use the asset as a means of transportation even after the death of the deceased's spouse.

Deceased Debt

For settlement of the deceased's debt, in practice, the debt would be deducted specifically from the share of the heirs after the division of matrimonial property had been made. This was illustrated in the

case of *Che Zawiyah Bt Che Din v. Zakiah Binti Che Din* (08100-017-85-2001, Perak) where the court held that the deceased's share of 50% of total value of matrimonial asset which amounted to RM250,000 be distributed to the deceased's heirs after deducting all debts incurred by the deceased and the net value of the asset would be distributed according to *faraid*.

Movable Asset

Movable assets such as shares, business assets and saving monies are included in the division of matrimonial property (*Su Binti Hj Md Yusoff v. Fauziah Binti Mad Isa and anor*, 08100-017-01165-2010, Perak). This was illustrated in *Che Zawiyah Bt Che Din v. Zakiah Binti Che Din* (08100-017-85-2001, Perak) where the court ordered that movable assets consisting of ASB shares and savings accounts of the deceased husband amounting to RM235,000 be declared as *harta sepencarian* and the amount was ordered to be divided equally between the plaintiff and the deceased's wife as they have been married for 65 years. However, in the case of *Absah Saidin v. Mohd Omar Mokhtar B. Sabri* (10200-017-0142-2008, Selangor) the assets of Term Loan (ASB) amounting to RM62,000, saving and insurance in Bank Rakyat amounting to RM9,350, ASB savings amounting to RM16,900, EPF amounting to RM5,000 were decided as *faraid* to be divided among the deceased's heirs. Assets in term of death and accident insurance payment benefit amounting to RM50,400, EPF amounting to RM58,000,

a salary balance of RM27,522.08 were included in the division of matrimonial assets.

Employee Provident Fund

As regards the EPF, the court approved the asset as matrimonial property upon the consent of the affected parties. This is a significant development in the Syariah Court as the general law excludes EPF as matrimonial assets. This was illustrated in the case of *Amienadzariza Jamali v. Abu Bakar Mohd Yusof* (10200-017-0315-2005, Selangor) where the court ordered RM100,000 to be awarded to the defendant, deceased's parents, as a settlement against insurance money, EPF and emolument of the deceased having gaining consent of the plaintiff. In contrast, the defendant agreed that the balance of insurance money, emolument and EPF monies to be awarded to the plaintiff and the two children. Similarly, in *Syarikin Bt. Ab. Rahman v. Awang B. Redan & anor* (1220-017-17-2000, Johor) the court ordered EPF monies solely funded by the deceased husband valued at RM66,357.59 to be regarded as *harta sepencarian* and the court awarded the plaintiff half of the share of the fund. A similar verdict prevailed in the case of *Yuslinda, Liza Suriani & Abd.Rashid B. Mohamad v. Norsidah Dakin* (10200-017-04-2001, Selangor) where the court ordered 1/3 share of EPF monies amounting to RM2000 to be awarded to the defendant. Thus, from the study, it is clear the court may declare EPF savings as matrimonial property

and divide the asset between the deceased spouse based on *sulh* and agreement of parties.

Factors Taken into Consideration

The study also observed that the agreed proportion is determined by the extent of the parties' contribution either directly or indirectly. This was illustrated in the case of *Mariam Abu Bakar/ Ibrahim Abu Bakar v. Dato' Zorkarnain B. Abd. Rahman* (10200-017-38-03, Selangor) where the court awarded the plaintiff 1/3 of the share as her entitlement for taking care of the family. In this case, a bigger share was awarded to the defendant who had made greater contributions. This shows that the agreed proportion determined through *sulh* may be based on the extent of the contribution of parties made during the acquisition of assets.

Thus, the above discussion signifies that in the division of matrimonial assets upon death, resolution by agreement of parties is substantial and significant to determine the division of matrimonial assets. The parties may agree to the division either on the basis of the parties' extent of direct or indirect contribution or mainly based on the welfare of parties or the children's interest. Pertaining to proportion of share of matrimonial property, it has been observed that by procedure of *sulh*, the parties may transfer a greater portion, despite the fixed rule of one third or half shares. In other words, the parties have a wider discretion to determine the proportion based on the needs of the deceased's spouse, amount

of contribution and others. As regards to matrimonial assets included in the division, the study highlighted that the court has expanded the types of matrimonial assets to include tangible and intangible assets owned by the deceased.

CONCLUSION

The spousal agreement, or *Sulh*, is a mutual agreement which does not require the contribution of the parties to be established in ascertaining the proportion of the matrimonial asset. This mode has been accepted in the practice of division of matrimonial assets upon the death of a spouse. It has been observed that in the Malaysian Syariah Court, *sulh* is a potential mode of an amicable settlement which is a strong mechanism to be used in the division of the matrimonial assets. This is due to the difficulty faced by the Syariah Court in determining the proportion by using the current mode of assessment that focuses more on the contribution of parties to quantify the proportions. Additionally, because of the nature of *sulh*, the proportion based on the spousal agreement promotes fair division among the parties and additionally shorten the process of application to *harta sepencarian*. The parties are generous as to allow exclusive ownership of matrimonial assets especially matrimonial home to the deceased's wife that could provide adequate security and protection for her after the death of her husband. Thus, it is suggested that the use of *sulh* as a mode of dividing the matrimonial asset be extended widely to

the division of property upon the death of a spouse. Hence, there is a need for a proper mechanism to uphold the process of *sulh* and facilitating the process via a proper checklist. This will ease the burden of the Syariah Court officers and equip them with proper knowledge related to the *sulh* process and the execution of *sulh*.

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Arbitration as a Method of Dispute Settlement in Islamic Banking and Finance: A Perspective from Malaysian Governing Law

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ABSTRACT

Arbitration is one of the important alternative dispute resolution (ADR) methods. Being an alternative method, it has advantages over the conventional dispute resolution mechanisms i.e. court litigation. This paper examines the law governing arbitration as a method of resolving disputes in Islamic banking and finance in Malaysia. Main provisions of related statutes and rules are discussed, as well as related issues. This paper adopts library research method and analyses relevant statutory laws, decided cases, books, journals, law reports, newspaper articles, conference proceedings and other periodicals. This paper concludes that although the law related to arbitration in Islamic banking in Malaysia is already in place, improvements are needed to ensure the arbitral process is more in line with the Shariah principle.

Keywords: Arbitration, disputes, Islamic banking and finance

INTRODUCTION

Islamic banking and Islamic finance have flourished in Malaysia since the passing of the then Islamic Banking Act 1983 which

paved the way for the establishment of Malaysia's first Islamic bank i.e. Bank Islam Malaysia Berhad in the same year. After more than 30 years, the country has witnessed the mushrooming of new Islamic banks, local and international, to cater to rising needs of the public. While it is good to have many Islamic banks offering a wide range of Islamic instruments or transactions, disputes and cases arising out of these transaction are also increasing. The conventional option

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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is to go for court litigation in order to get a settlement. However, there is another way of having those disputes settled without having to go to court. It is called the alternative dispute resolution (ADR), of which arbitration is one of its methods. The purpose of this paper is to discuss the law governing arbitration as an alternative method of settling disputes arising out of Islamic banking and financial transactions in Malaysia. In doing so, the paper will examine the law and rules governing the arbitration process of Islamic banking and finance disputes in Malaysia. Main issues related to these will be highlighted as well as suggestions on tackling them.

ARBITRATION

Arbitration is defined as ‘resolution of dispute by a person (other than a judge) whose decision is binding’ (Oran, 2000). It is also referred to as ‘[T]he determination of a dispute by one or more independent third parties (the arbitrators) rather than by a court’ (Martin, 1997). In short, arbitration is an out-of-court method of settling disputes with the help of a third party whose decisions are binding. Arbitration is regarded as one of the most referred to alternative dispute resolution (ADR) methods of settling disputes. Among the ADR methods, arbitration is known as an arbitral method because its decision is, similar to judgment in court litigation, made by a neutral third party and binding on the disputing parties.

When comparing arbitration and litigation, it is a fact that arbitration has several advantages which makes it more preferable to litigation. The advantages include, *inter alia*, party autonomy, fair settlement without unnecessary delay, cost saving, flexibility of process, full confidentiality, finality of award, and enforceability of award (Blake, Browne & Sime, 2011). These advantages may be appealing to parties to legal disputes, including those related to Islamic banking and finance matters.

RELEVANT STATUTES AND RULES

The relevant law governing arbitration of disputes arising out of Islamic banking transactions in Malaysia are the Arbitration Act 2005, Central Bank of Malaysia Act 2009 and Kuala Lumpur Regional Centre for Arbitration (KLRCA) i-Arbitration 2013. These statutes and rules are applicable as they are referred to by disputing parties in resolving their disputes in Islamic banking and finance.

Arbitration Act 2005

The Arbitration Act 2005 substitutes the Arbitration Act 1952. The repeal is due to the fact that the 1952 Act was outdated compared with arbitration laws in neighbouring countries and other countries worldwide at that time. Because the law was not keeping up with existing trend, the approach of the Malaysian judiciary towards arbitration in Malaysia was not so pro-arbitration (Dipendra & Bashir, 2010).

This resulted in several shortcomings in the conduct of arbitration and difficulty in enforcement of awards in the country. Among those shortcomings are issues related to court's appointment of arbitrators, unenforceability of arbitral awards and the court's tendency to interfere with the findings and awards of arbitrators (Abraham, 2003, 2006). These had discouraged disputing parties from using Malaysia as the seat for their arbitration (Rajoo, 2006).

This uncompromising position had prompted some arbitral bodies to come up with proposals with the object of amending the 1952 Act (Abraham, 2003). The proposals were then submitted to the Attorney General's Chamber for further action. As a result, the Arbitration Act 2005 was enacted by the Federal Legislature and came into force on 15 March 2005. This Act repeals the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Arbitration Act 2005, Section 51(1)). The ultimate purpose of the 2005 Act is to promote international consistency of arbitral bodies which are modelled according to the United Nations Commission on International Trade Law ("UNCITRAL") (Abraham, 2006). Thus, it is not surprising that most of the provisions of the 2005 Act are similar to those of the UNCITRAL model law.

The Arbitration Act 2005 has several new important features which disputing parties in Islamic banking and finance disputes must observe. First, the disputing

parties have autonomy over the flexibility of the arbitration process. The court cannot freely interfere in the arbitral proceedings and awards save in accordance with the provision of the Act (Section 8). When the parties agree on the exclusion of court power to intervene, any invitation to interfere in arbitral awards shall not be entertained by the court (Mogan, 2005). This was absent in the repealed 1952 Act where the court could and had freely interfered. Now, disputing parties are given the right to choose whether they want the court intervention in their arbitration or not with regard to certain matters. These matters are determination of a point of law arising in the course of arbitration (section 41), question of law arising out of an award (section 42), taxation of arbitration costs, extension of time for commencing arbitration proceedings (section 45), and extension of time for making awards (section 46). In cases where the parties allow court intervention in any of the above matters, they may customise such intervention to be full or partial as they wish.

Second, the 2005 Act provides for a mandatory stay-of-court proceeding when there is an arbitration agreement (Section 10(1)). This replaces the discretionary power of the court to grant a stay under the 1952 Act. The mandatory stay under the present law may be able to limit court interference in arbitration process and awards, and fortify the role of the court in support of arbitration. However, the mandatory stay order will not be given

on the following grounds: the arbitration agreement is null and void, inoperative or incapable of being performed, or there is no arbitrable dispute between the parties (Section 10(a) and (b)).

The courts have duly granted the mandatory stay by virtue of section 10 of the 2005 Act in many cases. In *Albit Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656, the defendant was a main contractor for a construction project and the plaintiff was the defendant's subcontractor under two subcontracts - one contracted in June and another in August. The plaintiff brought a legal action against the defendant for the two subcontracts. The defendant applied for an order of stay against the plaintiff's claim in respect of the sum MYR334,273.37 for the June subcontract and for reference to arbitration on the ground that the said subcontract was subject to arbitration. The plaintiff disputed the existence of arbitration agreement in the June subcontract. Thus, the main issue in this case was whether the June subcontract was an agreement to arbitration under section 9 of the Arbitration Act 2005. At trial stage, the judicial commissioner gave a negative answer and did not grant the stay order.

However, the Court of Appeal unanimously allowed the appeal on the ground that both parties had agreed to the inclusion of PAM agreement into the June subcontract and that clause 34 of the said agreement expressly contained provision for arbitration. Thus, on the true construction of contract, the June subcontract was

subject to arbitration agreement by virtue of section 9(5) of the Act which provides: "A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement provided that the agreement is in writing and the reference is such as to make that clause part of the agreement." Accordingly, the Court of Appeal held that the learned commissioner had erred in dismissing the defendant's application for an order of stay and reference to arbitration.

A similar outcome where the courts granted stay orders can also be found in *Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLJ 573 and several other cases, such as *Standard Chartered Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233 *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872; *Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors* [2008] 6 MLJ 817; *CMS Energy Sdn Bhd v Poscon Corp* [2008] 6 MLJ 561; and *Majlis Ugama Islam dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor* [2007] 10 CLJ 318. This statutory position in which the courts are bound by the wishes of disputing parties to settle their disputes by arbitration must be respected by the courts. Indeed it has become an important achievement since the coming into force of the 2005 Act.

Third, the arbitration tribunal may also in its own jurisdiction, decide on matters regarding preliminary objection and validity of arbitration agreement (Section

18). Under the old law, this power was vested only in the court. However, this power is only available to the arbitration tribunal, subject to both the parties' consent in the arbitration agreement.

Fourth, the 2005 Act empowers arbitration tribunal, in addition to the existing power of the court, to issue interim orders (Section 19). Such orders are treated as awards of the arbitration panel and may cover security for costs, discovery of documents and interrogatories of witnesses, affidavit evidence, and preservation or interim custody or sale of disputed property. Under the repealed Act, these reliefs were within the prerogative domain of the court and could only be obtained after the hassles of long time and rigid procedures. This current feature of arbitration will definitely save disputing parties' time and money in order to get the same reliefs.

Fifth, not all provisions of the Act are applicable to all arbitrations. The Act has four major parts. Parts I, II and IV of the Act are applicable to all arbitrations if the seat of arbitration is Malaysia. Regarding Part III, there are two general rules to be observed: a) the Part is applicable to domestic arbitrations whose seat of arbitration is Malaysia. However the Part is not applicable when the parties mutually agree in writing to opt out of the provisions of the Part (section 3(2)(b)); b) in case of international arbitrations whose seat of arbitration is Malaysia, the Part is not applicable. But it is applicable when the parties mutually agree in writing to opt in (section 3(3)(b)) i.e. to make the Part

applicable to their arbitration. Thus, Part III is in its 'default setting' applicable to domestic arbitrations but not applicable to international ones. On the other hand, it does not apply to domestic arbitration in case of 'opt out' and applies to international arbitrations in case of 'opt in'.

All the above features are meant at improving arbitration as an efficient dispute resolution method which can help parties settle their disputes without having to resort to court litigation. Does this mean that arbitration must be totally free from court intervention? The answer is negative. Although the court, by default under the 2005 Act, is not free to interfere in arbitration, total separation of the latter from the former is impossible. In fact, judicial help is still needed to support arbitration in certain situations. For instance, enforcement of arbitral award against a non-complying party, interim orders before the set-up of an arbitral tribunal, or interim orders against a third party not privy to the arbitration process (Muttath & Hwang, 2002). In those instances, the parties still need to go to court to get those remedies. In this regard, the court assumes a supportive role which is very much needed to ensure the arbitral process run smoothly and efficiently.

KLRCA i-Arbitration 2013

In Malaysia, the relevant body that has a direct connection with arbitration is the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"). This body was set up in 1978 under the auspices of the Asian-African Legal Consultative

Organisation (AALCO) (Kuala Lumpur Regional Centre for Arbitration (KLRCA), 2015). It became the first regional centre that AALCO established in Asia with the aim ‘to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings in Asia’ (KLRCA, 2015).

Since its birth in 1983, Islamic banking and Islamic finance in Malaysia has achieved tremendous growth and is still rapidly growing including related Islamic banking and financial products. This would also mean more disputes would arise from Islamic banking transactions. Thus, efficient arbitration rules for dispute resolution in Islamic banking and finance are important in addition to being Shariah-compliant.

In order to fulfil these two purposes namely efficient and Shariah compliant dispute resolution, the KLRCA issued a set of rules which was known as the KLRCA Rules for Islamic Banking and Financial Services Arbitration 2007 (“IBFSA Rules”). These rules have been constantly updated and the most current version is known as the KLRCA i-Arbitration Rules 2013.

As for its main features, the KLRCA i-Arbitration Rules 2013 can be divided into four main parts. Part I is KLRCA i-Arbitration Rules, revised in 2013 and has 18 rules. Part II is the UNCITRAL Arbitration Rules and has 43 articles. This part is divided into four main sections: Section I (introductory rules); Section II (composition of the Arbitral tribunal);

Section III (arbitral proceedings); and Section IV (the award). Part III provides four main schedules to the rules. Lastly, Part IV outlines the guide for the rules. If there is any conflict between a provision of Part I and another of Part II, the former shall prevail (Rule 1(3)).

As regard to the types of disputes that can be referred to arbitration, the KLRCA i-Arbitration Rules 2013 are silent. However Part IV of the Rules, which represents a guide to the rules, states “[A]ny dispute which arises out of an agreement which is premised on the principles of Shariah.” (Part IV, Item 4). The 2007 Rules stated such dispute was one arising out of ‘any commercial contract, business arrangement or transaction which is based on Shariah principles’ (IBFSA 2007, Rule 1(3)). Thus, clearly any dispute arising out of transactions based on *Mudharabah*, *Murabahah*, *Musyarakah*, *Ijarah* and other Shariah principles can be referred to arbitration under i-Arbitration Rules 2013. It is also worth to note that the statement on types of dispute is more general compared with the one stated in the previous IBFSA 2007 Rules. Being general in construction, item 4 of Part IV can cover all transactions or financing instruments which are based on the Shariah principles.

As such, it is important to note that the qualification of being ‘based on the principles of Shariah’ is the main factor to take into account before any dispute can be entertained by arbitration under the KLRCA i-Arbitration Rules 2013. The qualification would cover disputes arising out of the

present contracts or instruments of Islamic banking and finance as applied in Malaysia. On the other hand, disputes arising from conventional banking and finance contracts cannot be resorted to i-Arbitration Rules 2013. Instead such disputes should be referred to the KLRCA Arbitration Rules 2013.

In order to refer a dispute in Islamic banking and finance contract to arbitration under the KLRCA i-Arbitration Rules 2013, the contract must contain a provision to that effect. Such a provision is known as an arbitration clause. As guidance for contracting parties, the KLRCA i-Arbitration Rules 2013 provide the following model arbitration clauses for parties to adopt in their contracts.

“Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA i-Arbitration Rules.” (Schedule 3),

and

“The parties hereby agree that the dispute arising out of the contract dated _____ shall be settled by arbitration under the KLRCA i-Arbitration Rules.” (Schedule 4).

The clause in Schedule 3 can be inserted by parties to an instrument of Islamic banking or financial services at the time of contract. For existing contracts that have no arbitration clause or contracts that have different arbitration clause, the parties may include or substitute the old

one with another model arbitration clause as outlined in Schedule 4. By virtue of this clause, irrespective of Schedules 3 or 4, the parties are bound to refer any dispute, which may arise out of the contract, to the KLRCA i-Arbitration Rules 2013.

Considering the great advantages of arbitration over litigation, it is hoped that almost, if not all, Islamic banking and finance contracts contain arbitration clause or agreement so that any potential disputes may be settled without having to go to court.

An important feature of the KLRCA i-Arbitration Rules 2013 is its reference to a Shariah council or expert. Such a reference arises in two situations. The first one is when the arbitrator has to make an opinion on a matter related to Shariah principles (the KLRCA i-Arbitration Rules 2013, rule 11(1)(a)). Another is when the arbitrator has to make decision on a dispute arising from the Shariah aspect of the contract that can be subject to arbitration under the KLRCA i-Arbitration Rules 2013 (rule 11(1)(b)). When a matter or aspect in question comes under the purview of a specific Council, such a council shall be referred to (rule 11(2)(a)). In Malaysia, such a council will be the Shariah Advisory Council (SAC) of the Central Bank, or of the Securities Commission as the case may be (Section 51 of the Central Bank of Malaysia Act 2009; section 316A of the Capital Markets and Services Act 2007). However when the matter does not fall under the purview of any council, reference shall be made to a Shariah council or expert, as agreed

by the disputing parties (rule 11(2)(b)). In the second situation, the expert can be the SAC itself, Shariah Committee (of any Islamic bank), or any member thereof. In Malaysia; such an expert must be approved by the Central Bank (Para. 8 of Guidelines on the Governance of Shariah Committee for the Islamic Financial Institutions). This requirement is important to ensure integrity and independence of such Shariah council or committee or expert in Islamic banking and finance.

Before making the reference, the arbitrator may also consider the existing and published resolutions of the Council. Among them are the SAC of the Central Bank of Malaysia's *Shariah Resolutions in Islamic Finance* 2010 & 2012. If no answer can be found in these published resolutions, reference should be made to the Council or other Shariah experts, as the case may be.

An arbitral award under the KLRCA i-Arbitration Rules 2013 is final and binding on the parties and shall be carried out without delay by the relevant party (the KLRCA i-Arbitration Rules 2013, rule 12(7)). Further, the award may include late payment charge based on the principles of *gharamah* and *ta'widh* (the KLRCA i-Arbitration Rules 2013, rule 12(8)(a) and Shariah Resolutions in Islamic Finance, 2012). Should the party fail to comply with the award, the other party may enforce the award through the court (Arbitration Act 2005, s.38).

CENTRAL BANK OF MALAYSIA ACT 2009

A law which is also relevant to arbitration in Islamic banking and finance is the Central Bank of Malaysia Act 2009. This Act came into existence in 2009 which repealed the Central Bank Act 1958. Among the reasons for the promulgation of 2009 Act was to ensure judges or arbitrators make judgments or awards in accordance with the Shariah principles on Islamic banking and finance. Prior to the coming into force of the 2009 Act, the civil courts had the option to refer to the Shariah Advisory Council in deciding Shariah matters in Islamic banking and finance cases. However the option was not always exercised by the civil courts so that several cases were decided not taking into account the Shariah principles. Among these cases were: *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67 (High Court); *Arab Malaysia Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631 (High Court Kuala Lumpur); *Bank Islam Malaysia Bhd v Ghazali bin Shamsuddin & Ors* (Suit No D4-22A-215 of 2004); *Bank Islam Malaysia Bhd v Nordin bin Suboh* (Suit No D4-22A-1 of 2004); and *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2008] 6 MLJ 295. In the latter case, the learned judge made the following remark:

“Section 16B of the Central Bank of Malaysia Act 1958 (Act 591) however does not make reference mandatory... In the case of reference made by the court, the ruling is not binding but

shall be taken into consideration. Given the reference is discretionary and the rulings are not binding ... the court is of the opinion reference is not necessary.” (p. 299)

The Central Bank of Malaysia Act 2009 was passed to rectify the above setback. Now, the reference to the Shariah Advisory Council has been made obligatory on the court and arbitrators when the civil courts or arbitrators need to decide on Shariah matters involving Islamic banking and finance cases (section 56(1) of Central Bank of Malaysia Act 2009). The section provides:

“Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall (a) take into consideration any published rulings of the Shariah Advisory Council; or (b) refer such question to the Shariah Advisory Council for its ruling.” (Emphasis is added).

The ruling by the Council on the reference shall be binding on the arbitrator (CBMA, s.57) who is under duty to apply the ruling when deciding the dispute and making the award. Further, the ruling of the Council shall also be binding on the parties and shall be final and not subject to appeal. The 2005 Act has also accorded the Shariah Advisory Council as the highest authoritative body to ascertain questions of Shariah law in Islamic banking and finance in Malaysia. It means the Council

has the final say to make rulings in relation to Shariah matters in Islamic banking and finance in Malaysia.

The requirement of statutory reference to the Council is very important to ensure judgments in such cases are according to the Shariah principles, given the fact that judges of the civil courts are not all trained in the law of Islamic banking and finance. The weakness of the civil courts in this regard can be best illustrated by an *obiter* given by Mohd Zawawi J in *Tan Sri Abdul Khalid v Bank Islam Malaysia Berhad* [2012] 7 MLJ 597 whereby he said:

“... civil courts may not be sufficiently equipped to deal with the issue whether a transaction under Islamic banking is in accordance to the religion of Islam or otherwise. Civil courts are not conversant with the rubrics of Fiqh Al-Muamalat which is a highly complex yet under developed area of Islamic jurisprudence.” (pp. 615-616)

ISSUES AND SUGGESTIONS

Based on the above discussion, there seems to be an issue as regards the status of the reference. Is it obligatory on the arbitrator to make such a reference to Shariah Advisory Council?

Clearly, the Central Bank of Malaysia Act 2009 makes such reference an obligation by virtue of the word “shall” in section 56(1). On the other hand, the i-Arbitration Rules 2013 treats the reference as an option based on the word “may” used in rule 11(1).

It is suggested that the provisions of the 2009 Act should prevail over the 2013 Rules if the seat of a particular arbitration is Malaysia. This is due to the fact that the former is a statute while the latter is a delegated legislation. As such, the law of Malaysia, including section 56(1) of the Central Bank of Malaysia Act 2005, will be applicable to any arbitral proceeding relating to disputes in Islamic banking and finance when the parties mutually choose Malaysia as the seat for arbitration. In this situation, the arbitrator is under statutory duty to make a reference to the SAC for its ruling. On the other hand, the situation would be otherwise if the seat of the arbitration is not Malaysia. Thus, the arbitrator may choose whether to make a reference, subject to the agreement of disputing parties.

Another issue relates to maintenance of deposits. It is normal that deposits must be paid by disputing parties before the commencement of arbitration proceedings. For arbitration under the IBFSA Rules 2007, the deposit paid by the parties must be maintained by the KLRCA in a non-interest bearing bank account of a financial institution (IBFSA Rules, rule 18(3)). However, the present KLRCA i-Arbitration Rules 2013 are silent on the type of account for the deposits. It is not clear why the new Rules fall short to specify the type of account. It is suggested here that the position of 2007 Rules should be read with the current 2013 Rules, since it is important that the account in which such deposits are

to be kept must be Shariah-compliant. It is also submitted that the 2013 Rules be amended to include an express provision to the effect.

CONCLUSION

In Malaysia, disputes arising out of Islamic banking transactions can be referred to arbitration by virtue of several statutory laws. Although the Arbitration Act 2005 prevents the court's interference in arbitral proceedings, the role of the latter is still important and cannot be left out. In fact, the court plays a very strong supportive role to ensure arbitration as well as i-arbitration achieve their true purposes and functions. Apart from that, the existence of KLRCA as the first regional arbitration body in Asia since 1978 has helped expand the popularity of arbitration to local and international parties. With its own i-Arbitration Rules 2013, it is really hoped that most, if not all, Islamic banking transactions contain arbitration model clause so that disputes, if any, can be settled without having to go to the court. The statutes and rules governing arbitration of disputes in Islamic banking and finance are already in place in Malaysia. But there are issues which need proper attention by relevant authorities.

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Misappropriation And Dilution of Indigenous People's Cultural Expression through the Sale of Their Arts And Crafts: Should More Be Done?

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ABSTRACT

Indigenous cultural expressions, a component of traditional cultural expressions (TCEs), are drawing tourists to Malaysia by their millions and hence are considered valuable resources that need to be preserved to ensure their sustainability. Equally valuable are the indigenous arts and handicrafts which are sold and traded by craft centres set by the government or by private sellers. Unfortunately, these arts and handicrafts have fallen prey to counterfeit and fakes. This paper examines national initiatives to regulate the sale of indigenous people's arts and crafts as a means of constraining the misappropriation of these cultural expressions in Malaysia, and compares these initiatives with those in Australia, New Zealand and the United States of America. This paper uses the mixed methods of library-based and qualitative research. The latter consists of unstructured, face-to-face interviews with respondents from selected communities of aborigines in Peninsular Malaysia as well as Sabah and Sarawak. The focus is to explore and understand the problem and to observe whether misappropriation and dilution are real issues within the indigenous people. Based on the information and data collected from the interviews, the problem of misappropriation proves to be a real threat to the sanctity of indigenous people's cultural expression, in

particular their arts and crafts. The paper concludes that Malaysia must adopt a multi-pronged approach including a range of laws to effectively curb the misappropriation of indigenous arts and crafts as well as preventing them from being diluted.

Keywords: Traditional cultural expression, arts and crafts, indigenous people, cultural heritage

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Malaysia is home to more than 70 groups of indigenous peoples. In Peninsular Malaysia, the three main groups of indigenous peoples are the Negritos, Senoi and Proto Malays, amounting to about 0.8% of its total population. In Sabah and Sarawak, the natives constitute the majority with a total of 61.22 % of the total population in Sabah and 71.2 % in Sarawak.

As tourism is one of the important industries in Malaysia, the government is committed to leveraging the country's multicultural and multi-ethnic indigenous groups as a strong, unique drawing power for tourism (Norhasimah, *et al.*, 2014). Unfortunately, there has been an increase in the supply of fake and imitation indigenous arts and crafts in Malaysia. The lack of laws regulating sales and exports of indigenous arts and crafts renders all the illegal reproductions out of the reach of law. In light of the lack of regulatory laws, his paper considers the position of Malaysia's indigenous people or *orang asli* before examining the regulation of cultural heritage as a means to protect TCEs. Finally, by way of comparison, this paper considers legal approaches in Australia, New Zealand and the United States that provide regulations under consumer protection and intellectual property protection of indigenous people's art and craft.

COMMERCIALISATION OF INDIGENOUS CULTURAL EXPRESSION IN MALAYSIA

Orang Asli in Malaysia – An Overview

The *Orang Asli* are the indigenous minority peoples of Peninsular Malaysia. The name is a Malay term which transliterates as 'original peoples' or 'first peoples.' It is a collective term introduced by anthropologists and administrators for the 18 sub-ethnic groups of the three major groups consist (Negrito, Senoi and Proto-Malay). The 1997 statistics show that the indigenous peoples represent a mere 0.5% of the total national population. The *Orang Asli*, nevertheless, are not a homogeneous group. Each has its own language and culture, and is hence unique in this sense. Linguistically, some of them speak *Aslian* languages which can be traced back to the indigenous peoples in neighbouring countries of Malaysia such as Myanmar, Thailand and Indo-China. Interestingly, those people of the Proto-Malay tribes speak dialects which belong to the same *Austronesian* family of languages as Malay, with the exception of the Semelai and Temoq dialects (which are *Austroasiatic*) (Nicholas, 1997).

The *Orang Asli* have various unique ways of life, in particular, the occupations and activities that they engage in to sustain their life. *The Orang Laut, Orang Seletar* and *MahMeri*, for example, live close to the coast and thus most of them are fishermen. Some *Temuan, Jakun* and *Semai* people have taken to permanent agriculture and now manage their own rubber, oil

palm or cocoa farms. Other groups such as *Temiar*, *Che Wong*, *Jah Hut*, *Semelai* and *Semoq Beri* however, live close to, or within forested areas. This explains why the majority of them are involved in hill rice cultivation, hunting and the gathering of forest products. They usually earn some cash income by selling forest products such as petai, durian, rattan and resins. It is common to see *Orang Asli* selling these products at small booths or huts along the roadside in most *Orang Asli* villages (for example in Tapah, Perak and Gombak, Selangor). Despite the fact that the majority of *Orang Asli* now have permanent homes, a very small number, for example *Jahai* and *Lanoh* from the Negrito group, are still semi-nomadic, which means that they move from one forest area to another as they prefer to take advantage of the seasonal bounties of the forest. A growing number of *Orang Asli*, in particular the young generations, are now living in urban areas as they have obtained proper education and qualification to work in various professions in town, earning salaries by working in the public and private sectors (Nicholas, 1997).

Indigenous peoples have unique TCEs that exclusively represent their identity and heritage (Tarmiji et al, 2014). Every expression on carvings, weavings, in dance movements and rituals for example, has significant meaning which is peculiar to all members of an indigenous group. These expressions portray the life and beliefs that are attached to the land and the environment surrounding it. These

expressions are passed verbally from one generation to another reliving the beliefs, the value and authenticity of the cultural expression and thus binding them as one community sharing one communal belief, values and tradition.

The indigenous community's cultural expression is very much influenced by its environment and geographical demography. The *MahMeri* in Pulau Carey is a good example since they lived near mangrove swamps which supply an abundance of *Batu Nyireh* wood. The wood has an attractive colour and appearance and is suitable for carving. It becomes the natural choice for the *MahMeri* community for their carving work. The wood art in the forms of masks or figurines depicting super naturals or spirits known as *moyang* are used for rituals to cast away diseases and to protect their household members from evil spirits. Among the famous sculptures is the *Moyang Harimau Berantai* or tiger spirits in chains. Behind each of the *Moyang* lies hidden traditional folk tales that are relevant to their beliefs (Ratos, 2006). Similarly, the *Semiar* of *Batang Padang* and *Temuan* communities at *Bukit Payung* are all talented weavers who can easily obtain *mengkuang* and *bertam* leaves for making handicrafts, baskets, mats and roofs. Bamboo and rattan are in abundance in the areas and are used to make baskets and bamboo walls. These examples, to some extent, supports the view that the *Orang Asli* community has a specific human nature interdependence as they adapt to their specific environment.

Another form of TCEs among the indigenous peoples in Malaysia is traditional dances. The *Sewang*, for example, is a traditional *Semai* dance that combines elements of rituals, songs, dance and music. The *Sewang* is practiced by the *Semai* community not only for rituals but for medicinal purposes. Its rituals, songs, dance and music have been handed down verbally and have not been reduced to written form. Further examples of traditional dances include those of the natives of East Malaysia, such as the *Sumazau* that is the most famous dance of the *Kadazandusun* communities in Sabah and the *Ngajat* dance of the *Iban* and *Bidayauh* in Sarawak.

However, globalisation and commercialisation have indirectly diluted the original cultural expression to merely a performance rather than an appreciation of the intrinsic values that are attached to the expression itself. Consequently, the authenticity of the cultural identity and values may be lost and forgotten in the face of the threats of globalisation and commercialisation (Graber *et al.*, 2012)

Is Misappropriation A Real Threat?

For the purpose of this research, various fieldtrips which included visits to selected indigenous villages in Sarawak and Peninsular Malaysia were undertaken to obtain a better understanding of the their TCEs. According to Nicholas Mujah from *Persatuan Dayak Iban* based in Sarawak, there have been many efforts to preserve the traditional culture (e.g. their cultural

heritage, language, and land rights) of the *Dayaks*. It is their belief that traditional cultural heritage belongs to the community, such as the *Bunga Terung* tattoo— a sign that one belongs to the *Iban* community. The *Iban* community also complains that the performance of *Ngajat* as portrayed in the media is inauthentic. To the *Ibans*, *Ngajat* signifies everything. The steps for *Ngajat* in welcoming people are different from dances performed for other functions. To the *Ibans*, *Ngajat* is a sacred dance as it is an art of respect and not just a ‘show’ to outsiders. Since the association is just a small group, there is nothing much they can do against the adulteration of their cultural performances. The only effort that they can make is to preserve the authenticity of *Ngajat* in their own village. They cannot take any action against the commercial performances of *Ngajat* outside their village.

Cultural heritage is very diverse. This is one of the reasons why it is difficult to ensure everything is protected by the law, except for some crafts such as the *Pua Kumbu* which is very popular among the tourists. In terms of its design, if the maker is from *Lubok Bangku*, there is a distinctive line in its design. From that, it is possible to ascertain the origin or the place where it was designed. Prior to designing these crafts, the artist usually gets inspiration from their dreams. They conduct a specific festival called *membangun*, during which they become possessed and inspired by the spirits through dreams. The inspiration comes from the males in the community,

while the process of producing, such as the *Pua Kumbu* cloth will be undertaken by the females. The resulting designs will be considered as communal property or knowledge. When the designs are sold, the profits are normally divided among them. Most of the time, the women who have woven the cloth will get the bigger share of the profits.

It has been observed that the *Orang Asli* in general and in particular those communities such as *Iban* and *Bidayuh* of Sarawak are being protective over their heritage as they are afraid it might be abused. This is the discovery by Sarawak Biodiversity Centre (SBC) based on its collaborations with the people of *Iban* and *Bidayuh* in recording the medicinal practice of the people, from the preparation of the medicine itself, through to its utilisation. The SBC has even documented the plants that were used to charm people.

A short visit to *Kampung Orang Asli Guntur* in Kuala Pilah, Negeri Sembilan reveals that young people lack interest in learning about their traditional culture and prefer modern life as compared to traditional ones. TCEs have become something they do for tourists by way of sale of their handcraft items and hence are no longer regarded by the younger generation as cultural traditions. Modernity has taken over their cultural identity resulting in a loss of identity. A visit to *Kg. Orang Asli* in Sg. Rengsak in Tapah, Perak is interesting as it is observed that the aborigines to some extent managed to maintain their traditional and cultural values. For example, when

Jabatan Kemajuan Orang Asli (JAKOA) provided them with new brick houses, some old folks refused to move for their love of traditional houses. Nevertheless, many of the younger generation have obtained higher education and have moved to live in towns. This has resulted in the dilution of TCEs since they have not been passed down to the next generations.

Government Initiatives

In Malaysia, culture, arts and heritage related industries, especially crafts, have been identified as one of the important sources of economic growth since the Eighth Malaysian Plan (2001-2005). The significant role of arts and crafts was further emphasised during the Ninth Malaysian Plan (2006-2010). One of the strategic thrusts of the Ninth Malaysian Plan was the development of the craft industry and the promotion of craft products for the world market as part of a bigger plan to boost the tourism industry as a whole.

Undeniably, indigenous TCEs are an integral, indispensable component of Malaysia's unique rich heritage. In this regard, the Tourism Ministry has included them as part of tourism packages in Malaysia with the aim of attracting tourists worldwide. Additionally, the government has organised annual festivals featuring indigenous cultural expression as well as setting up cultural villages that showcase their physical as well as intangible cultural expression. Examples of such cultural villages are Monsopiad Cultural Village, Mari-mari Cultural Village, Sarawak

Cultural Village and *Pulau Carey MahMeri* Cultural Village. These physical locations, as well as the festivals which are held regularly, are the main highlight and serve as a focal point of cultural heritage tourism throughout Malaysia.

Indigenous traditional performance attracts thousands of tourists every year. The annual festivals such as the Rainforest Music Festivals, the National Crafts Fair, the Cultural villages and other cultural activities organised by the tourism ministry focus on indigenous music, dance and performance. Some of the performances are a mixed blend of traditional and modern dances. For example, at Santubong Cultural village, the dances shown are not authentic renditions of the culture of the specific indigenous peoples. What is performed is a combination of all the cultures of indigenous people in Sarawak to promote the concept of “unity in diversity”, however, such a combination diminishes the identity of the specific group within the indigenous community. Thus, commercialisation of cultural heritage brings only harm to the indigenous community in the long run. To make things worse, these cultural performances and products are simply performed and produced to meet tourists’ demand without an understanding of their cultural significance (Nicholas Mujah, personal communication, April, 2014).

As indigenous TCEs are important resources for cultural heritage tourism in Malaysia, a consideration of the heritage protection law as one mechanism to preserve the authenticity of designated

cultural heritage in Malaysia is necessary before exploring the initiatives undertaken in Australia, New Zealand and the United States of America.

Heritage Law as the ‘Primer’ For Protection of TCEs in Malaysia

In Malaysia, the National Heritage Act 2005 (NHA 2005) was passed as a domestic support towards UNESCO’s effort in preserving cultural heritage. The Act, which was enforced in March 2006, paved the way for the designation of both tangible and intangible cultural heritage for the purpose of conservation and preservation. Among the indigenous cultural expressions that have been designated as national heritage is *Mayin Joooh* (the Mah Meri cultural dance), the art of land clearance (Iban, Sarawak), the *Petudui* Culture (the marriage culture of Melanau, Sarawak) and *Sogit* (the culture of paying compensation among the Kadazandusuns), Ngajat (cultural dance of the Iban) and Sumazau (cultural dance of the Kadazandusuns), *Pakaian Adat* Kadazandusuns, *Datun Julud* (Cultural Dance of the Kenyah Tribe) and *Adat Mandi Anak Iban* (Bath Rituals for Iban Babies).

Under the Act, TCEs fall within the definition of intangible cultural heritage (Section 2, National Heritage Act, 2005). Intangible cultural heritage consists of living expressions as well as culture and traditions inherited from ancestors and transmitted to descendants. Such a process occurs all over the world in a myriad of groups, tribes and communities and it

usually exists on an oral basis without any proper documentation or recording, as compared to modern life. The urge to safeguard this valuable heritage can be traced back to the attractive profit reaped from international trade and irresponsible commercial exploitations of cultural heritage, whereas the people or community who are the preservers of the heritage gain extremely little, in fact meagre economic returns. (Hussein, *et al.*, 2001)

The NHA primarily empowers the respective authorities to conserve Malaysian built and natural heritage, tangible and intangible cultural heritage, and traditional arts and culture and other manifestations such as heritage food and heritage persons. The Minister is responsible for the policies needed for the conservation and preservation of heritage. Section 4 of the NHA recognises the establishment of a Commissioner for Heritage. The Commissioner is vested with the authority to register any heritage object having cultural heritage significance in the Register (s 67 NHA 2005).

The role of the NHA (2005) in the preservation of cultural heritage has been lauded by many parties despite its apparent limitations although the scope of cultural heritage, for example under the purview of 2001 UNESCO Declaration, is broader (Nurulhuda Adabiah & Nuraisyah Chua, 2013). In this regard, it is to be noted that Malaysia is yet to ratify some relevant conventions within this sphere such as the Convention for the Safeguarding of the Intangible

Cultural Heritage 2003, the Safeguarding of Traditional Culture and Folklore Convention 1989, and the Universal Declaration on Cultural Diversity of 2001 (Mustafa & Abdullah, 2013).

Unfortunately, not all cultural heritage of Malaysia is listed in the Register unless the Commissioner and the public are actively involved in identifying certain objects as having cultural heritage significance. (Mustafa & Abdullah, 2013). Furthermore, the heritage protection law is only meant for preservation, but it does not define who are the beneficiaries of intangible heritage are. The duty of the Commissioner is merely to designate what is considered as national heritage. The Commissioner cannot take action against any third party who offended any of provisions of the Act. What is more worrying is that not all TCEs are designated as Malaysian cultural heritage. Just like culture in general, intangible heritage is constantly changing and evolving and being enriched by each new generation. Many expressions and manifestations of intangible cultural heritage are under threat, endangered by globalisation and cultural homogenisation, and also by a lack of support, appreciation and understanding. There is a concern that it fails to provide the prime support for the preservation of TCEs and the sales of indigenous arts and crafts. By way of comparison, consideration is now given to approaches to the protection of indigenous cultural heritage in Australia, New Zealand and the United States of America.

Australian Law

Indigenous art is significant to the Australian economy, and furthermore, has been growing remarkably over the past 10 to 15 years (Bowrey, 2009). This trend applies for souvenirs as well as for high quality art. Prices in the fields of art, craft, and tourism have risen according to the increasing demand. Nevertheless, in the trade of Indigenous arts and crafts, exploitation occurs in cases where commercial traders sell or offer their products at a much lower price. They are able to do so as they have been importing “Aboriginal” art from Indonesia. One specific example is when Didgeridoos are offered for about A\$10 to A\$20 (approximately one tenth of the price Aboriginal artists would receive from a fair business) (Thomas Scheele, 2007).

One of the legal mechanisms is by enacting a specific legislation to protect aboriginal art through the Protection of Moveable Cultural Heritage Act, 1986. This Act restricts the export of items that are of significance to Australia’s Cultural Heritage. In 1999, the minimum age of items of heritage value to be exported without permit was reduced from 30 to 20 years and the value of art was increased from \$5,000 to \$10,000. Many Indigenous communities applaud this Act as it assists in the monitoring of important Aboriginal art leaving the country.

The Competition and Consumer Act, 2010 (replacing the Trade Practices Act, 1974) makes it an offence to engage in misleading and deceptive marketing. This restricts the sale and marketing of aboriginal

arts that are not genuine. In addition, the Australian Consumer and Competition Commission (ACCC) is vested with powers to prevent misleading or deceptive conduct by prosecuting those who falsely market products as ‘Aboriginal-made’ or ‘authentic Aboriginal merchandise’. As indigenous people and discerning consumers become aware of products falsely claiming indigenous attribution, they may draw this to the attention of the Commission. In addition, labelling and protocols are also aimed at benefiting indigenous arts producers. For instance, the Indigenous Art Code provides that ‘Dealer members must not make false and misleading representations or engage in conduct which constitutes misleading or deceptive conduct or conduct that is likely to mislead or deceive, when dealing with a person in connection with an artwork.’ (Terri Janke, 2012)

New Zealand Law

Over the past few years, an increasing number of companies in New Zealand and overseas have started using Maori imagery and text in order to increase the commercial value of their products. Two of the most well-known examples are the use of Maori and Polynesian names for a range of toys by Lego and the use of Maori imagery by Sony Playstation in a game called the Mark of Kri. (Zografos, 2005). In addition, a growing quantity of imitation products, mass-produced offshore or by non-Maori artists, have appeared on the New Zealand market, mainly in the field of tourism, to the detriment of local authentic works.

In response to growing Maori concerns about the inappropriateness of existing intellectual property laws to protect their traditional knowledge and TCEs, New Zealand amended its trademark law of 1953 to incorporate a mechanism by which the interests of sections of the community, particularly Maori, can be taken into account during the trademark registration process (Fernando, 2013-2014). In particular, Section 3(c) of the New Zealand Trade Marks Act 2002 Act disallows the registration of a trademark if it is culturally offensive to the Maori. The Act also envisages the creation of an advisory committee to help the Commissioner of Trade Mark assess the potential offensiveness of a trademark.

As opposed to a trademark specifying a specific producer or manufacturer of a goods or services, a certification mark is usually applied to a product by an outside "certifying" body. Certification marks are an indication to consumers that certain standards have been met and certification marks therefore have a "stamp of approval" function. A renowned example is *toiho*™, which is a registered certification trademark to certify that the arts and crafts are made by a person of Māori descent and to provide a mark of quality. It was developed and implemented in response to calls from Maori to assist them retain ownership and control of their *taonga* (treasures) and maintain the integrity of their art culture. While, overall, the introduction of the *toiho*™ mark has been beneficial to artists and consumers

alike, the certification mark was disinvested in 2010. Some of the reasons for the disinvestment were that: (a) *toiho*™ no longer fitted in the strategic priorities of Creative New Zealand; (b) there was insufficient funding and resources to run the scheme appropriately; (c) the breadth of the scheme's design was too wide. Despite the disinvestment, artists have not been deregistered and the *toiho*™ scheme is currently in a transition phase. One possible plan for its future would be for a group of Māori artists to create a trust to take over the *toiho*™ mark.

In short, the New Zealand Trade Marks 2002 does not aim to provide a general protection of Maori culture and heritage, but only practical measures to deal with cultural offensiveness. Even if the registration of a trademark may prevent the registration of offensive and deceptive marks, it will not prevent the offensive and deceptive use of indigenous names, signs and symbols where the user does not seek to register a trademark, and nor will it prevent the registration of indigenous names, signs and symbols by third parties where the signs are not considered offensive or deceptive. In the same way, the use of a certification mark or authenticity label will not, in itself, prevent the sale of imitation products in the marketplace (Zografos, 2012).

United States Law

In the United States, indigenous intellectual property protections slowly emerged through privatised programmes (Willis, 2006). Private organisations

initiated a movement in the 1970s to protect the marketing of indigenous arts and crafts with the creation of the Indian Arts and Crafts Association (IACA). At that time, legislation to protect the market of indigenous arts and crafts was barely in existence, so the IACA came together demanding the dignity of authentic indigenous arts and crafts. As a result of the IACA's advocacy, the Indian Arts and Crafts Act of 1990 was enacted. Under the Act, civil and criminal penalties may be imposed for unlawfully misrepresenting arts and crafts as those of a federal or state recognised American Indian tribe. An artisan must truthfully mark all works with the proper tribal affiliation to prevent misuse and protect traditional knowledge needed for constructing these artistic works.

Another influential protection mechanism from 1990 is the Native American Graves Protection and Repatriation Act (NAGPRA), which can be found at 25 U.S.C. § 3001. The NAGPRA is aimed at protecting Indigenous artefacts with particular cultural value. Unfortunately, this statute is limited to protection of human remains and items of cultural heritage that are specifically held by museums or institutions receiving government funding (Schuler, 2013).

In relation to intellectual property rights, the USPTO has created a database for the voluntary registration of Indigenous insignia and symbols of state and federally recognised tribes known as the USPTO Database of Official Insignia of Native

American Tribes. However, although there are guidelines for entering insignia, there is no investigation as to whether this is the official insignia of the registering tribe (Genia, 2012). Since the database is voluntary and is merely a collection of insignia, no intellectual property protections are gained through the database, like trademark rights. The database is used as a reference device to aid in examining trademark applications to refuse admittance of marks that "falsely suggest a connection with particular institutions" per 15 U.S.C. § 1052(a)(2)(a).

CONCLUSION & WAY FORWARD

The misappropriation and diminution of TCEs in Malaysia has been the result of multi-factors that are legal and non legal. TCEs in Malaysia are suffering from the threat of commercialisation from acquisition of customary land and cultural identity (Nicholas 2000, Masron 2014). TCEs have also suffered from being diluted according to demands from tourists, such as the *Sewang* dance. Mass productions dilute TCEs and the spiritual values attached to them. When TCEs lose their spiritual values, adulteration of cultural identity becomes a consequence. The new resettlement to replace the customary land is totally a different environment, therefore the indigenous peoples are not able to carry out their normal cultural activities and rituals. As a result, the culture is lost due to the detachment of the indigenous peoples with their customary land. To this effect, Rameli Dollah, an *Orang Asli*,

lamented, 'to chase *Orang Asli* from their land means to destroy their identity and life'. Acquisition of customary lands by governments cause indigenous people to be unable to continue with traditional customary practices hence diminishing their cultural identity. Indigenous peoples also suffer from the threat of assimilation and integration policy. For example, they marry 'outsiders' which automatically causes their cultural identity to be diluted (Jabatan Orang Asli Daerah Alor Gajah, personal communication, April, 2015).

It is submitted that laws governing the protection of indigenous peoples in Malaysia are out-dated as they merely define who '*orang asli*' are. The *Jabatan Kemajuan Orang Asli* (JAKOA) was created as the 'guardian' to *Orang Asli* where they treat them as groups of peoples requiring 'special protection'. As a matter of fact, the *Orang Asli* wants to live in peace, undisturbed by any socio-political agendas from outsiders. It was also discovered that land rights under the Aborigines Peoples Act 1954 are very weak. When government acquires aboriginal lands, cultural traditions are similarly taken away. Mechanisms to register or gazette aborigines' lands should therefore be improved. We must emulate the good practices of the Philippines, for example, who have a broad range of indigenous rights including the right to ancestral domains, right to self-governance and empowerment, social justice and human rights and cultural integrity (Tobias, 1998-1999).

It was unsurprising to discover that cultural identity diminishes with TCE through erosion of memory. More indigenous peoples prefer a modern life compared to the traditional ones (Salim Jantan, personal communication, March, 2015). In contrast with the *MahMeri*, many young people are involved in cultural preservation. The *MahMeri* does not mix with the Malays, making them feel proud of their cultural uniqueness. Contrary to popular view, modern lifestyle does not inhibit the *Mah Meri* to continue with their animistic beliefs. Further, many indigenous craftsmen (such as '*Bah Dek Crafts*' in Tapah, Perak) make crafts based on demands and incentives from the government. If there are no demands, there will be no incentive to produce indigenous arts and crafts. As a result, many young generations of *Orang Aslis* are no longer interested in the traditional lifestyle as they adopt modern gadgets and entertainment (Salim Jantan, personal communication, April, 2015). As such, there is a lack of transmission of TCEs from older generations to the younger ones resulting in the loss of an appreciation of their roots and identity among the young *orang asli*.

The fieldwork demonstrates that TCEs in Malaysia are in a state of dilution due to various identified factors including the waves of modernisation. Available laws on the protection and preservation of TCEs in Malaysia are arguably too weak to prevent this from happening. It is imperative that we revisit these laws and consider stronger measures for the protection of TCEs in

Malaysia. Perhaps it is also time to consider amending the Aborigines Peoples Act 1954 by introducing special provisions on rights over culture whilst at the same time strengthening their rights over communal lands from which TCEs revolve.

Moreover, the only possible legal protection is through the heritage protection law. While heritage protection is perfect for tangible cultural heritage, its effectiveness over intangible cultural heritage, including TCEs, leaves a lot to be desired. The designation process denies protection to the whole range of TCEs, with only certain 'widely publicised and promoted' TCEs to be placed within the system.

Practices in Australia, New Zealand and the United States of America attest to the fact that what is needed is not a single piece of legislation that deals with all aspects of commercialisation or dilution of TCEs. What can be seen in Australia is a combination of consumer laws targeted against deceptive practices in the sales of indigenous arts and crafts. Strong provisions are introduced to ensure that the aboriginal arts and crafts are not expropriated to other countries. New Zealand, on the other hand, maximises intellectual property protection in the form of certification marks. Revered images of the Maori tribe are given special protection and recognition and this keeps them away from being used outside their community or adulterated by others. In order to do this effectively, a database containing the sacred symbols and insignia of the Maori are created and maintained. The United States,

on the other hand, focuses on the sale of Indian arts and crafts, making it a criminal offence to sell fake items. The USA also maintains a database containing insignia and symbols for defensive purposes.

While it is not possible to eliminate altogether the dilution of TCEs as a result of modernisation and other social factors as have been identified through the field work, it may be possible to prevent them from being misappropriated through the sales of their arts and crafts or improper use in trademark registrations. While dilution and misappropriation are two separate processes, they are intertwined. Dilution can further lead to misappropriation. In this context, both must be reduced, if not eliminated. It is in this context that Malaysia must emulate the practices of New Zealand, Australia and the United States of America that have a long standing tradition in this area.

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Sexual Harassment: Liability of Sexual Harasser And Employer in Tort

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ABSTRACT

Sexual harassment conducts such as patting, pinching, constant brushing or touching an inappropriate area of another person's body, making sexually-related comments, jokes and graphic drawing, making degrading comments on one's appearance and displaying sexually suggestive pictures, among others, are examples of situations in which the honour and dignity of an employee is violated. Such conduct, if allowed to go unchecked, would create an 'intimidating, hostile and offensive work environment that can adversely affect the industrial relations climate in the organisation'. In most cases, the victims get annoyed, angry and even embarrassed by the unwanted sexual attention, as it belittles their person. The aggrieved worker may experience emotional trauma, anxiety, nervousness, depression and low self-esteem. Further, it may also affect the employee's morale and job performance such as causing difficulty in concentrating on the job. Employers may avoid liability if they exercise reasonable care to prevent or correct promptly any harassing behaviour. If a co-worker is involved, employers are generally liable if they knew or should have known of the misconduct, unless they can show that they took immediate and appropriate corrective action. Further, failure to respond to *bona fide* complaints of sexual harassment would constitute a breach of the implied trust and confidence term. In the aforesaid breach,

the aggrieved employee may resign and claim constructive dismissal. This paper explores the possible causes of action in tort against the assailant and the employer of the aggrieved worker for general and specific damages for the alleged assault and battery arising from incidents of sexual harassment.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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Keywords: Sexual harassment, employer liability, vicariously liability

INTRODUCTION

The relationship between employers and workers is fiduciary as it is one of trust and confidence. This relationship imposes a duty on employers to protect workers' safety and health at the workplace. The workplace should not only be free from dangerous and hazardous substances, but also from all forms of sexual harassment and inappropriate sexual conduct. Further, as reputation is part and parcel of human dignity, an employer is under moral and legal obligation to ensure that all employees are treated with respect and courtesy. Reasonable care and support must be given to employees so that they can carry out their job without harassment and disruption by fellow workers and/or customers of the company, among others. An employer who fails to take proactive steps to ensure a hostile free work environment may lead the affected employee to resign from employment and thereafter allege constructive dismissal (Mohamed, 2011). A serious incident of sexual harassment such as uninvited touching of the victim's intimate parts, such as the sex organs, may invite a criminal charge of sexual assault against the harasser. This article examines the victim's possible cause of action in tort against the harasser for unwanted or unwelcomed sexual conduct and the personal and vicarious liability of the employer for harassment at the place of work.

Safe Place of Work: Employer's Duty

An employee should feel secure at the workplace and it is the duty of the employer to provide not only a safe system of work but also a safe place of work. The duty to provide a safe place of work relates to the employer's responsibility to ensure that the work site is reasonably safe (Anantaraman, 2004). The workplace should be free from hazards, and this includes all forms of harassment such as degrading words or pictures (like graffiti, photos or posters), physical contact of any kind and sexual demands. In *Gelau Anak Paeng v Lim Phek San and Ors* (1986), Roberts CJ stated:

The common law duty of an employer is to take reasonable precautions to protect his workers against danger. He is not required to insure them and to protect them against all risks of any kind but he is obliged to provide a reasonably safe system of work and to take reasonable care for his employees.

Reasonable safety and care demands *inter alia* that the employer or those to whom power is delegated for running the organisation must ensure that employees are not subjected to loss of dignity, self-respect and esteem, whether the sexual harassment was perpetrated by superiors, peers or subordinates. They should take necessary measures to protect workers from unreasonable behaviour directed at a worker or groups of workers that creates a risk to health and safety. The employer's responsibility to provide a safe place of work is not restricted to the actual work

site but may also include any area that the employee uses in connection with and in furtherance of the employment (Mohamed, 2004).

The employer may be in breach of duty of care when he knows that acts of sexual nature are being carried out by his employees during their employment, and that these acts cause physical or mental harm to a particular fellow employee but does nothing to supervise or prevent such acts. The employer may also be in breach of that duty if he can foresee that such acts may happen and if they do, that physical or mental harm may be caused to an individual. Failure by the employer to provide a safe place of work may well expose the employer to a civil claim for negligence. In *Waters v Commissioner of Police of the Metropolis* (2000), Lord Hutton stated that:

A person employed under an ordinary contract of employment can have a valid cause of action in negligence against her employer if the employer fails to protect her against victimisation and harassment which causes physical or psychiatric injury. This duty arises both under the contract of employment and under the common law principles of negligence, although an employer will not be liable unless he knows or ought to know that the harassment is taking place and fails to take reasonable steps to prevent it.

Whether or not the employer was in breach of the duty of care is determined

with reference to the test propounded by Diplock J in *Houghton v Hackney Borough Council* (1961), namely, that queries if the employer “has...taken reasonable care, paying special attention to the risk and paying reasonable attention to other circumstances”. This test was further elaborated on by the Australian High Court in *Turner v South Australia* (1982). The Court stated:

where it is possible to guard against a foreseeable risk which, although perhaps not great, nevertheless cannot be called remote or fanciful, by adopting a means which involves little difficulty or expense, the failure to adopt such means will, in general, be negligent.

Hence, the employer is to investigate the alleged acts of sexual harassment and where the allegation is well-founded, necessary action should be taken against the harasser. As noted earlier, employers would be in breach of duty of care if they fail to take reasonable steps to prevent incidents of sexual harassment from recurring at the workplace. In *Melewar Corporation Bhd v Abu Osman* (1994), the Industrial Court held *inter alia* that the employer, upon receiving credible information of complaints committed against the employee, was under a duty to inquire into the allegations. If, pursuant to a due inquiry, the allegation of sexual harassment is proven, the employer has the duty to act firmly against the errant employee.

Sexual Harassment: An Actionable Tort

Distinct from a dismissal case tried in the Industrial Court, if harassed employees choose to claim for damages arising from the harassment, they could bring an action against the harasser through tortious action in the civil courts and compensation would be awarded depending on the nature of the damage due to the harassment. A civil action may lie against the perpetrator individually under the law of torts for a cause of action based on assault and battery or intentional infliction of emotional distress. A threat to cause harm to the victim can be considered a tortious assault, so long as the threat of harm is imminent, such as the shaking of a fist or the waving of a knife at a person to signify a forthcoming blow (Linden & Feldthusen, 2011).

A sexual assault or sexual abuse involves one person intentionally putting another person in fear of harm by threats, words or gestures of a sexual nature without bodily contact. A sexual battery claim may lie if it involves physical touching or intentional infliction of unlawful force on another person. For example, in *Mas Anum Samiran v Othman Mohamed* (2015), the plaintiff, a former personal assistant of the defendant, was sexually harassed physically and verbally by the defendant. A civil claim was successfully brought in the Sessions Court and a sum of RM25,000 was awarded as damages for the civil wrong inflicted on the plaintiff. Again, in *Collier v Warren Shepell Consultants Corp and Anor* (1994), an action was commenced by the plaintiff in the Ontario Court against

the defendants for damages for sexual assault. The plaintiff's civil claim was essentially based on the persistent attempts of the second defendant, being his superior, to seduce him into engaging in homosexual activity, which eventually led to his resignation from the company. In *Sheridan v Kelly and Another* (2006), the plaintiff alleged repeated episodes of sexual assault by the first defendant.

It must be added that a claim for damages for assault and battery is actionable *per se*. In *PR v KC Legal Personal Representative of the Estate of MC deceased* (2014), Baker J observed:

The essence of a claim for assault and battery and trespass to the person is the intentional affliction of injury to that person. No proof of actual damage is required for a plaintiff to succeed in recovering damages arising from the tort of trespass to the person or assault....The essence of the tort of assault or trespass to the person is that a plaintiff may be awarded damages even in the absence of actual injury to that person. The quantum of damages ultimately awarded by the court may depend on the fact and nature of injury suffered, but it is not a prerequisite to the bringing of an action arising from this tort that actionable injury be suffered.

Further to the above, verbal abuse, intimidation, stalking and the like can support a claim of intentional infliction of emotional distress. The outrageous conduct of the perpetrator may also entail a claim

for mental distress damages. For example, in *Yuen Sha Sha v Tse Chi Pan* (1999), the defendant's act of video-taping the plaintiff without her consent dressing and undressing was held to constitute an act of sexual harassment and the Hong Kong District Court awarded *inter alia* a sum of \$50,000 as damages for injury to feelings. It must be added that a civil action for damages is primarily an attempt to place the victim as much as possible in the state she or he would have been but for the sexual abuse. Furthermore, the civil justice system can serve as a tool to deter perpetrators.

Vicarious Liability of the Employer

In cases where an employee has sexually harassed a co-worker or a customer and where it is proven that the employer has not taken steps to rectify or prevent it, the co-worker or customer can also bring a tort action against the employer. For example, if the incident occurred at the place of business, the employer can also be liable based on a negligent supervision claim or a failure to provide a safe place of work. Litigation against the employer is founded on the basis of failure to use reasonable care to protect its workers against foreseeable sexual assault.

Under the doctrine of vicarious liability, the employer can be found to be liable towards a third party for the tortious acts of its employees provided that the tort occurred during the course of employment.

Vicarious liability refers to a situation where A is liable to C for damage or injury suffered by C due to the

negligence or other tort committed by B. A need not have done anything wrongful and A further need not owe a duty of care to C. The most important condition for imposing liability on A is the nature of relationship between A and B and the tort committed by B is connected to the nature of this relationship. This relationship is usually that of master and servant or employer and employee and as between a principal and his agent. (Talib, 2003).

In *John Doe v Bennett* (2004), a Canadian case, McLachlin CJ stated:

The doctrine of vicarious liability imputes liability to the employer or principal of a tortfeasor, not on the basis of the fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise.

In John Doe's case, the Supreme Court of Canada considered the liability of a church for the sexual assault of one of its priests.

Before doctrine can be imputed against the employer for the wrong committed by employees, certain requirements must be fulfilled, namely: (a) there must be a tortious act or wrong; (b) relationship between the person alleged to be vicariously liable and the tortfeasor must be shown; and (c) the tort was committed within the course of employment. For an act to be considered

within the course of employment, it must either be authorised or be so connected with an authorised act that it can be considered a mode, though an improper way, of performing the said act. In deciding whether an employee's tort has been committed in his or her employment, the so-called 'Salmond test' is usually applied.

In *Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals* (2015) Mohd Zawawi bin Salleh JCA stated:

Salmond maintained that a wrongful act done by a servant is deemed to be in the course of employment if it is either: (i) a wrongful act authorised by the master; or (ii) a wrongful act and unauthorised mode of doing some act authorised by the master. Further, a master is liable even for acts which he or she has not authorised, provided they are so connected with acts which he or she has authorised, that they may be rightly be regarded as modes - although improper modes - of doing them. So, if the unauthorised and wrongful act of the servant is not so connected with the authorised act so to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting the course of his or her employment, but has gone outside it.

In *Dyer and Wife v Munday and Another* (1895), Lord Esher MR stated:

The liability of a master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of

carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

Lopes LJ, delivering a separate judgment, in the above case, stated:

The law says that for all acts done by a servant in the conduct of his employment, and in furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

Rigby LJ, in "Dyer and Wife", explained the expression 'within the course of employment' thus:

The law on the matter was laid down by Willes J in Bayley v Manchester, Sheffield, and Lincolnshire Ry. Co. (1)": 'A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment.

In *Keppel Bus Company Ltd v Sa'ad bin Ahmad* (1972), it was stated that the expression 'within the course of employment' is not limited to the obligations which lie on an employee by

virtue of his contract of service. It extends to acts done on the implied authority of the master. The principle in the Keppel Bus Company case was followed by the Court of Appeal in *Maslinda Ishak v Mohd Tahir Osman & Ors* (2009). In particular, the Court stated:

The principle of the employer being responsible for the act of its employee, in the course of his employment, was applied in its full force in Keppel Bus Co Ltd v. Sa'ad bin Ahmad (1972). In that case, the Court of Appeal of Singapore found that there was sufficient evidence for the trial judge to conclude that the conductor in hitting the respondent in a very high handed manner, was acting in the course of employment.

The doctrine which makes the employer responsible for the act of its employee may be illustrated with reference to the case of *Maslinda Ishak v Mohd Tahir Osman & Ors*. In *Maslinda Ishak's* case, the appellant and several colleagues were arrested by the Federal Territories Islamic Religious Department (JAWI) enforcement officers and RELA members. After the arrest, they were led into a lorry. At about 12.50 a.m., when the vehicle was in Cheras, the appellant had requested to go to the toilet but her request was denied. Instead, she was told to relieve herself inside the lorry. She did as directed and was shielded by a scarf held by her friends. The first respondent then pushed her friends away and took photographs of her relieving herself with his camera. The incident had injured her emotionally.

The High Court found the first respondent liable for his conduct in taking the pictures, an invasion into privacy, and ordered him to personally pay the appellant damages, a sum of RM100,000. It was stated that what the first respondent did was outside the scope of his duty and he did it purely on his own accord. In other words, the first respondent was acting on a frolic of his own i.e. he was solely responsible, and the other respondents could not be associated with his actions. On appeal, the Court of Appeal held that the respondents, the Director-General of RELA, the Federal Territories Islamic Religious Department and the Government of Malaysia, were jointly and severally liable to pay the said damages because the act of the first respondent was done within the course of employment. In particular, Suriyadi Halim Omar JCA, delivering the judgement of the Court of Appeal, stated:

The first defendant therefore was not there on his own volition but on instruction. He not only was under the direct supervision of RELA, but on that particular night was also subject to the direction of JAWI, with his duties shuttling from ensuring the security of those who participated in the exercise, and to keeping an eye over those arrested. As he took the unauthorized photographs, whilst in the course of the work or employment for which he was instructed to carry out, at a time when the operation was in progress, the respondents must be held vicariously liable.

From this case, it is seen that on the proof of the requirements of vicarious liability, the employer, as the principal, could be liable for any wrongful act done or any neglect or default committed by an employee in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done or any neglect or default committed by his agent. Every case is decided on its own peculiar facts. The tortious liability of the harasser and the employer is further illustrated with reference to the selected local and foreign decisions in the table below.

TABLE 1
Selected Cases on the Tortious Liability of the Harasser and the Employer

Title of the case	Allegation	Decision
<i>Mas Anum Samiran v Othman Mohamed</i> (Malaysia)	The plaintiff, a former personal assistant of the defendant, alleged that she was sexually harassed by her former boss, the defendant. The allegation included physical and verbal harassment by the defendant throughout the time she served as his personal assistant. In one incident, the plaintiff claimed her headscarf was undone and exposed her chest area. When the plaintiff quickly pulled down her scarf to cover the area, the defendant said: "Why are you hiding it? I like to see your chest. Nice. Open it for me." Because of the repeated incidents of sexual harassment, the plaintiff was forced to resign from her job.	As the plaintiff had succeeded in proving the elements of sexual harassment by the defendant, the Sessions Court awarded the plaintiff a sum of RM25,000 as damages.
<i>Bishop v Takla</i> (2004) (Australia)	The applicant alleged long-term sexual harassment by the first respondent that intensified in the final four months of applicant's employment. The application for damages for sexual harassment was based on the alleged unwanted remarks, brushed contact and actual physical contact.	The Federal Magistrates Court held <i>inter alia</i> that the first respondent was liable for damages minus amount paid at settlement.
<i>Burgiss v Clisby Pty Ltd</i> (2004) (Australia)	The plaintiff claimed damages for sexual harassment in the course of employment. The plaintiff alleged that the defendant had made several sexually-orientated comments against her.	The court found in favour of the plaintiff and awarded her damages of \$3000.
<i>Frith v Glen Straits Pty Ltd t/as Exchange Hotel</i> (2005) (Australia)	The applicant alleged sexual harassment by the hotel director. The alleged sexual harassment included an overnight stay in the hotel when the applicant was only employed for two days at the hotel.	The court held that the hotel director's conduct amounted to sexual harassment. The employer was vicariously liable for the actions of the hotel director. Damages awarded were as follows: \$5000 for economic loss and \$10,000 for non-economic loss.
<i>South Pacific Resort Hotels Pty Ltd v Trainor</i> (2005) (Australia)	The respondent alleged that she was sexually harassed by a co-worker.	The learned magistrate awarded the respondent a sum of \$17,536.80 as damages for sexual harassment. The employer was also held vicariously liable.

Table 1 (continue)

Title of the case	Allegation	Decision
<i>Zhang v Kanellos</i> (2005) (Australia)	The applicant brought a civil claim against the defendant for damages for sexual harassment. The applicant alleged that she was sexually harassed by her supervisor and the allegations included pinching her bottom on three occasions and squeezing her breast.	The application was dismissed as the applicant failed to establish the alleged acts of sexual harassment.
<i>Kraus v Menzie</i> (2012) (Australia)	The applicant alleged that almost from the start of her employment she was sexually harassed by the first respondent by unwelcome advances and conduct, including inappropriate and unwanted gifts of lingerie, sex toys and scanty clothing and text and multimedia messaging containing explicit and pornographic content.	In allowing the applicant's application, the court awarded her damages for those items of conduct at the rate of \$12,000 in total. The respondents were jointly to pay the applicant the aforesaid amount.
Alexander v Cappello and Anor (2013) (Australia)	The plaintiff alleged that the second defendant sexually harassed her during the course of her employment by actions which included asking her whether she was offended by pornography, asking her for a massage and sex, touching her bottom, pushing his groin in her face, pointing at his penis and telling her to come back, he had something to show her and trying to grab her breasts and vagina.	The Federal Circuit Court of Australia found that the plaintiff had succeeded in proving the allegations and accordingly awarded her damages. The first defendant being her employer was also held vicariously liable.
<i>L v Burton</i> (2010) (Hong Kong)	The defendant sexually harassed the plaintiff during the plaintiff's short-lived employment in the company. The employment relationship between the plaintiff and the defendant deteriorated when she refused the sexual advances by the defendant. The plaintiff's dismissal from the company was extremely high-handed and openly oppressive abuse of the plaintiff's personal dignity. The plaintiff was extremely distressed and humiliated. As a result of the sexual harassment she suffered anxiety, stress, humiliation, physical injury and insomnia.	The court found in favour of the plaintiff and awarded her a sum of \$100,000 as damages for loss flowing from both the acts of sexual harassment and dismissal.
<i>Yuen Sha Sha v Tse Chi Pan</i> (1999) (Hong Kong)	The defendant had without the knowledge or consent of the plaintiff, secretly recorded images of the plaintiff undressing and changing her clothes. In a civil action against the defendant, the plaintiff alleged that she suffered loss and damages by reason of the sexual harassment and prayed <i>inter alia</i> for compensation for injury to feelings pursuant to s 76(6) and 76(3A)(e) of the Sex Discrimination Ordinance.	In allowing the application, it was held that the defendant's video-taping of the plaintiff without her consent dressing and undressing constituted an act of sexual harassment that was rendered unlawful under s 39(3) of Pt IV of the Ordinance. In awarding a sum of \$50,000 as damages for injury to feelings, which is specifically provided for under s 76(6) of the Ordinance, the court noted that the plaintiff, "a student and not, at the time, a person enjoying a reputation in the community, the injuries done to her were mainly to her feelings and the tape had not been shown to a large section of the public".

Table 1 (continue)

Title of the case	Allegation	Decision
<p><i>Richardson v Oracle Corporation Australia Pty Ltd and Anor</i> (2014) (Australia)</p>	<p>The plaintiff who worked as a consulting manager in the Sydney office of the first defendant alleged that she was sexually harassed by the second defendant. She brought proceedings against the defendants under the <i>Sex Discrimination Act 1984</i> in relation to the second defendant's conduct towards her and the subsequent handling of her complaint by the employer. The conduct complained of included a series of humiliating sexual comments and sexual advances by the second defendant towards the plaintiff over a number of months.</p>	<p>The court at first instance found that the second defendant had sexually harassed the plaintiff and that the first defendant was vicariously liable for that conduct. The court awarded the plaintiff \$18,000 as general damages for the distress occasioned by the second defendant's unlawful conduct. On appeal, the Federal Court of Australia increased the damages to \$100,000. It was held <i>inter alia</i> that the award of \$18,000 in general damages was "<i>manifestly inadequate</i>" given the physical, psychological and other non-economic loss and damage caused by the sexual harassment.</p>

CONCLUSION

A victim of sexual harassment may file a tortious lawsuit against the harasser in civil court for assault and battery. A claim for battery may lie when the abuse involves physical touching. If the victim was threatened with physical sexual abuse or had been assaulted, an assault claim could be maintained. A claim of emotional distress would lie when it involved verbal abuse, intimidation and stalking, among others. Where the claim is well-founded, the court may award damages for the physical and emotional harm suffered by the victim. The employer may be liable to the victim for the tortious acts of its employees committed within the course of employment. The victim may consider filing a suit for vicarious liability against the employer for sexual harassment done by another employee of the organisation. However, before the employer can be

made vicariously liable as principal for any claim in tort, the employee who was responsible for the alleged tortious act must be made a party and his liability be established. To successfully bring a vicarious liability claim, the plaintiff must prove the following elements: (a) there was an employee and employer relationship between the parties; (b) the act was done in the course of employment, and (c) the committed act was either authorised by the employer, or a wrongful and unauthorised mode of an act that was authorised by the employer. The abovementioned claims are alternative to other available remedies of the victim employee, namely, resigning from employment and alleging constructive dismissal and lodging a police report pursuant to the Criminal Procedure Code for various sexual offences governed by the Penal Code.

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Saudi-Led Military Intervention in Yemen and International Law

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ABSTRACT

On 25 March 2015, Saudi Arabia launched a military intervention, known as “Operation Decisive Storm”, in civil-war stricken Yemen, changing the status of the conflict from ‘non-international armed conflict’ (NIAC) to ‘international armed conflict’ (IAC). Saudi Arabia conducted the operation in response to a *de jure* Yemeni government request, headed by President Abd Rabb Mansur Hadi, and in coordination with a coalition comprising the United Arab Emirates, Qatar, Kuwait, Bahrain, Jordan, Morocco, Sudan, Pakistan and Egypt. The United States supported the coalition by providing ‘logistical and intelligence support’. The *de facto* Yemeni government was led by Abdul Malik al-Houthi (a Zaidi Shia Muslim) and previously, by former President Ali Abdullah Saleh (a Sunni Muslim). The *de facto* government was supported by Iran. Some observers described the war in Yemen as a proxy war fought on behalf of Iran and the Saudi government while the victims of the war were the poverty-stricken innocent civilians of Yemen. The conflict in Yemen raised numerous questions that this paper attempts to answer. Does Operation Decisive Storm show lawful use of force? Is Iran’s support of the Houthi-led *de facto* government lawful? Is this conflict an international armed conflict or a non-international armed conflict? Does international humanitarian law (IHL) apply in this conflict and if so, do the parties to the conflict abide by their obligation under international law? These questions will be discussed in this paper with reference to the relevant international law provisions using primary sources as well as subsidiary sources of the law.

Keywords: Yemen, Saudi-led coalition, military intervention, legality of the use of force, IHL

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Yemen is one of the oldest centres of civilisation in the Near East with fertile lands and is a strategically important country. Sadly, due to mismanagement, corruption and internal conflict, Yemen

is impoverished and plagued with power struggles and armed conflicts that have serious implications for the region and the world. The conflict in Yemen is between numerous groups, mainly forces loyal to the beleaguered President, Abdrabbuh Mansour Hadi, supported by the southern Sunni militia known as the Popular Resistance Committee and local tribesmen, and Houthis and their ally, former President Ali Abdullah Saleh. Both Hadi and the Houthis are opposed by al-Qaeda in the Arabian Peninsula (AQAP). All these divergent forces are opposed by another and yet more brutal armed group known as the Islamic State (Daesh). The Houthis and Saleh forced President Hadi to flee to Saudi Arabia. At the request of President Hadi a coalition led by Saudi Arabia intervened in Yemen and launched air strikes on Houthi targets. The coalition comprises five Arab Gulf states and Jordan, Egypt, Morocco and Sudan.

The issues of concern that this article intends to address are whether Iranian support to the Houthis and the Saudi-led intervention in the conflict in Yemen show lawful use of force in the sight of international law regulating the use of force. Another issue of concern is whether the conflict in Yemen has reached the required legal threshold for armed conflict. This may lead to the question of whether the Saudi-led and the Iran intervention has affected the nature of the armed conflict in Yemen and whether the belligerents involved in the conflict are complying with their obligations under international

humanitarian law (IHL). Lastly, the paper considers whether the conflict in Yemen could have been resolved through other methods of dispute resolution or diplomatic means rather than the use of force.

Military Intervention and International Law

It is a trite law that states should refrain from intervening in the sovereign independence of a state. Use of military force to intervene in the affairs of an independent state generally violates the established customary principle of non-involvement and the enshrined prohibition of the use of force under the United Nations Charter (UN Charter) (*Nicaragua v United States*). Article 2(4) of the UN Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or any other manner inconsistent with the purposes of the United Nations.” This provision of the Charter specifically prohibits the use of military force against the sovereignty of a state and does not preclude the exertion of economic or political pressure on a state. The prohibition of the use of force in this context does not also cover cases of indirect intervention as it has been established by the International Court of Justice (ICJ) in the case of *Nicaragua v United States*. It is important to mention that the provision of Article 2(4) of the UN Charter covers not only the actual use of armed force but the threat of use of force. Accordingly, the “threat of use of force”

includes situations in which an ultimatum is given announcing recourse to use of military measures if certain demands are not accepted. Thus, both threat and actual use of armed force against the territorial integrity of a sovereign state is prohibited in international law (Ruiz, 1997).

However, the prohibition of the use of armed force contained in the UN Charter is not absolute as the Charter appreciates that certain situations may warrant the use of force in international relations. In other words, the Charter has provided for certain exceptional circumstances where the use of force is allowed. It permits the use of force in two broad situations i.e. military force may be used in self-defence under Article 51 of the Charter and military force may also be used if it is authorised by the UN Security Council under Chapter VII of the UN Charter. It is obvious that in the case of the conflict in Yemen, there has been no UN Security Council resolution authorising the use of force in accordance with Chapter VII of the UN Charter. As such this paper concentrates on self-defence being the principle of international law mostly relied upon by state involved in conflict such as the conflict in Yemen.

In the case of use of force in self-defence, Article 51 of the UN Charter has allowed a member state to use its armed forces against another state in individual self-defence or collective self-defence. The Article provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed

attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

It is obvious from the wording of the Charter that self-defence may be individual or collective. Self-defence envisaged under the Charter is a lawful use of force by a state in line with the conditions prescribed under international law. In essence, a state is allowed to resort to use of armed forces in response to an unlawful use of force against its territorial integrity or sovereignty. According to the provisions of Article 51 of the UN Charter, it is a fundamental (inherent) right of every sovereign State to deter aggression against its territory in order to protect its territorial sovereignty. The principle of self-defence by states in protection of their territorial sovereignty is a well-established customary norm that is to be exercised in a defensive but not retributive manner.

It is significant to mention that the right of states to resort to use of force in self-defence has its limitations. Therefore, for a state to exercise the right of self-defence in this respect, there must be “a necessity

of self-defence”, that is, the action taken in self-defence must be in response to an armed attack. It has been emphasised that the phrase “if an armed attack occurs” contained in the provision of Article 51 of the UN Charter must be given its ordinary meaning. The ICJ in *Nicaragua v United States* stated that the ordinary meaning of the phrase was that the exercise of the right of self-defence was subject to the State concerned having been the victim of an armed attack and that reliance on collective self-defence did not remove the need of this requirement. Perhaps this position excludes other extraneous meaning to be given to the phrase “if an armed attack occurs”, thereby preventing the imputation of “pre-emptive self-defence” within the scope of the principle of self-defence. In line with this argument, Philip C. Jessup asserted that:

Article 51 of the Charter suggests a further limitation on the right of self-defence: it may be exercised only ‘if an armed attack occurs’. This restriction in Article 51 very definitely narrows the freedom of action States had under traditional international law.

The question now is whether intervention in the conflict in Yemen is in consonance with the spirit of international law regulating the use of force.

Military Intervention in Yemen

In view of the discussion above, it is clear that the UN Charter prohibits the use of force in international relations but it has,

however, provided for two circumstances that may necessitate the use of force against the territorial sovereignty of a state. The two exceptions are use of military in self-defence as well as use of force as authorised by the UN Security Council under Chapter VII of the UN Charter. The intervention under consideration in this paper is Iranian support given to the Houthis and the Saudi-led intervention. Do these two cases of interventions violate the prohibition of use of force enshrined in Article 2(4) of the UN Charter or they are within the lawful contemplated exceptions provided for under Article 51 of the UN Charter? It is understandable to exclude the exception provided for under Chapter VII of the UN Charter since there is no issue whatsoever as to authorisation of use of force by the UN Security Council.

To begin with, Iran has been alleged to have been providing aid to the Houthis in Yemen. Iran is accused of supporting the Houthis through weapons supply, financial aid and military advice. The question is, does mere supply of weapons, rendering financial aid and providing military advice amount to military intervention? This question has been answered in the case of *Nicaragua v United States*. The ICJ stated that:

The United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of

Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.

In essence, the ICJ decided that providing training, arming, equipping, financing as well as providing military aid and support to an armed group in NIAC violated the prohibition of the use of force in Article 2(4) of the UN Charter.

Therefore, support given to the Houthis in Yemen by Iran violates Iranian obligation to refrain from intervening in the territorial integrity or political independence of another State as enshrined under Article 2(4) of the UN Charter. Since Iran provides support to the rebel forces that may be considered the *de facto* government of Yemen after the *de jure* President had fled the country, this dismisses any claim that Iran intervenes based on invitation from the government of Yemen. In addition, Iran's support given to the Houthis began prior to the time when the Houthis gained control of Yemen's capital, the act that forced the *de jure* President to flee the country. It can be submitted that Iran's intervention in supporting the Houthis in Yemen is unlawful as it violated the prohibition of the use of force against the sovereign entity of a State.

In the case of the Saudi-led intervention, there is no gainsaying the fact that air strikes by the coalition are an intervention in the sovereign territory of Yemen. The issue of the degree of involvement of the Saudi-led coalition is apparent and does not need to be assessed as in the case of Iran since

in the Saudi case there have been direct military strikes in Yemen. The question is whether the Saudi-led intervention was in violation of the prohibition of the use of force contained under Article 2(4) of the UN Charter or if it was a lawful intervention that falls under the exception in Article 51 of the UN Charter.

According to Saudi Arabia, the coalition force it is leading intervened in Yemen based on the invitation of Hadi, who was the *de jure* President of Yemen. Based on this assertion made by Saudi, since Hadi remains the *de jure* president of Yemen, he has the power to invite foreign forces to assist in the protection of lives and the property of innocent citizens of Yemen who are caught in the middle of these hostilities. Any intervention against the territorial sovereignty of a state that is based on the invitation of the sovereign state cannot be held to be a violation of the prohibition on the use of force envisaged under Article 2(4) of the UN Charter. In other words, military intervention by a State in the internal conflict of another State that is based on invitation to assist in the protection of life and property is in line with the UN Charter. Article 51 has provided for the right to resort to self-defence in a collective manner. Thus, invitational military intervention in this case could be said to have fallen within the contemplation of collective self-defence envisaged by Article 51. Therefore, since the Saudi-led coalition is carrying out a military operation in the territory of Yemen based on the invitation

of the *de jure* President, the operation may be considered within the realms of collective self-defence. The question now is whether the parties involved in the conflict in Yemen are complying with their respective obligations under international humanitarian law (IHL), which is the law applicable during armed conflict.

The Conflict in Yemen and IHL

IHL is the body of law that applies in armed conflict. It consists of principles and regulations that set out to regulate the conduct of belligerents during hostilities and limits the rights of the belligerents to choose the means and methods of warfare of their choice as well as provides protection to persons who are not or who are no longer taking part in hostilities. This branch of international law applies to victims of war without discrimination and regardless of whether the armed conflict is legitimate or not under *jus ad bellum* (law regulating the legality or otherwise of going to war) (Henderson, 2010; Turns, 2010). Thus, application of IHL is independent of any argument as to whether or not the armed conflict is just or not within the realm of *jus ad bellum*. IHL regulates the conduct of hostilities from the initiation of the armed conflict to the cessation of hostilities and it applies to both international and non-international armed conflict. The rules of IHL are basically contained in the Hague Law and the Geneva Conventions of 1949. Presently, The Geneva Conventions are four in number and with the adoption of their additional protocols of 1977, the

Hague Law has become silent. All the four Conventions apply to international armed conflict while common article 3 to the Conventions applies to non-international armed conflict. In addition, the first and second Additional Protocols of 1977 to the Geneva Conventions apply to international and non-international armed conflicts respectively (Wallace & Martin-Ortega, 2009).

With this understanding of IHL, the issue now is, does the conflict in Yemen constitute an armed conflict to which IHL applies? If it does, do the intervention of Iran and the Saudi-led coalition change the nature of the conflict or affect the obligation of the parties under IHL? To begin with, armed conflict has been defined by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Prosecutor v Tadic*. According to the Tribunal, “armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state”. This definition has taken care of both international and non-international armed conflicts. The first limb refers to resort to use of force between states, which categorically means international armed conflict, while the second limb refers to protracted armed violence between armed forces of the State and armed groups or between armed groups that represent non-international armed conflict. Obviously, the conflict in Yemen started between government

armed forces and armed groups, and thus, portrays a non-international armed conflict and at the same time precludes imputing international armed conflict. However, for armed violence to become armed conflict, the violence must meet the required legal threshold for non-international armed conflict. The requirements are: protracted armed violence; organisation of the armed groups; exercise of control over certain territory; and ability to implement IHL (Paulus & Vashakmadze, 2009).

These requirements are further elaborated on by the International Committee of the Red Cross (ICRC). Considering the nature of the violence, “the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces.” The armed groups are expected “to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements” (ICRC, 2008). It is further required that the groups should exercise control over certain parts of a territory of the State that enables them to carry out concerted and sustained military operations. The armed group should also exhibit organisation that is capable of imposing discipline among its rank as a *de facto* authority (Schmitt, 2012). Therefore, considering the legal requirement for non-international armed conflict, it is clear that the conflict in Yemen has satisfied the intensity requirement

and the armed groups involved in the conflict have satisfied the requirement of organisation, territorial control and ability to implement IHL. This position has been confirmed by the ICRC declaration on the situation in Yemen as being a non-international armed conflict.

Having established that there is a non-international armed conflict in Yemen, the pertinent question remains as to whether the intervention of Iran and Saudi-led coalition have changed the nature of the conflict to internationalised armed conflict. A non-international armed conflict usually changes its character to internationalised armed conflict when there is an intervention by a third State (Jinks, 2003). Thus, we are going to analyse the Iran and Saudi-led coalition intervention separately.

We begin with Iran. The intervention of Iran was in support of the rebel forces (including dissident armed forces) fighting the government forces. This satisfies the requirement for internationalisation of internal conflict, which demands that support must be given to the side of the rebel forces in order to effectively have two or more states fighting each other either directly or through agents. However, for support to armed groups to constitute intervention that changes the nature of an armed conflict, the intervening state must have overall control over the military activities of the armed groups. The degree of involvement has to reach a certain level that the military activities of the armed group can be attributed to the intervening state. In other words, mere provision of

training and financial support to armed groups by a state is not enough to attribute the military activities of the group to the state. In *Prosecutor v Tadic*, the ICTY stated that for acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it *ex post facto* publicly endorsed those acts.

Therefore, it can be concluded that the intervention of Iran through provision of training, weapons and finance to the Houthis does not suffice to attribute the military activities of the Houthis to Iran. Iran does not exercise overall control over the military activities of the Houthis and the military activities of the groups cannot be attributed to Iran. Thus, Iran's intervention in support of the Houthis does not affect the nature of the non-international conflict in Yemen.

In the case of the Saudi-led coalition intervention, the intervention has been in support of the *de jure* government of Yemen. Military intervention in non-international armed conflict that is in support of government forces does not change the character of the conflict. It is not every intervention by a third State in a non-international armed conflict that will internationalise the conflict. For an intervention to internationalise an armed conflict, the intervention must have resulted in two or more states effectively fighting one another either directly or

through *de facto* agents (Carswell, 2009). Thus, Saudi-led intervention in support of government forces does not change the situation in Yemen since, effectively, the conflict is still between the armed groups and the government forces that enjoy the support of the coalition forces. Therefore, the involvement of the coalition forces in support of the Yemen government forces does not change the nature of the armed conflict in Yemen from non-international to international.

It is now clear that there is an armed conflict in Yemen and the intervention of Iran and the Saudi-led coalition has not changed the character of the non-international armed conflict to internationalised armed conflict. This raises concern as to the obligation of the parties involved in the conflict including the intervening forces under IHL. It is significant to point out at this juncture that though the fact that a party to an armed conflict may have the legitimate right to wage war or resort to self-defence under the UN Charter, this does not absolve the party from observing its obligation under IHL. In essence, the armed groups involved in the conflict in Yemen as well as the government and coalition forces are bound to observe the minimum standards set out by IHL during their conduct of hostilities. The obligation of the intervening forces stems from the fact that they intervene by carrying out activities that form part of the hostilities in an already existing non-international armed conflict that is regulated by IHL. Accordingly, the parties involved

must avoid creating a humanitarian crisis by balancing military necessity with humanitarian considerations during hostilities. Since it is a non-international armed conflict, the parties are bound to respect the rules contained in Common Article 3 of the Geneva Conventions of 1949 and the Additional Protocol II of 1977 to the Geneva Conventions as the applicable law in non-international armed conflict. The parties must also respect the rules of customary IHL that are applicable in both international and non-international armed conflict. It is important to mention that the entirety of the armed conflict would have been avoided had the parties considered diplomatic options of dispute resolution.

CONCLUSION

The conflict in Yemen started as an armed violence between the government forces and the Houthis. Iran has been alleged to be providing support in terms of training, weapons and finance to the Houthi-led armed groups. Recently, Saudi Arabia has led coalition air strikes in Yemen against the Houthi rebels. The intervention of Iran in the internal affairs of Yemen violates the prohibition of the use of force in international relations as contained in Article 2(4) of the UN Charter. The Saudi-led intervention in the conflict in Yemen does not violate the prohibition of the use of force enshrined in the UN Charter. This is in view of the fact that the intervention is sequel to an invitation from the *de jure* president of Yemen, Hadi. Thus, the

Saudi-led intervention falls within the contemplated collective self-defence envisaged in Article 51 of the UN Charter. The situation in Yemen is indeed a non-international armed conflict to which IHL applies. The armed conflict remains non-international despite the intervention by Iran and the Saudi-led coalition. Support given by Iran to the Houthi-led rebels does not affect the nature of the conflict since Iran is not exercising effective control over the military activities of the rebels and the activities of the rebels cannot be attributed to Iran. Similarly, the Saudi-led intervention in support of the government forces does not also change the nature of the conflict. For an intervention to alter the nature of a conflict it has to be in support of the rebel groups so that, effectively, there will be a conflict between two or more states. As such, IHL applies to the conflict in Yemen and the parties involved must respect their obligations under the law. It is suggested that Iran should withdraw from supporting the Houthi-led rebels and respect its obligation under Article 2(4) of the UN Charter while the parties involved in the conflict in Yemen should balance their military operations against humanitarian considerations in order to minimise civilian casualty and destruction of civilian objects.

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Community Mediation in Malaysia: The Challenges faced by Community Mediators and the DNUI

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ABSTRACT

The Department of National Unity and Integration (DNUI) designed community mediation programmes to provide mediation as a method of dispute resolution to be adopted at community level. The Department trained “*Ahli Jawatankuasa Rukun Tetangga*” (Neighbourhood Committee Members) to be community mediators. The objective of this paper is to study the challenges faced by these community mediators in practising and subsequently, providing mediation services to the community as well as the challenges faced by the Department in supporting the community mediators. The authors adopted the qualitative research method to gather data in writing this paper. From the data collected, it was found that community mediation programmes are new, the mediators were yet to be recognised widely in Malaysia, there was not enough promotion and the funds allocated for the programme were limited. These are the challenges faced by both the community mediators and the Department. It is suggested that the community mediation programme in Malaysia be given a proper centre and administrative structure in each state so as to ensure that the programme is administered by an appropriate body that will overcome all challenges, allowing the programme to succeed.

Keywords: Community mediation, challenges, dispute resolution, Rukun Tetangga, Neighbourhood Committee

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Community mediation programmes in Malaysia were initiated in 2008. It was the effort of the Department of National Unity and Integration (DNUI) under the Prime Minister's Office and currently is placed

under the auspices of the Unity Management Unit of the Department. The community mediators are grassroots leaders selected from *Ahli Jawatankuasa Rukun Tetangga* (Neighbourhood Committee Members). Most of the mediators are presidents of the *Rukun Tetangga* (Neighbourhood Committee) programme in their residential areas. Currently, Malaysia has almost 1,000 mediators throughout the country. The role of community mediators is to be a neutral third party in assisting disputing parties in their residential area or any other places by facilitating communication between the parties in order to provide them the chance to listen to one another in order to agree upon a settlement. The authors conducted interviews to collect data; the interviews were divided into one-to-one in-depth-interviews and short interviews. Community mediators, professional mediators, *Rukun Tetangga* committee members and DNUI officers were interviewed to collect information in 2012, 2013 and 2014. The challenges faced by both community mediators and the DNUI will be overcome if the DNUI were to establish a community mediation centre in each state in Malaysia with a proper administrative structure to handle the community mediation programme.

FINDINGS ON CHALLENGES IN PRACTISING MEDIATION

Community mediation programme in Malaysia is still new and there are many rooms for improvement. The programme is a great effort of the Malaysian government to provide

mediation as a medium of dispute resolution at community level. The programme is in its early years, therefore it is expected that there are many challenges faced by the mediators and the DNUI. The researchers shall discuss the challenges facing by the mediators in the first part and the DNUI in the second part herein, respectively.

Challenges Faced by Community Mediators

Data collected revealed that there were challenges faced by the community mediators in practising mediation in Malaysia. The biggest challenge for the mediators was recognition and acceptance by the residents in their locality. Some mediators were unable to carry out their work of mediation due to not receiving cooperation and recognition from the residents. Many residents had received no information of the existence of the community mediation programme and the mediation process. The mediators complained that their authority to mediate was questioned every time they tried to approach disputants. Hence, the non-acceptance by the residents was perceived as a challenge in practising mediation. The mediators believed that the rejection was due to residents not being given prior information about mediation or the community mediation programme and the existence of the community mediators.

According to Respondent 88, none of the residents in his housing area were aware of the mediation process. He stated, “[T]he residents in my area have no information on

mediation as problem solvers.” Respondent 84 further elaborated that the residents were unaware of the programme because no promotion of the community mediators or their roles had been carried out at any time. He stated, “[T]he residents have no information because no one promotes [the programme].”

Thus, in order to overcome this challenge, the mediators suggested that the DNUI should create awareness programmes and promote community mediation programme immediately so as to ensure that residents recognised community mediators. They suggested the following:

[T]he DNUI should visit the KRT (*Rukun Tetangga* area) of each mediator and share information on the roles of mediators. (Respondent 88);

[T]he DNUI must inform the residents of the existence of [a] mediator. (Respondent 78); and

[T]he DNUI must promote community mediators and provide each mediator with an identification card. On top of that, the DNUI must promote the programme to show that the programme is recognised by the government. Upon promotion and recognition, then the mediator may offer [his] services. (Respondent 84).

Many of the mediators agreed that there was no promotion made in their state. According to them, when the officers requested committee members to participate in the community mediation course, they were not given full information

about the course. They were only asked to send available candidates to join the programme. However, candidates in 2014 shared that they were selected because they were interested to be community mediators. Further, many mediators alleged that the officers of the DNUI had yet to share information on community mediation with *Rukun Tetangga* committee members.

Secondly, the mediators claimed that there was lack of support from the DNUI and no further training was given to them. They were not happy because the DNUI had yet to send them for extra training courses and they claimed that the officers at district level were not very supportive. Respondent 33 agreed with other mediators’ claim that the basic training alone was insufficient for mediators to move forward. She said that the responsibilities placed on their shoulders by the DNUI were not equal to the training given. They needed more courses to enhance their knowledge and skills. She expresses her dissatisfaction in the following words:

There has been little effort taken by the DNUI to improve the community mediation programme up to today. The programme is run by the community mediator. The only action taken by the DNUI was to issue the instruction letter that required the mediators to write to all government departments [about their services]. In my understanding, the community mediation programme was initiated by the DNUI and Institut Kajian dan Latihan Integrasi Nasional (IKLIN); they must take responsibility.

Her unhappiness was shared by Respondent 36. He was frustrated that the DNUI put in less effort to improve the community mediation programme. He stated, "The DNUI has never tried to assist us in improving the community mediation programme."

Both mediators were practising mediation at the time of the interviews and had contributed to the community. But they believed that the inefficiency of the programme and the failure to overcome the challenges faced by the mediators were because they had not received adequate support from the DNUI. Respondent 33 felt the same way but took a different approach. The respondent admitted that the DNUI seemed to have forgotten about the mediators after giving them the certificate of appointment but she had taken the initiative to ensure the programme worked. She explained:

In the beginning, the DNUI forgot about the mediators after they had given us the certificate of appointment. They were not concerned about us. But then I took the initiative to start mediating problems and submitted reports to them. Just to ensure they saw my role in community mediation. We (the mediators) need to prove ourselves and then the DNUI will support us.

She believed that the DNUI would support them if the mediators played their roles. However, she disagreed with the attitude of some of the DNUI officers, who did not want to share the responsibility of any cases with the mediators. Such conduct

suggested that the DNUI had no confidence in the mediators. She explained:

The DNUI is the authority that manages the *Rukun Tetangga* programme and is aware of all conflicts or problem faced by *Rukun Tetangga* committees in all areas. Sometimes, the mediator is aware only of the problem faced by the committee in his area and has no information about other areas, even though those communities may be in neighbouring areas. In this circumstance, the DNUI must play their role to promote mediation by referring the cases to community mediators or to mediate the case (there are many staff of the DNUI who have been trained as mediators). In cases that involve *Rukun Tetangga* committees or DNUI kindergarten teachers, the DNUI officers should call us (the community mediators) to conduct mediation. We have to give mediators the opportunity to practise and to solve cases.

Respondent 35 was aware of lack of support from the DNUI but he did not cease to practise. He shared that he practised mediation in his own way. Gradually, he developed the skills of listening and negotiating. He stated:

I gained experience in mediation from my practice that I did without strictly following the rules because I didn't know of any rules. Most of the cases that I mediated were based on my own method or what we call trial and error. I feel that the main challenge

that I face is to mediate without adequate knowledge and mediation skill. I'm still learning. Sometimes I could sense that my approach was wrong but I proceeded with the session (mediation). I sensed that I had done something that I should not have had. From that I improved my methods.

Thirdly, the mediators did not receive support from the *Rukun Tetangga* committee members. The residents as well as the *Rukun Tetangga* committee members had no information on the community mediation programme. The researchers conducted interviews with 65 *Rukun Tetangga* committee members in an attempt to obtain information on the relationship between the *Rukun Tetangga* programme and community mediation and the roles of *Rukun Tetangga* committee members in promoting community mediation. Unfortunately, 47 respondents had no information at all on the community mediation programme conducted by the DNUI. Ten respondents (RT1–RT10) had some information on community mediation, even though there was no community mediator in their areas. Eight respondents (RT11–RT18) learnt about the community mediation programme when the DNUI selected one of their committee members to join the programme and subsequently appointed the said member to be the community mediator.

All respondents unanimously answered “no” when they were asked whether there was a relationship between the mediation programme and the *Rukun Tetangga*. They

looked upon the community mediation programme as a separate programme that was not a part of the *Rukun Tetangga* programme. Hence, they conducted many programmes for unity and integration purposes but never promoted community mediation. Furthermore, the mediators never attempted to share information with other committees and to spread the information. The respondents claimed that they had never been given any information on mediation either by the community mediator or DNUI officers. The respondents’ comments are given below:

[T]he mediator does not mingle with others and has issues with the *Rukun Tetangga* committee members. (Respondent RT11);

[T]he mediator never shared any information on the community mediation programme and I think he does not practise [mediation]. (Respondent RT12);

[W]e have a mediator in our area but he never shares any information with the other committee members, so we have no information on mediation. (Respondent RT13);

[W]e do have a community mediator but the information we get is insufficient, confusing and we don’t know what mediation is. (Respondent RT14);

[H]e does not share any information with others. (Respondent RT16); and

[W]e received no information on mediation. (Respondent 18).

Rukun Tetangga committee members assumed that the community mediators were not part of the *Rukun Tetangga* programme once they received the certificate of appointment, especially when the mediators did not share the information and present themselves as committee members of the *Rukun Tetangga*. Furthermore, unlike the committee members of the *Rukun Tetangga* programme, who are elected every two years, the appointment of the mediators is for life. Respondent 12 explained:

If the community mediators are not re-appointed by the people in his area as a committee member in the *Rukun Tetangga*, the title community mediator remains. He is not removed from the appointment.

Fourthly, some of the mediators were not actively practising community mediation. According to a few respondents, the mediator in their areas could not be contacted. This situation led to the perception that once a *Rukun Tetangga* committee member is appointed as a community mediator, he is not a part of the *Rukun Tetangga* programme. He need not be included in any of the *Rukun Tetangga* programmes as, it was believed, he worked alone.

Having said that, there are many practising mediators who are active in sharing information and yet *Rukun Tetangga* committee members are reluctant to assist them in promoting mediation. Respondent 2 shared with the authors that the mediator in his area practised mediation and had assisted a few people

in the area. The said mediator also shared information on mediation with the *Rukun Tetangga* committee members. However, the *Rukun Tetangga* committee members never assisted the mediator in promoting mediation actively. They only introduced parties in disagreement to the mediator for him to help the disputants. He also felt that mediators belonged to another group and not to the *Rukun Tetangga* committee. According to him, one of the challenges faced by the mediators is difficulty in getting a response from residents in the neighbourhood. He stated:

RT committee members in this area have been informed of the roles of mediators. The mediators shared the information with us. However, up to today the RT has never promoted the programme because we believe that the mediators belong to their own group of mediators and have their own area of authority, which means once a person is appointed as mediator, he has his own jurisdiction and is separate from the *Rukun Tetangga*.

Rukun Tetangga committee members are not aware that community mediators are part of the *Rukun Tetangga* programme. The *Rukun Tetangga* committee members did not see any problem in assisting the mediators to promote mediation on condition that they are informed of the programme and of the roles and responsibilities of the mediators. If the mediators disseminated the information to their *Rukun Tetangga* committee members, the committee members would be able

to assist them. Lack of information on the mediation programme has become an impediment for committee members in promoting mediation. According to the respondents, there were many ways to promote mediation at community level such as by sharing information with the residents:

[T]o give an opportunity to the mediator to explain and discuss his roles with the residents in his *Rukun Tetangga* area [including providing an explanation to *Rukun Tetangga* committee members]. (Respondent RT18);

[T]o design programmes to promote mediation in all *Rukun Tetangga* areas [to ensure *Rukun Tetangga* committee members were aware of the programme]. (Respondent RT17);

Rukun Tetangga committee members may assist the mediator in promoting the benefits and advantages of mediation by conducting programmes, writing proposals for the programme to finance the programme and to be committees for such programmes. (Respondent RT15);

Rukun Tetangga committee members may assist the mediator in financing his/her transportation and accommodation expenses for him/her to attend extra mediation courses and to assist the mediator in conducting courses to share his experiences with [communities in] surrounding areas. (Respondent RT 13);

Rukun Tetangga committee members [could] conduct programmes to educate the community on mediation. (Respondent RT 11);

Rukun Tetangga committee [members] may assist the mediator to gather residents for briefings on mediation and its benefits. (Respondent RT 10); and

[T]o conduct awareness programmes. (Respondent RT 4 & RT 8).

The mediators cannot practise if the residents refuse their services. This issue may only be solved if there is recognition from the community for the community mediation programme. However, it is not easy for residents to recognise if they have no information on the services offered by the mediator. Therefore, as a solution, there is an urgent need for awareness programmes to be held to inform residents and to promote the benefits of community mediation.

The fifth challenge was identified as the lack of monetary assistance to the mediators for transportation costs. The mediators were all volunteers and rendered their services on *pro bono* basis. According to Respondent 35, some of the mediators were using their own pocket money until recently when the DNUI issued a circular stating that each report submitted to the Department would entitle the mediator to RM50.00 as transportation fee. The circular brought relief to the mediators, especially those who were not *Rukun Tetangga* committee members. The comments by the respondents suggested that

community mediation in Malaysia needs a proper organisational structure to channel money as transportation allowance for the mediators.

Challenges Faced by the DNUI

The DNUI as the department that is responsible for the provision of community mediators also faces challenges in supporting the mediators financially. The DNUI require mediators to submit reports as evidence of their. It has been highlighted by DNUI officers that it is compulsory for the mediators to submit reports to the DNUI. It is very important for the DNUI to keep a record of each case handled by the mediators. However, many mediators have yet to fulfil this task. Respondent 14 was not happy with the mediators' performance of their duty. He said, "It is compulsory for the mediators to report to us [about each mediation case] but up to now, we have received very few reports."

As a solution to this issue, the DNUI started to collect reports by conducting meetings or case conferencing with the mediators at state level. One of the officers of the department that handles mediators, Respondent 15, stated that he had tried his best to collect the reports:

[W]e are trying our utmost best...by meeting all the mediators at the state level...through these meetings...we try to compile whatever cases that [the mediators] have managed to solve lah.... The problem with these mediators is some of them refuse to accept invitations to meet the DNUI officer.

Non-practising mediators was the second challenge faced by the DNUI. Despite providing training for mediators, some chose not to practise. In admitting this as a challenge for the DNUI, Respondent 15 stated:

The mediators are community leaders; they render their services voluntarily. We (DNUI) understand that voluntary means sometimes they are very active, sometimes they are not... . Secondly, these people are not permanent in one place. The knowledge of mediation is not imparted to others. And thirdly, of course, the financial constraints.

Lack of funds for community mediation programmes was the third challenge facing the DNUI. According to Respondent 15, the DNUI needed evidence to show the effectiveness of the programme to enable them to obtain funds. If there were no positive results, it was difficult for the DNUI to channel grants to the mediators for them to conduct programmes or to send the mediators for extra courses. Funds were also needed for awareness programmes and to promote community mediation at the national level. Therefore, it is crucial for the DNUI to have a record of all cases handled by the mediators. The respondents were aware that many mediators practise but do not record the cases they have solved. The DNUI are working hard to assist the community mediators and to ensure the programme is successful. But their effort would be wasted if the community mediators do not cooperate with them.

CONCLUSION

The challenges faced by both parties are inter-related. The DNUI need reports as evidence of the effectiveness of the community mediation programme for them to provide funds for the programme and conduct activities that promote mediation and create awareness among Malaysians. On the other hand, the mediators face challenges to render their services to the residents at their locality because they are yet to be recognised due to lack of information on the community mediation programme.

All these challenges may be overcome if the DNUI have a community mediation centre with adequate facilities and a proper organisational structure for the community mediation programme. The mediators need support financially as well as in many other ways. The DNUI need a proper organisational structure that could effectively solve all these issues. It is suggested that the DNUI establish a community mediation centre in each state with adequate staff to keep records, conduct awareness programmes, advertise the mediators' services and the promote community mediation programme. Such centres would be the agent to disseminate information to Malaysians about community mediation services. Thus, these responsibilities would not be a burden on either community mediators or the DNUI. The centre would solve the challenges faced by both parties.

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Limited Liability Partnership (LLP@PLT): New Business Vehicle for The Malaysian Legal And Accounting Private Practice

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ABSTRACT

Prior to 2012, the business practice and legal frameworks in Malaysia were primarily carried out in the form of sole proprietorships, partnerships and registered company. However, with the development of the economy, the general partnership structure was found to be no longer suitable for some of businesses, particularly professional ones. The rising cost of conducting trade and litigation has forced partners to take precautions with regards to liabilities connected with doing business. This led to the introduction of limited liability partnership (LLP). In Malaysia, the Limited Liability Partnership (LLP) Act was enacted in February 2012; it introduced a new business vehicle in the local market. LLPs are seen as alternative business vehicles for professionals in Malaysia who are not allowed to carry out business in the form of companies, namely lawyers and accountants. Such restriction is provided by the professional's regulatory body such as the Bar Council and the Malaysian Institute of Accountants. With the introduction of LLP, these two professions are allowed to enjoy quasi limited liability by carrying out their private practice in the form of LLP. This paper discusses the legal framework of Malaysian LLP and how it is useful for the legal and accounting private practice.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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Keywords: Limited liability partnership, professional businesses, Malaysia

INTRODUCTION

LLP is a fascinating and innovative business vehicle or legal framework that blends some elements of corporate structure with

some elements of partnership structure. It is an additional option of business vehicle for general and several professionals businesses. In Malaysia, lawyers and accountants are not allowed to carry out private practice in the form of incorporated companies. Such restrictions are provided by legislations regulating professional membership and other professional regulatory frameworks under the Legal Profession Act 1976 and the Accountant Act 1967.

BUSINESS RESTRICTIONS ON PROFESSIONALS

In Malaysia, there are two categories of professional who are not allowed to carry out their legal or accounting practice by way of incorporation or under incorporated companies. They are advocates and solicitors and the accountants. Such restrictions are derived from the rules and provisions of respective legislations that govern these professions and their professional practice.

Section 18 of the Accountants Act 1967 clearly states that, with reference to accountants:

Without prejudice to any other provisions of this Act or rules or by-laws no member shall -

- (a) allow any person not being a member to practice in his name as a chartered accountant;
- (b) be a director or a shareholder in a company incorporated under the Companies Act, 1965, or any other written law, being a company which carries on a business of auditing, nor shall he use a trade or association name under which to practise the profession;

(c) in any way, practice as a chartered accountant or licensed accountant other than:

- (i) in his own name;
- (ii) in the name or names of his partner or partners being chartered accountants or licensed accountants; or
- (iii) in the name of a firm existing at the time of the coming into operation of this Act or formed thereafter provided that the partners in Malaysia are eligible to be registered as chartered accountants or licensed accountants;

Rule 2 of the Malaysian Institute of Accountants (Membership and Council) Rules 2001[P.U.(A)343/2001] (as amended by the Malaysian Institute of Accountants (AMENDMENT) RULES 2002 [P.U.(A)258/2002]), provides that “member in public practice” means a chartered accountant or licenced accountant who, as a sole proprietor or in a partnership, provides or is engaged in public practice services in return for a fee or reward for such services otherwise than as an employee. The exclusion of the word ‘company’ in both the Accountants Act 1967 and the Malaysian Institute of Accountants (Membership and Council) Rules explicitly provides that the business vehicles in which the accounting private practice could be carried out is only either the sole proprietorship or partnership.

As for advocates and solicitors, the main regulation that governs the

professional practice is the Legal Profession Act (LPA) 1976. The Bar Council also issues rules and rulings pertaining to the practice, conduct and etiquette of advocates and solicitors (collectively “Rulings”). These Rulings are generally made ad-hoc as a result of specific queries made by advocates and solicitors or members of the public. Chapter 1 of the Rulings, clause 1.01(l) clearly provides that all references to a “firm” or a “law firm” mean a firm of advocates and solicitors whether a partnership or a sole proprietorship. Again, similar to the ruling for accountants, the exclusion of company structure from the definition of the term ‘firm’, clearly indicates that the legal private practice can only be carried out in the form of sole proprietorship or partnership.

LIMITED LIABILITY PARTNERSHIPS (LLP)

LLP is a business approach that combines the best features of the partnership framework and corporate structure. It enjoys all the attributes of a body corporate, namely separate legal entity, limited liability, perpetual succession and legal entity but at the same time retaining the internal flexibility of a partnership. There are many types of LLPs; the type mainly depends on the legal status of the LLP. For example, in the United Kingdom (UK), the Jersey LLP (the Isle of Jersey is an offshore of the UK) has the status of a legal person but not a body corporate whilst in the UK itself, the LLP is an entity with a body corporate status. In India and in the United States of America (USA), the

LLP is a legal entity with the status of a partnership. In the Southeast Asian region, only Malaysia and Singapore have LLPs and in both countries LLP are legal entities with a body corporate status.

An interesting feature of the LLPs is that whatever legal status it has, the internal regulation of all LLPs is based upon the partners’ agreement, which is akin to a partnership agreement. However, despite adopting similar internal regulation as to a partnership, partnership laws are not applicable to the LLPs.

It is also important to highlight that the legal entity of all LLPs albeit their different legal status provides LLPs similar attributes to a company, namely separate legal entity, perpetual succession, rights to take legal proceedings, rights to own properties and power to limit liabilities of its partners. Nonetheless, the scope of the partners’ limited liability in LLPs is merely partial and not full limited liability as is the case for companies. In all LLPs, defaulted partners are jointly liable with the LLP for claims for losses resulting from wrongful act or omission whilst partners who did not commit the default are released from any liability to the LLP and to the third parties. The application of quasi limited liability is also one of the differences between LLPs and partnerships.

The tax status of LLPs is generally similar to that of partnerships, whereby the partners are taxed on the income they received and the LLPs are not taxable, except for Malaysian LLPs, and the tax status is similar to that of a company.

TABLE 1
Attributes of LLP

Attribute	Explanation
Legal Status	A legal person either as a body corporate or a non-body corporate or a partnership.
Limited Liability	Partial Limited Liability- The LLP is liable for all debts of the business but the defaulted partner shall also be jointly liable for the debts incurred by the LLP for his default.
Registration	<ul style="list-style-type: none"> • Must be registered with the Registrar (SSM) • No submission or incorporation document
Disclosure Requirement	<ul style="list-style-type: none"> • No audit requirement and no submission of audited account to Registrar • Have to keep a proper keeping of accounts and documents • Have to submit annual declaration of solvency
External Regulation	<ul style="list-style-type: none"> • Regulated by the LLP Act • Winding Up procedures- applies the Companies Act
Internal Regulation	<ul style="list-style-type: none"> • Regulated by an agreement between the partners • Default rules of the LLP Act only applies in absence of the agreement
Composition of Partners	<ul style="list-style-type: none"> • Minimum two person but there is no maximum number of partners • There must be at least one Compliance officer (has statutory responsibilities akin to a Company Secretary)
Protection of Third Parties	<ul style="list-style-type: none"> • Claims against the LLP • Claw-back mechanism
Tax Regime	<ul style="list-style-type: none"> • Either similar to a Company or to a Partnership

LLPs IN MALAYSIA

The Malaysian LLP is one of the products of the Companies Commission of Malaysia (CCM) under its Corporate Law Reform Programme (CLRC). In 2003, CLRC published a consultative document (CD) for an alternative business vehicle for small businesses and venture capital arrangements. In 2008, they published the second consultative document and pursuant to the feedback, CCM published the draft bill of LLP in 2009. The LLP Act was passed by the Parliament in 2012. Different from other countries that adopted LLP as the abbreviation for limited liability partnerships, the Malaysian LLP used the

abbreviation PLT or “*Perkongsian Liabiliti Terhad*”, the translation of LLP in the Malay language.

Other than the PLT, the limited liability partnerships structure is also available in Labuan (a Malaysian offshore). The Labuan LLPs are regulated under the Labuan Limited Partnership and Limited Liability Partnerships Act (LP and LLPA) 2010. The Labuan LLPs and PLTs are generally similar but have different tax regimes.

Labuan LLP

Under the LP and LLPA 2010, any two or more persons may form a Labuan

limited liability partnership for any lawful purpose. To register a Labuan LLP, there must be at least one designated partner who has the duty to submit all relevant documents to the Authority. The name of a Labuan LLP shall end with the words "Labuan Limited Liability Partnership" in full or in abbreviation "(Labuan) L.L.P." or "(Labuan) LLP. The Labuan LLP has the status of a body corporate and also enjoys all attributes similar to those of a company. However, similar to PLT, only partial limited liability is applicable for partners in a Labuan LLP, whereby only innocent partners are protected against third party claims whilst the defaulted partner is jointly and the LLP are liable to the third party.

With regards to tax status, a Labuan LLP is categorised as a Labuan entity and as such, the entity is subject to tax under the Labuan Business Activity Tax Act 1990 (LBATA). The tax rate for trading as a Labuan entity is 3% whilst a Labuan entity conducting non-trading activity is not subjected to taxation.

Perkongsian Liabiliti Terhad (PLT)

The Malaysian PLT is similar to the LLP of the UK, India and Singapore, whereby the PLT has a status of body corporate and enjoys all attributes of a company. With regards to limited liability, the LLP Act 2012 clearly provides that all partners have limited liability in respect of claims against the PLT but such protection is only available to innocent partners. Any

defaulted partners shall be jointly liable with the PLT for claims made by third parties.

Although, PLT has many similarities to a company, the formalities required for registration and operation of PLTs are less than those of a company. The PLT are not required to be audited but have to ensure the keeping of proper accounts for a period of seven years. The PLT must also have a compliance officer that has statutory responsibilities to submit certain documents to the Registrar.

With regards to the tax regime, PLT is treated the same as a company, which means that for chargeable income above RM500,000, the PLT is subject to a tax rate of 25%.

Pertaining to internal arrangements, partners of a PLT have all the rights to decide their internal regulation via a partners' agreement but in the absence of any agreement between the partners, default rules as provided for in LLP Act 2012 are applicable.

Professionals' PLT

The First Schedule of the LLP Act 2012 only provides three types of professional practice that may be registered as a PLT, namely advocate and solicitors, accountants and company secretary. However, section 92 provides for the Minister to add or alter the First Schedule, which indicates that other professionals who are interested to form a PLT may request that the minister include their respective professions in the First Schedule.

TABLE 2
First Schedule [Section 2] Professional Practice

Professional Practice	Governing law	Governing body
1. Chartered Accountant	Accountants Act 1967 [Act 94]	Malaysian Institute of Accountants
2. Advocate and Solicitor	i) Legal Profession Act 1976 [Act 166] (ii) Advocates Ordinance of Sabah [Sabah Cap. 2] (iii) Advocates Ordinance of Sarawak [Sarawak Cap. 110]	(i) Malaysian Bar (ii) Sabah Law Association (iii) Advocates' Association of Sarawak
3. Secretary	Companies Act 1965 [Act 125]	Nil

The main difference between the professional PLT and the general PLT is the requirement of membership. In a professional PLT, members must be of the same profession such as all advocates and solicitors or all company secretaries. Partners in a professional PLT are also subjected to their respective professional body's regulations and in the application for registration as a professional PLT, the partners must attach an approval letter from its respective governing body. A professional PLT may also not limit its liability below the compulsory level of insurance as approved by the Registrar of LLP.

CONCLUSION

For professionals specified in the First Schedule of the LLP Act 2012, the PLT is indeed good news as it allows them to conduct their business with fewer risks compared to what is provided for in the existing partnership/firm structure. The

body corporate status provided for by the PLT allows professionals to improve and increase capital structure and to expand their business. The 'internal management' structure of the PLT is seen as an advantage for professionals as it allows them to regulate their relationship via agreement and not be regimented as is a company.

The quasi limited liability regime of the PLT is designed to ensure that professionals are still personally liable for their own default but not for that of other partners; this is sufficient to protect third parties, in particular clients and public interest. Despite the flexibilities, it is clear that the PLT does not compromise the integrity and high duty of care expected from professionals as partners may still be made liable for default.

The introduction of PLTs in Malaysia is also timely to cater for the globalisation of professional practices, which allows the PLT to take foreigners as partners as there is no restriction against the participation of foreigners.

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***Maqasid al-Shariah* as a Parameter for Islamic Countries in Screening International Treaties Before Ratification: An Analysis**

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ABSTRACT

Research into *Maqasid al-Shariah* (objectives of Islamic Law) has been conducted since the era of al-Juwaini and al-Ghazali. Islamic scholars today try to accommodate the application of *Maqasid al-Shariah* in a plethora of complex and complicated issues. Generally, the essence of *Maqasid al-Shariah* is to avoid evil and uphold public interest. *Maqasid al-Shariah* is important because the law or rules (*hukm*) will only be effective among Muslims and acceptable in the eyes of God if they are made within the purview of *Maqasid al-Shariah*. As members of the modern world community, it is inevitable that Islamic countries will need to participate in international treaties. However, there are several provisions in international treaties that may not commensurate with *Maqasid al-Shariah*. Islamic countries that tend to uphold the principles of *Shariah* have to ensure that every law, including international treaties, observes the principles of *Maqasid al-Shariah* in order to make such laws effective and acceptable as mentioned above. This paper, therefore, aims to analyse the essence of *Maqasid al-Shariah* and use it as a parameter for Islamic countries to participate in international treaties. This parameter can be a guideline for Islamic countries as to whether to consent, reserve or object to provisions in international treaties.

Keywords: *Maqasid al-Shariah*, parameter, public interest, consent to be bound, international treaties

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

The substance of law is not a simple word without spirit. There is always wisdom behind the law that needs to be dug out and observed. Any law is made with the purpose to be served. Likewise, Islamic law is also fuelled by its objective to be achieved by

the human being and blessed by Allah (S.W.T). Some of the divine regulations are comprehended through their objectives, such as the implementation of *Zakah* with its objective to help the poor and needy. However, other regulations require deep thinking to understand their objective, such as the prohibition against eating pork and the wearing of gold by men. The effort of Islamic scholars has enabled us to recognise certain objectives of these divine injunctions as intended by the lawgiver. We also have to bear in mind that there are some divine rules whose objectives will remain incomprehensible to us, for example, the question of the number of *rakaat* in obligatory daily prayers. The objective of Islamic law (known as *Maqasid al-Shariah*) is a very important subject in the eyes of Islamic scholars in understanding and studying legal texts. They have even deduced some indispensable objectives attached to the divine sanction, and these objectives have been imperative parameters for their issuing of legal decrees through *ijtihad*. In addition, these objectives also could be the parameters, not only for the individual scholar, but for the government in drafting national and international policy. By observing *Maqasid al-Shariah*, the government of Malaysia may protect the interests of Islam as a religion of the Federation (as stated in Article 3 of the Federal Constitution) and Muslims as the core and dominant citizens.

Maqasid al-Shariah as a Parameter

The term *Maqasid al-Shariah* is derived from two Arabic words, which are *maqasid* and *al-shariah*. *Maqasid* is a plural word

which means ‘aims’ (Majma’, 2004), ‘purposes’ or ‘goals’ (Jasser, 2008). Therefore, *al-Shariah* refers to what is prescribed by Allah S.W.T for His creation in the form of religious duty. When the words *maqasid* and *al-Shariah* are combined the term connotes whatever objectives that are aimed to be achieved by the Al-Quran and al-Sunnah through instructions, prohibitions and permissions (al-Qaradhawi, 2012).

There are three phenomenal types of *Maqasid al-Shariah* as introduced by Imam al-Haramayn al-Juwayni (Muhammad, 2007), which are *al-Maqasid al-Dhoruriyyah* (the essential objectives), *al-Maqasid al-Hajiyyah* (the complementary objectives) and *al-Maqasid al-Tahsiniyyah* (the embellishment objectives). This categorisation is unequivocally embraced and accepted by Muslim jurists and has become the focal point for them in discussing *Maqasid al-Shariah*. ‘Essential objectives’ refers to the aims that are to be achieved for the religious and material well-being of individuals where otherwise life would be chaotic and destructive in this world and the hereafter. ‘Complementary objectives’ refers to the aims to remove hardship and severity in life, where such hardship and severity are not to the extent of turning life chaotic and destructive. The last type refers to beautifying and refining the customs and conduct of the people.

Furthermore, according to Imam al-Ghazali, *Maqasid al-Shariah* revolves around five principles or objectives, namely, protection of religion, life, intellect, lineage

and property (Muhammad, 2007). Some quarters have said that these objectives are the extended categorisation for the *Maqasid al-Dhoruriyyah* while others have said that these five principles are actually the methodology to find and establish the *Maqasid al-Dhoruriyyah*.

The said five principles are critically and widely examined by classical and contemporary scholars, who have stated that the principles are not exhaustive as there are many essential (*dhoruriyyah*) aspects that need to be protected as an integral part of the objectives of *Shariah*. For instance, dignity is an objective that is protected by the divine ruling that finds false accusation (*al-qazf*) a major sin and serious offence. However, the prominent *maqasid* scholar Sheikh Tohir Ibnu A'shur did not regard this protection of dignity as a *Maqasid al-Dhoruriyyah* because in his opinion this aspect does not claim the level of *dhoruriyyah*. In his opinion, *dhoruriyyah* is restricted to the physical, sensible and visible only when life depends on it; therefore, dignity is not included in this understanding of *maqasid* (al-Qaradhawi, 2012).

Although the protection of dignity may not be included because of this reason, it is still argued that the five objectives of *Shariah* are not exhaustive as there are many *dhoruriyyah* or essential aspects that need to be protected as promoted by the Al-Quran and al-Sunnah directly and implicitly. Among others is the protection of people's freedom, the protection for equal status before the law and others.

It is submitted that the said five objectives can be a basic guideline that is inclusive by nature in term of interpretation. For example, the protection of dignity may be included under the protection of lineage because the wisdom behind the divine ruling on *qazf* is also to cleanse one's lineage, which is one of the five objectives mentioned above. The five objectives are to be a comprehensive and holistic guideline in any matter so as not to infringe on the *Shariah* or *Maqasid al-Shariah*. The Al-Quran and the *hadith* have shown how the divine ruling protects the five objectives as follows:

- 1) Punishment of apostasy is to protect the religion.
- 2) Ruling on *qisas* is a mechanism to protect life.
- 3) Punishment of adultery is a tool to protect lineage.
- 4) Punishment of theft is a way to protect property.
- 5) Punishment of drinking liquor is to protect intellect.

Therefore, it is indisputable to say that the five objectives also can be a very beneficial parameter for the government that intends to uphold Islamic values in drawing up rulings or policies. The five objectives are also very useful for the government in dealing with international matters. As a government it has to deal and engage with neighbouring countries and the international community where it may be required to enter into agreements or sign treaties. However, international treaties will always not guarantee the protection

of *Shariah* as intended by an Islamic government. Some treaties may benefit the country while others may not. Some international treaties clearly clash with *Shariah* rulings. When treaties contradict *Shariah*, Islamic countries may reject them. For instance, the freedom to change one's religion as provided for in Article 18 of the Universal Declaration of Human Rights states that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

In addition, Article 18 of the International Covenant on Civil and Political Right provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such

limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Freedom of religion is guaranteed in Islam but the freedom to change religion by a Muslim is not tolerated by Islam. This is one of the main things that seems not suited to the Islamic principles.

However, sometimes international treaties do not seem to directly infringe upon the principles of *Shariah* but the objectives of *Shariah* tend to be neglected. Such tenets of an international treaty would be filtered through the five objectives of *maqasid al-shariah*. For example, Article 21 of The Convention on the Rights of the Child recognises and allows child adoption:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents,

- relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;
- b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
 - c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
 - d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
 - e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavor, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

This is blanket recognition and permission without considering the issue of the religion of the child and the potential adopting parents. There will be a problem when the potential adopting parent is non-Muslim and the child is from a Muslim family. This situation may affect the sensitivity of the Muslim society with

regards to the dignity of Islam in a Muslim-majority country. The article is superficially commensurate with Islam on the issue of permissibility of child adoption but by giving blanket permission it may affect one of the objectives of *Shariah*, that is, protection of religion. However, sometimes a ruling may seem not to infringe directly on the principles of *Shariah* but it neglects the objectives of *Shariah*. Such a situation would need to be examined in the light of the five objectives of *Maqasid al-Shariah*.

The treaty is futile if it does not serve the objectives of *Shariah*. Therefore, in order to prevent a treaty from becoming non-*Shariah* or *Maqasid* compliant, it has to be screened through the five objectives. The five objectives are a parameter for the filtering and screening of international treaties in order to prevent Islamic countries from ratifying treaties that potentially disregard *Shariah* and its objectives.

If a treaty clearly infringes the objectives of *Shariah* it may affect government policies of Islamic countries that seek to uphold *Shariah* and it may affect the lives of Muslim citizens in terms of religion, life, intellect, lineage and property.

Maqasid al-Shariah as a Parameter for the Screening of International Treaties Related to Religion

There are several objectives of *Shariah* relating to religion that an international treaty must not preclude:

- 1) Propagation of the religion of Islam
- 2) Enjoining good and eliminating evil

- | | |
|---|--|
| 3) Implementing Islamic-based education | 1) Prevents illegitimate birth and free sex |
| 4) Eradicating apostasy and deviant teaching | 2) Disallows false accusation |
| 5) Islamic scholarship | 3) Frames upon the <i>Shariah</i> framework with regards to contraception and abortion |
| 6) Islamic framework for freedom of speech, expression and others | 4) The prohibition of LGBT lifestyle |

Maqasid Al-Shariah as a Parameter for the Screening of International Treaties Related to Life

There are four objectives of *Shariah* relating to life. The aim to protect life is common to all countries or communities. The international treaty must adhere to the following:

- 1) Guaranteeing the life of the people.
- 2) Prohibition of suicide
- 3) Preventing self-destruction
- 4) Maintaining health of the individual and society

Maqasid Al-Shariah as a Parameter for the Screening of International Treaties Related to the Intellect

The government must ensure that an international treaty observes the following:

- 1) Curbs illegal alcoholic and drug substance
- 2) Implements the *Shariah* framework for academic freedom
- 3) Ensures Islamic-based education

Maqasid Al-Shariah as a Parameter for the Screening of International Treaties Related to lineage

Pertaining to the issue of protection of lineage, an international treaty must ensure the following:

Maqasid Al-Shariah as a Parameter for the Screening of International Treaties Related to Property

Sheikh Tohir Ibnu A'shur lined up several objectives in property dealings that must be taken into consideration by the government before adopting an international treaty (Tohir, 2001). The objectives are:

- 1) Circulation of wealth
- 2) Clarity of laws related to property possession and ownership
- 3) Fairness in property ownership

CONCLUSION

Maqasid al-Shariah plays an important role in guiding government that seek to uphold *Shariah* principles. Government policies must not only adhere to *Shariah* principles but serve its objectives because implementing *Shariah* without serving its objectives is futile. These policies include the ratification of international treaties. Therefore, international treaties must also observe the *Maqasid al-Shariah* before being adopted by an Islamic government. A *Maqasid al-Shariah*-compliant treaty will preserve a government's aspiration to implement *Shariah* values in all its policies.

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Employer's Managerial Prerogative Right: An Evaluation of its Relevancy to the Employer-Employee Relationship

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ABSTRACT

The contract of employment is the main instrument governing an employment relationship, with explicit deliberations on the rights and duties of parties to the contract, namely the employer and the employee. In a collective bargaining process, trade unions will scrutinise the terms and conditions of a contract of employment to seek possibilities of engaging and expanding the employer's managerial prerogative right in the bargaining process to maintain industrial harmony. Section 13 of the Industrial Relations Act 1967 has limited trade unions from encroaching on the employer's managerial prerogative rights in a collective bargaining process. Thus, employers are vested with vast discretionary power in the exercise of their day-to-day management duties. This particular section has triggered the query as to whether managerial prerogative right is absolute and unchallengeable by employees. The purpose of this article is to investigate the relevancy of managerial prerogative on the employer-employee relationship. As an initial study into the concept of managerial prerogative right, the methods used are the doctrinal analysis of statutory provisions, judicial decisions and relevant government policies.

Keywords: Contract of employment, employer and employee relationship, employer's managerial prerogative, Industrial Relations Act 1967

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Malaysia has succeeded in promoting itself as a lucrative business hub by providing business and regulatory frameworks that attract foreign investors. Major policy changes have been made to ensure the

sustainability of this success. For instance, Vision 2020 was introduced by the fourth Prime Minister, Tun Dr Mahathir Muhammad, in 1991 as a national agenda with the ultimate aim of transforming Malaysia into the most developed nation in Asia. Vision 2020 envisaged that by the year 2020, Malaysia would be a fully developed nation in control of its own robust and dynamic economy and a confident Malaysian society with strong ethical and moral values. In order to achieve this vision, Tun Dr Mahathir stressed on the need to overcome nine challenges that required the whole nation to work in unity and tolerance (Mohamad, 1991).

In furthering Vision 2020, the current Prime Minister of Malaysia, Datuk Sri Najib Tun Razak has introduced the 1-Malaysia policy as a mechanism to promote national integration. The 1-Malaysia policy emphasises involvement and participation of all citizens towards realising the country's national agenda. From the perspective of industrial relations, to achieve Vision 2020 target via the I-Malaysia policy, employers and their employees need to play a significant. Both parties have to maintain industrial harmony in their employment relationship to ensure the realisation of these two national agenda.

In the employment relationship, the governing law regulating disputes between parties takes the perspective of employment law. Nonetheless, English common law recognises that relationships between an employer and its employees are contractual in nature and thus premised by judicial

authority similar to common contractual relationships. This principle was upheld in *Nethermere (St Neots) Ltd v. Gardiner and Another* [1984] via the dicta of Kerr LJ:

The determination of the statutory issue whether the applicant home workers were employees under section 54(1) of the Employment Protection Act 1978 involves a two-stage process. The first stage requires the determination of the question whether there was a contractually binding nexus between the alleged employees and alleged employer in relation to the employment in question. The second stage is if some binding contract exists as a matter of law; is then to clarify or to define the nature of a contractual relation.

The above case reveals that the law regards the relationship between an employer and his employee as contractual in nature, where both parties are free to negotiate terms and conditions to be incorporated in the contract of employment. Kamal and Mir (2013) commented that due to the strong economic position and high bargaining power of employers, there are many instances where a contract of employment tends to be favourable to the employer, leaning towards exploitation of the employee, and does not depict a true contractual bargain between the parties involved (Parasuraman, 2014). Such exploitation may cause an employee to resign and seek other opportunities (Kamal & Mir, 2013). Besides terms and conditions that relate to specified details and tasks to be carried out by the employee, employers also include such terms and conditions

relating to their managerial rights, which allow employers to decide and implement decisions taken for the benefit of their organisation. This particular practice has raised queries on whether an employer may utilise managerial prerogative powers to the extent of disregarding the rights of an employee and disrespecting the employee's dignity in order to ensure the efficiency of his business.

This paper is divided into three parts. The first part will discuss briefly the concept of managerial prerogative in Malaysian industrial relations. The second part explains the impact of managerial prerogative rights on the employer-employee relationship and the final section evaluates the relevancy of managerial prerogative rights via the lens of the principle of mutual trust and confidence as embedded in the implied terms of the contract of employment as well as according to current government policy.

THE CONCEPT OF MANAGERIAL PREROGATIVE AND INDUSTRIAL RELATION ACT 1967

The term 'managerial prerogative' is used interchangeably with such phrases as 'management rights' and 'management function' (Storey, 1976). Quoting Storey (1983), the term 'managerial prerogative' refers to:

... the name for the remaining portion of management's original authority and is therefore the name for the residue of discretionary powers left at any moment in the hands of managers. Every act

which a manager of his subordinates can lawfully do, and without the consent of workers' organisation is done by virtue of this prerogative.

The above definition indicates that in business context, managerial prerogative is traditionally viewed as legitimate rights that empower managers to organise and direct employees, machinery, materials and money in order "to achieve the business's aims" (Young, 1963; Storey, 1976). Darrow-Kleinhaus (2001) suggests that the definition of managerial prerogative can be viewed as when the employer is 'exercising all the rights necessary to effectively and efficiently run the business. Bergen (1940) added that within the sphere of employment matters, these rights include:

The absolute right of management to select, transfer, promote, demote, lay off, reemploy, and discharge employees on whatever basis it desires; to establish rates of pay; to determine work standards, duties, and responsibilities; and to demand the cooperation of employees in whatever plans of operation undertaken.

The Malaysian Government has included Bergen's interpretation of managerial prerogative rights in the Malaysian labour laws framework to interest foreign investors in the postcolonial period (Galenson, 1992). The same interpretation is also used in the Malaysian Industrial Relation Act 1967 as a legal safeguard for foreign investors (Ayadurai, 1997; Suhanah, 2002).

Section 13 of the Industrial Relations Act 1967 provides that:

No trade union of workmen may include in its proposal for collective agreement a proposal in relation to any of the following matters, that is say-

- a. The promotion by employer of any workman
- b. The transfer by employer of any workman
- c. The employment by an employer of any person
- d. The termination by an employer of the services of any workman
- e. The dismissal and reinstatement of a workman by an employer
- f. The assignment or allocation by an employer of duties or specific task to a workman.

The principle of managerial prerogative rights is recognised by Malaysian courts as evidenced in *Elya Designs Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor* (2001). In this case, The High Court of Ipoh ruled that:

The court should be mindful of the fact that every business strives to keep afloat during these times when prevailing economic situations turn such endeavour into a near struggle. With as much latitude as our laws would allow, the court has always respected a company's exercise of its prerogative to devise means to improve its operations. Thus, courts have held that management is free to regulate, according to its own discretion and judgment, all aspects

of employment, including hiring, work assignments, working methods, time, place and manner of work, processes to be followed, supervision of workers, working regulations, transfer of employees, work supervision, lay off of prerogative, whenever exigencies of the service so require, to change the working hours of its employees.

Thus, the purpose of managerial prerogative rights under the Industrial Relations Act 1967 is to provide legal space for employers to use their discretionary powers in management of their organisations or businesses as they think fit, tailoring these rights according to the current situation that is best suited for the need of their business.

In the next section, we will analyse the impact of managerial prerogative rights on employer-employee relationship in Malaysia.

THE IMPACT OF MANAGERIAL PREROGATIVE RIGHTS ON THE EMPLOYER-EMPLOYEE RELATIONSHIP IN MALAYSIA

The inclusion of managerial prerogative rights and their implementation in Malaysian industrial relations has ignited a debate among industrial relations scholars and legal experts in Malaysia. Many have claimed that such implementation has triggered another issue i.e. the denial of an employee's rights in his or her working place.

Sharma (1989) suggested that by virtue of Section 13 of the Industrial Act the sphere of collective bargaining in

Malaysia within the private sector has been limited as matters regarding hiring, transfer, promotion and the like are within the purview of employers' managerial prerogative right. The wording of Section 13 of the Industrial Relations Act 1967 clearly prohibits unions from discussing or negotiating issues such as hiring, firing, redundancy, promotion, transfer and the allocation of duties in the collective bargaining process (Suhanah, 2002).

Parasuraman (2014) in his research on employees' participation in the manufacturing, automobile and service industry in Malaysia found that managerial prerogative (Section 13 of IRA 1967) has limited the power of trade unions in negotiating and bargaining related to issues such as promotion and transfer. For instance, Parasuraman (2014) reported that some employees in a research he conducted were reallocated to other branches due to restructuring without their having a say in the matter. This indirectly affected their circumstances in terms of having to find new accommodation, making changes in their children's education and their cost of living.

Managerial prerogative rights have a significant impact on the role of trade unions. Parasuraman's research (2014) reported that as a direct result of implementing managerial prerogative right, a trade union's power in negotiating and bargaining with an employer is curbed and limited. In his case study, upon merger of a company with another, managerial prerogative rights were exercised quite extensively by the employer. Issues such as promotion, demotion and relocation of employees to

other branches of the company were carried out by the employer without negotiation with the respective employees. One of the key findings from Parasuraman's study was that the exercise of managerial prerogative rights directly affected employees' job performance and satisfaction.

Based on the evidence and arguments above, it can be said that the management or employer utilises 'managerial prerogative' as a management tool to control and limit employees' and unions' involvement in the workplace decision-making process. The implementation of such managerial prerogative also has to a certain extent created a feeling of exploitation and victimisation on part of employees who feel they have no right to discuss or question the fairness of the management's decision.

Empirical evidence seems to suggest that the relevancy of managerial prerogative has never been directly questioned by employees even though its implementation might not be favourable to employees.

The following section proceeds to evaluate the relevancy of managerial prerogative through the principle of implied terms in the contract of employment and the policy of the Malaysian government on employment-related matters.

CONTRACT OF EMPLOYMENT

Essentially, the relationship between the employer and employee and their respective rights and obligations can be classified into two scenarios: whether the employment agreement is a contract of service or a contract for service.

The distinction between these two forms of contract is not so obvious and in cases of dispute the courts will determine the nature of the employment relationship between the parties based on the facts and circumstances of each case. The importance of distinguishing between a contract of service and a contract for service lies in the redress and protection afforded to different forms of contractual relationship. Employees under a contract of service are afforded statutory rights and relief as enumerated under the Malaysian Employment Act 1955 in contrast to employees under a contract for service (Aminuddin, 2013).

Section 2 of the Malaysian Employment Act 1955 defines a contract of service as an agreement of employment between an employer and employee, as well as apprenticeship contract, which can either be in the form of an oral or written contract or by way of implied agreement between the parties. Under a contract of service, the employer is required to provide all the statutory benefits and protection accorded to an employee under a contract of service such as annual leave, sick leave and maternity leave.

Contract for service, on the other hand, refers to an agreement between an employer and an independent contractor who is hired to complete a specified assignment or project for the employer for an agreed sum as payment. Under this type of contract, an independent contractor is not statutorily protected under the provisions of the Malaysian

Employment Act 1955, and employers are not vicariously liable for any acts of independent contractors. Thus, there is no employer-employee relationship under this category of contractual relationship (Mir & Kamal, 2013).

There are several tests used by the court to determine the existence of a contract of employment, among which are control test and organisational test. A control test was applied by the court in the case of *Yewens v Noked* (1880), where the court found that the employee was subject to the command of his master as to the manner in which he exercised his duty. According to this test, if an employee is under control of his employer as regards to the work that he is employed for, then he is in a contract of service. The organisational test was introduced later to redress the lacuna (loophole) in the control test as many employees nowadays can work independently in their workplace without much supervision. This organisational test considers the degree of integration of an employee into the workplace organisation before it can be decided whether he is under a contract of service.

However, the diversity and complexity of employment relationship nowadays require a more comprehensive test and should not rely on a single test. Consequently, the court now adopts multiple tests to determine if employment is by contract for service or contract of service. In the use of multiple tests, the court's approach is to consider the criteria of the control test in conjunction with

the integration test. Thus, the court will not look into only the employer's power to control the employee with respect to means and methods but will also consider the underlying economic realities of the relationship (*Short v Handerson*, 1946).

A contract of employment consists of terms that constitute the gist of the contract. These terms can be classified as express and implied terms. An express term refers to all terms expressly stated in the contract of employment as agreed upon by the employer and employee. Usually, terms such as job description, duties and salary are explicitly mentioned in a contract of employment. Unlike an express term, an implied term is not expressly mentioned in the contract of employment. It exists through interpretation by the court and intention of the parties.

The implied term in a contract of employment was well explained by Lord Brown as an overriding obligation added to the literal term of the contract (*Wood v. WM Car Services (Petersborough) Ltd*, 1981). The significance of implied terms and conditions in the contract of employment has been described as central in the law of contract of employment (Brodie, 2001) and is a substance of the legal formation for the contract of employment (Freedland, 2003).

The importance of implied terms and conditions in employment contacts has been highlighted by Lord Browne-Wilkinson in the case of *Woods v WM Car Services (Peterborough) Ltd* (1981) as follows: "... the employer not to conduct himself in manner calculated of likely to destroy or

cause serious damage the relationship of confidence and trust between the employer and employee". He further stated that:

in our view, an employer who persistently attempts to vary an employee's conditions of service (whether contractual or not) with a view to getting rid of the employee or varying the employee's terms of service does act in a manner calculated or likely to destroy the relationship of confidence and trust between employer and employee. Such employer has therefore breached the implied term.

The principle laid down by Lord Brown has shown that implied terms play a significant role in the employment contract so as to maintain the contractual relationship between the parties in order to ensure smooth and harmonious business efficiency. Hence, in *Courtalds Northern Textiles Ltd v Andrew* (1979), a breach of implied terms in the employment contract was regarded as a fundamental breach as it affected the root of the contract.

Common law has categorised implied terms and conditions in employment contracts into two, namely, implied terms and conditions pertaining to joint duties and obligations of parties to employment contracts; the other is relating to the employer-employee duties. With regards to joint duties, both parties in the contract of employment are expected to exercise such duties mutually. Among the joint duties recognised by the court is the wage-work bargain implied duty of reasonable care and mutual trust and confidence (Vanitha

Sundra-Karean, 2012). The principle of implied mutual trust and confidence requires both contractual parties respectively i.e. employer and employee to conduct themselves in a manner within the spirit of mutual benefit and respect for the other's rights.

The duty of mutual trust and confidence has been judicially initiated as an implied term in employment contracts by Lord Styen in *Mahmud & Malik v Bank of Credit and Commerce International SA* (1973). He described mutual trust and confidence as inclusive of an employer's obligation not to destroy or seriously damage the relationship of confidence and trust between an employer and his employee without reasonable reason and proper cause. This was subsequently followed in *Courthaulds Northern Textiles Ltd v. Andrew* 1979: "It was an implied term of the contract that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the confidence and trust between the parties."

The mutual trust and confidence principle has created a significant impact on the relationship between the employer and his employees, wherein both parties are under obligation to be bound by their bargain as stated in the employment contract and the need to protect their dignity in the workplace. By applying the principle of implied term of mutual trust and confidence, a more comprehensive application of employer-employee duties is provided for that includes

unreasonableness and unacceptable conduct by parties that are not detailed in employment contracts (Vanitha Sundra-Karen, 2012). For example in a *Visa International* case in 2004, the court regarded the failure of the employer to inform the employee of a vacancy in a suitable post for the said employee as a breach of the implied duty related to mutual trust and confidence. A similar remedy, however, could not be read into other implied duties such as the implied duty of reasonable care.

Another example of the application of the duty of mutual trust and confidence is seen in the case of *Steven Horkulak v Cantor Fitzgerald International* (2003) where the court held that the employer had breached mutual trust and confidence when he frequently used abusive and rough language as well as acted dismissively towards his employee.

The significant role of implied terms of mutual trust and confidence has also been emphasised by Lord Styen in the *Malik* case as a formula to cover the diversity of situations in the work place, as well as a mechanism to balance employer's interest in managing the business and the employee's rights of not being unfairly and improperly exploited. Under implied terms of mutual trust and confidence, employers are required to exercise their power in good faith. In addition, employers are also responsible for ensuring that they will refrain from conducting themselves in a manner calculated or likely to destroy the relationship of confidence and trust

between the parties. Nevertheless, the type of behaviour, which might breach the implied term, is a question of fact where the court has to decide according to the peculiarity of each case (Mohamed, 2005). Hence, the existence of the implied term of mutual trust and confidence in a contract of employment commands greater responsibility than in a normal contract. Any act conducted by employers in exercising their managerial prerogative right must not go against the duty of the implied term of mutual trust and confidence.

An evaluation of the relevancy of the employer's managerial prerogative right to the current national agenda is also a pertinent issue to be considered here. As mentioned earlier, the principle of unity has been emphasised in both national agenda i.e. Vision 2020 and 1-Malaysia.

At the launch of the 'National Seminar Towards a Developed and Industrialised Society: Understanding of the Concepts, Implications and Challenges of Vision 2020' in 1993, former Deputy Prime Minister, Tun Ghafar Baba, stressed on the concept of unity:

Malaysia should be developed economically, as well as in other key dimensions including the political, social, spiritual, psychological and cultural areas. Also important is that Malaysia should also endeavour to create a united, confident, socially just and politically stable society in which everybody has a place and takes pride in being a Malaysian.

Significantly, unity among peoples in Malaysia has been identified as one of the greater challenges in achieving this vision.

The principle of unity in the national agenda is continued in the 1-Malaysia concept, which upholds the role of participation and togetherness in the nation. Under this social partnership, people are encouraged to be actively involved in the decision-making process by contributing their opinion. This is in line with its slogan and tagline, "1Malaysia. People First, Performance Now". The policy clearly motivates each and every individual in the public and private sector to work as a team to achieve Vision 2020 (Ab Rahman, 2011). Thus, in the perspective of industrial relations, as main players, both parties i.e. employer and employee, need to adopt this unity principle in their employment relationship as a pre-condition for their own sustainability and contribution towards Malaysia's economic and social development.

In promoting the concept of unity to maintain industrial harmony it is ideal for the policies to be supported by a strong legal framework. The existence of a legal framework ensures legal rights for employers' participation in management on various issues concerning them at their work place, particularly on the issues of managerial prerogative. Markey (2004) stressed on the importance of a legal framework in the work place and argued that:

...without legislation, work councils may not be secure from managerial or union encroachments upon their

independence ...legislation would ensure that all work councils have the same opportunities and constraints, and the neutrality of participative structures, free from the impositions of whichever party is favoured by the balance of industrial power.

Accordingly, the managerial prerogative principle needs to be re-defined in order to give some space for employees to be actively involved in the decision-making process in line with the current national agenda, which encourages participation from the employer and employee and relevant representative such as trade union. In conclusion, this article argues that exercise of managerial prerogative on matters as listed in Section 13 of the Industrial Relations Act 1967 needs to be re-defined, as currently it seems to be a major bone of contention in employee and trade union negotiations, which raise issues that need improvement for better working conditions and working life for employees (Parasuraman, 2014).

CONCLUSION

Managerial prerogative right is a concept inherited from pre-independence days as part of the labour package framework to protect the interest of foreign investors. However, to retain the concept in its outmoded interpretation, without reflecting on the current need and changes in social as well as employment law would not be doing justice to the development of human rights and government policies to unite

citizens in the journey towards realising Vision 2020. Therefore, the managerial prerogative right as enshrined in Section 13 of the Industrial Relation Act 1967 should be amended to provide legal space for employees to be included and involved in the decision-making process in the interest of the business, whilst at the same time retaining certain privileges accorded to the employer in their capacity as management of a business entity.

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LAFAMS: Account Management System for Malaysian Small Legal Firms

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ABSTRACT

One of the vital components of a successful private legal practice is good account management. Legal firms have a unique business process and specific rules on how accounting records should be kept and recorded. At present, there are many software packages for legal account management systems such as the MyCase web-based legal practice management software and the QuickBooks legal accounting software. However, for small- and medium-size legal firms in Malaysia, the software designed for international use might not be suitable. The majority of local law firms are SMEs and most of the time, their account management is done by the lawyers themselves. With limited knowledge of accounting and business management, it is not a surprise that many legal practitioners face difficulties in managing their accounts. LAFAMS (Law Firm Account Management System) was developed to assist legal firms to manage their financial transactions, monitor their performance, record cash inflow and outflow and facilitate the auditing process. The system requires only the basic Windows operating system and is easy to operate. The

report produced by LAFAMS should be sufficient for submission to the Bar Council as evidence of proper account-keeping by legal firms.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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Keywords: Account management system, law firms, SMEs

INTRODUCTION

According to Ismail *et al.*, (2014) and Kouser *et al.*, (2011), SMEs have limited resources and little influence on the market compared to large companies. Their survival depends on their ability to take full advantage of the resources available and promptly find and adjust to a market niche (Zhang *et al.*, 2009). Therefore, accurate decision-making is crucial to the success of these firms (Fadhil & Fadhil, 2010). Sian and Roberts (2009) suggested that managers in SMEs need to have effective financial management skills and must be efficient in information technology (IT) as a tool to assist them in making effective decisions.

Computers and software programmes are important business tools for SMEs as they can be used to reduce production and labour costs (Nguyen, 2009), innovate and facilitate niche marketing, increase productivity and effectiveness (Gullkvist, 2002), increase efficiency of internal business operations (Chatterjee *et al.*, 2002; Tan, 2010), become more innovative and gain competitive advantage (Thong, 1999; Nguyen, 2009; Shabanesfahani & Tabrizi, 2012). Other benefits include connecting SMEs to external contacts such as related businesses, stakeholders and institutions and networking with other parties more easily and cheaply.

In Malaysia, the majority of legal firms can be categorised as SMEs and they have specific processes and rules regarding how accounting records should be kept and recorded. At present, there are

many software packages for legal account management systems but most of them are expensive and cater mainly for the business processes of big legal firms. LAFAMS is a user-friendly account management software developed specifically for lawyers of small legal firms in Malaysia for the management of their financial transactions.

RESEARCH METHODOLOGY

LAFAMS is developed using Rapid Analogy Design (RAD) methodology. RAD integrates project management techniques, development techniques, users and tools to build quality application systems in a fixed time frame to deliver business value. It can eliminate the time constraint problem in order to develop a system faster. RAD has four main processes and requires less time to complete compared to the Waterfall Model approach. In general, RAD is a software development methodology that involves iterative development and the construction of prototypes. The prototype approach creates a demonstrable result, which allows for refining of the system based on the result. Refinement is based on feedback from the business, the eventual users of the system. Prototyping requires an open approach to development as well as an emphasis on relationship management and change management.

Fig.1 shows RAD processes, where the result of each phase, often called an end product or deliverable, flows down to the next phase. This is a continuous phase where prototypes are rapidly developed until they fulfil the objectives and requirements of the system.

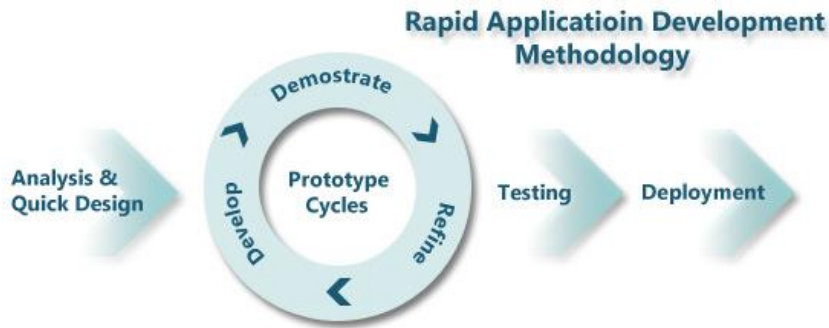


Fig.1: Rapid Application Development (RAD).

The first phase of the RAD is to understand the requirements of the system (analysis and quick design). It requires a high level or knowledgeable end-users to determine what the functions of the system should be. This should be a structured discussion of the business problems that need to be solved. This phase of the process includes deciding what programming languages and database need to be used. PHP scripts and the MySQL database are used as the development tools to develop a prototype. PHP is a scripting language originally designed for producing dynamic web pages. It has evolved to include command-line interface capability and can be used in standalone graphical applications. PHP is a free software released under the PHP license and is widely used. It also includes the interface design that determines what the interfaces will look like and the data design i.e. what data will be required. In this phase, the software's overall structure is defined. It is important to understand the requirements of the system before proceeding to prototype development.

The second phase is a repetition of the prototype development phase i.e. development, demonstrate, design. It includes creating a physical design for the database and mainly focusses on translation of the design into programming codes. A code to connect from programming language to MySQL Database Management System (DBMS) is created.

The third phase is testing the prototype to validate the LAFAMS business process. Usually, programmes are written as a series of individual modules and functionality. LAFAMS is tested by looking at the functions available in the system. Later, the flow of the system is tested to ensure that interfaces between modules work (integration testing). Next, the analysis report of the system is compiled. The next process involves enhancement and error correction of the prototype. This stage is repeated until the prototypes meet the research objectives. The last phase is deployment in the actual environment after all system functionalities and the database design have been validated.

THE MODULE

Legal firms are famous for the high volume of paperwork they must manage. Additionally, lawyers must keep track of their time to manage expenses, revenue and payroll, among other finance-related matters. These are challenging when there are multiple clients or the lawyers are working on contingency. Therefore, lawyers today face a great challenge in having to balance their law practice and manage their business.

The Legal Firm Account Management Software (LAFAMS) is an account management system specially designed for use in legal practice. This system is built based on the requirements of small- and medium-size law firms. Such legal firms appreciate the convenience and effectiveness of LAFAMS as this software takes into consideration the nature of legal business compared to general accounting software. Furthermore, it streamlines the lawyer's workflow with a centralised database; hence, it helps to enhance firm efficiency and prevents lawyers from being buried under physical files. As LAFAMS focusses on small- and medium-size legal firms, this software organises all essential information of the legal firm in a simple integrated system.

LAFAMS requires only the basic Windows operating system to record financial transactions on daily basis. It comprises three main modules, which are the Client Profile Module, Client Account Module and Office Account Module.

Documents such as vouchers, receipts, invoices, bank statements and client datasheets are the input for LAFAMS. This input is stored in databases and become sources for the three modules.

The first module is the Client Profile Module, which categorise the firm's clients according to specific cases such as property procurement and accident cases. The module accesses information related to all the firm's clients from a single point with comprehensive client profiling that includes multiple files and contacts, full transaction history and related documents. The database is important for preparation of clients' registration files and warrants for the lawyer's appointments.

The second module is the Client Account Module, which applies the cash book concept to record financial transactions related to client accounts. The module updates cash inflow and outflow from client transactions. The main output from this module are a summary of bank lists and client balances, client lists by bank balances and bank reconciliation statements. These reports are critical for the audit purposes.

The third module is the Office Account Module which was developed to manage the financial transactions of the legal firm's operation. It records income and expenses from the services performed by the firm. Financial statements such as profit and loss and balance sheets are the output of this module. These statements are important for internal decision-making.

COMPARISON WITH GENERAL CANNED SOFTWARE

There is a variety of off-the-shelf software with general features in the market. Most of the systems offer the same applications for all practice areas. Although they are fine programmes, they focus on the purely financial areas; thus, they do not meet the special needs of attorneys and law firms. In contrast to them, LAFAMS focusses on the Client Module (Client Profile and Client Account), which is a unique feature for legal firms. Handling client accounts and office accounts in different modules enables the separate management of both accounts and this ensures greater accountability especially of client monies at any point of time. The Client Module also avoids the losing track of a client balance. Every transaction is documented, and so, the user may view detailed account balances and as well as the transaction history for every client. The Client Module

in LAFAMS also can track multiple bank accounts and organise client information by matter or case. Therefore, adoption of this system helps to ensure movement of client monies, which fulfils audit requirements and guarantees better management of small- and medium-size legal firms.

COMPARISON WITH OTHER LEGAL SOFTWARE IN THE MARKET

There are a few software packages that are specially designed for legal account management but most of them are expensive and use complex features that are not relevant for small firms. In fact, some of these software packages have advanced accounting features simply for enhancement of the system. Such features are not necessary for small legal firms and would only end up trapping them into spending more than they need to.

TABLE 1
Features and Price of Legal Software in the Market

Software/Origin	Target	Features	Price
Legalmaster USA	Small firms	<ul style="list-style-type: none"> ✓ time accounting and billing, click here to see sample bills ✓ open item (invoice based) accounts receivable ✓ retainer and trust accounting ✓ fee splitting ✓ task billing ✓ electronic billing ✓ management reporting ✓ revenue distribution by timekeeper, billing or originating attorney ✓ conflict of interest ✓ calendaring ✓ case management ✓ connections to over 30 other law office application software products 	USD695 per licence/user

Table 1 (continue)

Software/Origin	Target	Features	Price
Perfect Case Manager UK	Small firms	<ul style="list-style-type: none"> ✓ Accounts ✓ Case Manager ✓ Time recording/Billing ✓ Perfect Books Online ✓ Legal Aid 	£1,129.13 per licence
Prosecutor II UK	Small firms	<ul style="list-style-type: none"> ✓ Case Related ✓ Victim & Witness ✓ Calenders ✓ Reports ✓ Administrator 	£1,100 per licence
Docket Legal Bar USA	Small firms	<ul style="list-style-type: none"> ✓ Docket Enterprise ✓ Matter Link ✓ Assemble It ✓ Legal Bar ✓ Metareveal 	USD495 per licence
PracticeMaster USA	Solo Attorneys Small firms	<ul style="list-style-type: none"> ✓ Billing ✓ PriceMaster ✓ Financial 	USD600 per licence/user
Spider Law Malaysia Malaysia	Solo Attorneys Small firms Large firms	<ul style="list-style-type: none"> ✓ Client's Account ✓ Office Account ✓ Office Advance ✓ Billing & Debtors Control ✓ Time cost/Time slip ✓ Case KIV/Workflow ✓ Document Assembly & Management ✓ FD Management ✓ Payroll ✓ Bill Generation Wizard ✓ RFID 	RM188 per year
Ecolaw Malaysia	Small firms	<ul style="list-style-type: none"> ✓ Account maintenance (Bank account, other account) ✓ Account Group ✓ Backup and Restore Database ✓ Client's case file ✓ File category (Conveyancing, Litigation, Others) ✓ Foreign currency ✓ Import data from UBS Lawyer client account ✓ Lawyer's detailc ✓ Transaction by project ✓ User level and user access 	USD299 per licence

Table 1 shows that many vendors provide cloud computing software. Over time, the users end up paying more for a cloud solution than a desktop version as there are charges for maintaining the cloud solutions. LAFAMS, on the other hand, provides practical accounting management functions specifically for small law firms and would be inexpensive as it does not dependent greatly on advanced IT solutions.

LAFAMS SYSTEM

The Legal Firm Account Management system requires the basic Windows

operating system to financial transactions on a daily basis. The system consists of six tables that correspond with the system (refer to Fig.2) and one database to keep track of records. The data in the database can be retrieved, deleted, added and updated by users while the administrator has authorisation to observe activities recorded on the system. In fact, this system specialises in accounting, and there are many preventive measures taken to ensure cash flow is calculated correctly.

Table	Action	Rows	Type	Collation	Size	Overhead
bank	Browse Structure Search Insert Empty Drop	~3	InnoDB	latin1_swedish_ci	16 Kib	-
cbclient	Browse Structure Search Insert Empty Drop	~34	InnoDB	latin1_swedish_ci	16 Kib	-
cboffice	Browse Structure Search Insert Empty Drop	~29	InnoDB	latin1_swedish_ci	16 Kib	-
chart	Browse Structure Search Insert Empty Drop	~53	InnoDB	latin1_swedish_ci	16 Kib	-
client	Browse Structure Search Insert Empty Drop	~6	InnoDB	latin1_swedish_ci	32 Kib	-
company	Browse Structure Search Insert Empty Drop	~4	InnoDB	latin1_swedish_ci	16 Kib	-
6 table(s) Sum		~10	InnoDB	latin1_swedish_ci	112 Kib	0 B

Fig.2: Account management system.

System Architecture and Framework

System framework is a platform for developing software applications that provide a foundation on which software developers can build programmes for a specific platform. The architecture of the software is a depiction of the system that aids in the understanding of how the system will behave. Fig.3 shows the system framework with its input i.e. Client Module, Client Account Module and Office

Account Module. The Client Module contains details and personal data of the client. The Client Account Module applies details of the client's financial transactions while the Office Account Module manages the firm's financial operations. The core of the system are the transaction details, which require the operation of both the office account and client account. Data are also analysed through the records presented in reports.

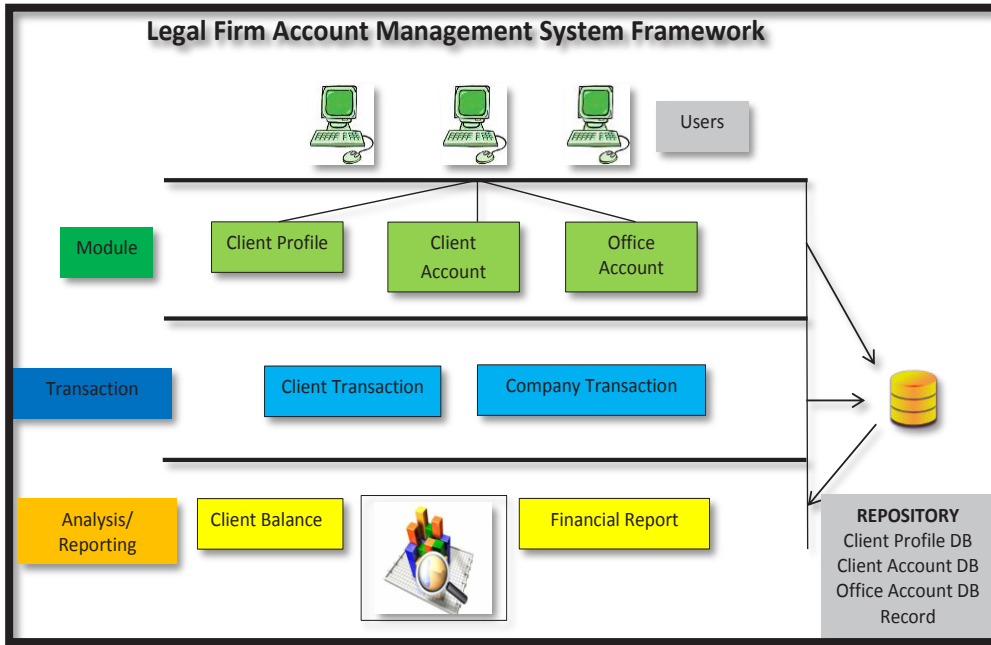


Fig.3: System framework.

System Implementation

System implementation is the action that must follow any preliminary thinking in order for something to actually happen. It is the process of getting a software system

operating properly, including installation, configuration, running, testing and making any necessary changes. Fig.4 shows the homepage of LAFAMS that sets up the menu of the system.

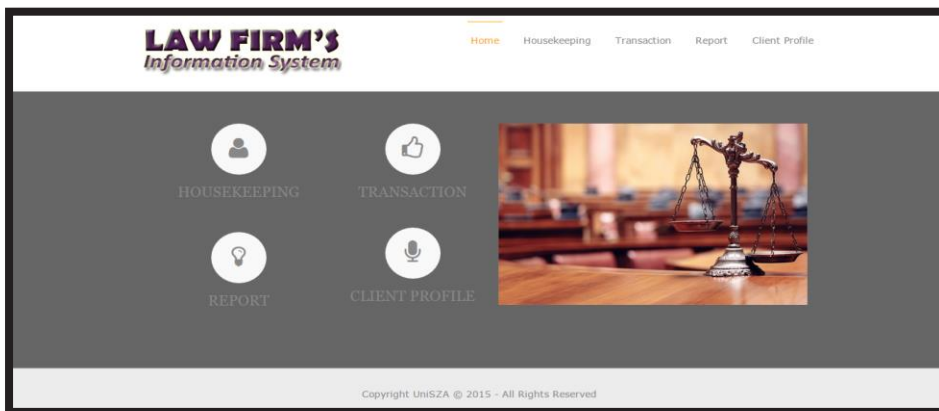


Fig.4: Homepage.

Fig.5 shows the chart of the account system, which the user needs to set a code for an account name.

ACCOUNT CODE	ACCOUNT NAME	ACCOUNT TYPE	ACTION
8000/1	LEGAL FEES EARNED	Income	[EDIT] [DELETE]
8000/2	INTEREST RECEIVED	Income	[EDIT] [DELETE]
3000/1	BIMB	Bank (Client Account)	[EDIT] [DELETE]
3000/2	MAYBANK	Bank (Client Account)	[EDIT] [DELETE]
8000/3	OTHER INCOMES	Income	[EDIT] [DELETE]
3000/3	CASH	Current Assets	[EDIT] [DELETE]
2000/1	LONG-TERM INVESTMENT	Non-Current Assets	[EDIT] [DELETE]
2000/2	MOTOR VEHICLE	Non-Current Assets	[EDIT] [DELETE]
4000/1	ACCOUNTS PAYABLE/CREDITOR	Liability	[EDIT] [DELETE]
4000/2	SHORT TERM LOAN	Liability	[EDIT] [DELETE]
5000/1	CAPITAL	Capital	[EDIT] [DELETE]
6000/1	BAYARAN GUAMAN : PINDAH MILK	Client Account	[EDIT] [DELETE]
6000/2	YURAN GUAMAN :	Client Account	[EDIT] [DELETE]

Fig.5: Account system.

Fig.6 shows the opening balance menu, where each year's transactions are displayed.

DATE	ACCOUNT NAME	CLIENT NAME	BANK/CASH	REF NO	IN(RM)	OUT(RM)	ACTION
2014-01-08	BAYARAN GUAMAN : PINDAH MILK	ALI BIN AHMAD	Maybank	1001/K1		2800	[EDIT] [DELETE]
2014-01-08	YURAN GUAMAN : GADALAN	ALI BIN AHMAD	Maybank	1001/K1		2800	[EDIT] [DELETE]
2014-01-12	MELEPAS GADALAN	ALI BIN AHMAD	Maybank	1001/K1		300	[EDIT] [DELETE]
2014-01-12	YURAN GUAMAN : PERANJIAN JUAL	ALI BIN AHMAD	Maybank	1001/K1		300	[EDIT] [DELETE]
2014-01-23	YURAN GUAMAN : KEBERKAWAN SUKAT	ALI BIN AHMAD	Maybank	1001/K1		300	[EDIT] [DELETE]
2014-01-18	YURAN DEBURSEMEN : DUTE STEK	ALI BIN AHMAD	Maybank	1001/K1		40	[EDIT] [DELETE]
2014-01-01	YURAN GUAMAN : PANG LEE FONG	PANG LEE FONG	HSBC	1002/K1		3500	[EDIT] [DELETE]
2014-01-24	YURAN DEBURSEMEN : CARAN BAS	ALI BIN AHMAD	Maybank	1001/K1		20	[EDIT] [DELETE]
2014-01-25	YURAN DEBURSEMEN : CARAN BOM	ALI BIN AHMAD	Maybank	1001/K1		20	[EDIT] [DELETE]
2014-01-25	PKA & PSA (PERANJIAN ISLAN)	ALI BIN AHMAD	Maybank	1001/K1		400	[EDIT] [DELETE]
2014-01-25	YURAN DEBURSEMEN : DUTER BEL	ALI BIN AHMAD	Maybank	1001/K1		25	[EDIT] [DELETE]

Fig.6: Opening balance menu.

Fig.7 shows the transaction menu of Cashbook for a client.

ACCOUNT CODE	ACCOUNT NAME	DEBIT (RM)	CREDIT (RM)	ACTION
8000/1	LEGAL FEES EARNED	28500	0	[EDIT] [DELETE]
8000/2	INTEREST RECEIVED	0	0	[EDIT] [DELETE]
3000/1	BIMB	10000	0	[EDIT] [DELETE]
3000/2	MAYBANK	0	0	[EDIT] [DELETE]
8000/3	OTHER INCOMES	0	0	[EDIT] [DELETE]
3000/3	CASH	0	1360	[EDIT] [DELETE]
2000/1	LONG-TERM INVESTMENT	0	0	[EDIT] [DELETE]
2000/2	MOTOR VEHICLE	212000	0	[EDIT] [DELETE]
4000/1	ACCOUNTS PAYABLE/CREDITOR	0	0	[EDIT] [DELETE]
4000/2	SHORT TERM LOAN	0	0	[EDIT] [DELETE]
5000/1	CAPITAL	0	0	[EDIT] [DELETE]
6000/1	BAYARAN GUAMAN : PINDAH MILK	0	0	[EDIT] [DELETE]

Fig.7: Transaction menu.

Fig.8 shows the report of a client ledger that provides details of cases of each client.

BALANCE SHEET			
NON-CURRENT ASSETS			
ACCOUNT CODE	ACCOUNT NAME	RM	RM
2000/1	LONG-TERM INVESTMENT	0	0
2000/2	MOTOR VEHICLE	212000	0
2000/3	LONG TERM INVESTMENT	0	0
2000/3	(-)ACCUMULATED DEPRECIATION	(52700)	159300
2000/5	OFFICE EQUIPMENTS	20000	0
2000/4	(-)ACCUMULATED DEPRECIATION	(12000)	8000
TOTAL			RM 167300
CURRENT ASSETS			
ACCOUNT CODE	ACCOUNT NAME	RM	RM
3000/3	CASH	0	1360
3000/4	SHORT-TERM INVESTMENT	0	0
3000/5	PREPAID INSURANCE	0	1100
3000/6	ACCOUNTS RECEIVABLE/DEBTORS	0	0
3000/7	(-)PROVISION FOR DOUBTFUL DEBT	0	0
TOTAL			RM 2460
CURRENT LIABILITIES			
ACCOUNT CODE	ACCOUNT NAME	RM	RM
4000/1	ACCOUNTS PAYABLE/CREDITOR	0	0
4000/2	SHORT TERM LOAN	0	0
4000/3	ACCRUED EXPENSES	0	500
4000/4	BANK OVERDRAFT	0	0
4000/5	NOTES PAYABLE	0	0
TOTAL			(RM 500)
TOTAL ASSETS			RM 169260
OWNER'S EQUITY			
OWNER'S CAPITAL			RM 150000
RET INCOME			RM 19260
TOTAL			RM 169260
TOTAL OWNER'S EQUITY			RM 169260

Fig.8: Report of client ledger.

Fig.9 shows the balance sheet, which displays all records of all transactions.

CLIENT LEDGER			
Account Name : ALI BIN AHMAD			
REF NO	DESCRIPTION	DEBIT(RM)	CREDIT(RM)
1001/K1	PEMBELIAN RUMAH	280000	
1001/K1	BAYARAN GUAMAN : PINDAH MILIK		2800
1001/K1	YURAN GUAMAN : GADAIAN		2800
1001/K1	YURAN GUAMAN : MELEPAS GADAIAN		300
1001/K1	YURAN GUAMAN : PERJANJIAN JUAL		300
1001/K1	YURAN GUAMAN : KEBENARAN SUKAT		300
1001/K1	YURAN DISBURSEMEN : DUTI STEM		40
1001/K1	YURAN DISBURSEMEN : CARIAN RAS		20
1001/K1	YURAN DISBURSEMEN : CARIAN BAN		20
1001/K1	PPA & PSA (PERJANJIAN ISLAM)		400
1001/K1	YURAN DISBURSEMEN : DAFTAR MEL		25
1001/K1	YURAN DISBURSEMEN : DAFTAR PIN		40
1001/K1	YURAN DISBURSEMEN : DAFTAR KEB		40
1001/K1	MISCELLANOUS/RAMPAI		100
1001/K1	ELAUN PERJALANAN		250
1001/K1	BAYARAN KONTRAKTOR		271400
TOTAL		RM 280000	RM 278835
		TOTAL BALANCE	RM 1165

Fig.9: Report of balance sheet.

CONCLUSION

LAFAMS provides effective ways to maintain and manage business accounts of small law firms in Malaysia. It involves paperless maintenance, yet is able to record client information for easy retrieval,

reducing paperwork, which is a bane of the traditional method of account-keeping. LAFAMS is also able to track payment records in terms of debit and credit payments as well as unpaid billing. Reports produced by LAFAMS are sufficient to

meet the requirements of the Bar Council for evidence of proper account. With regards to system requirements, LAFAMS is able to retain existing hardware and network resources of a legal firm to safeguard its existing IT investment. The main setback of this system is that it needs to be upgraded if the firm's work flow changes. For example, if the firm receives a new type of work it has never done before, it will need to contact the administrator to upgrade the system; this might incur an additional cost.

LAFAMS is obviously suitable for small- and medium-size law firms to manage their accounts while complying with the standard accounting requirements. This software is easy to use and is ideal for lawyers who have limited knowledge of accounting.

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United Nations Security Council Permanent Seats and OIC Requests

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ABSTRACT

A UN Security Council reform has been overdue for decades. Throughout its entire history, reform only took place in 1963 with the addition of four non-permanent seats. Calls for an increase in the number of the Security Council's permanent seats for representatives of developing nations have been loud. The 57 members of the Organisation of Islamic Cooperation (OIC), the largest Muslim organisation in the world and the second largest inter-governmental organisation outside the UN spreading over four continents, is demanding a permanent seat on the United Nations Security Council (UNSC). The need was considered vital due to the spate of events such as the Palestine issue, the September 11, 2001 incident, the global war against radical Islamist terrorists, the Arab Awakening, the UN Security Council's deadlock on the Syrian crisis, Iran and a host of other issues from setting gender policy to human rights, all of which have further amplified a sense of alienation between Muslim communities and the West. This research examines the events that obliged the OIC requests. It identifies the appropriate members for the requested seat and highlights the future benefits of the seat to OIC. The findings of this paper seek to provide a major breakthrough recommendation for the OIC permanent seat on the UNSC.

Keywords: Reforms, Security Council, OIC, permanent seats, representation, request, unity, trust

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

The UN was established in 1945 to serve as a replacement for the League of Nations. Its existence gave birth to all its organs as enshrined in the UN General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the

UN Secretariat. The UN Charter imposes certain responsibilities on the Security Council (SC), most important of which was the maintenance of international peace and security. The composition of the SC is five permanent and 10 non-permanent members. The permanent members are drawn from the representatives of nation states that were victorious in World War II. These include the People's Republic of China, the Soviet Union (now Russia), France, the United Kingdom, and the United States; these five nations are provided with the special position to veto resolutions of the Council, while the 10 non-permanent members are elected by the General Assembly for a two-year term (Horgan, 2008).

The Security Council takes the lead in determining the existence of a threat to peace or acts of aggression. It calls upon the parties to a dispute to settle it by peaceful means. In some cases, the Security Council can impose sanctions or even authorise the use of force to maintain or restore international peace and security (Fasulo, 2009). The need for a UNSC reform has been recognised over the years with the first significant change signalling a numerical increase of seats. In March 2005, the then UN Secretary General Kofi Annan presented a report known as "In Larger Freedom", in which he proposed two variants of the Security Council reform. Both plans aimed at increasing the total number of seats to 24 (Bourantonis, 2005). Plan A proposed six additional permanent seats, and three rotating, with a

total of 11 veto and 13 non-veto seats. Plan B reserved the veto right exclusively for the P5 countries, and proposed to add eight seats with a four-year renewable tenure, along with 11 two-year non-renewable seats (Muravchik, 2005). The proposal of six additional permanent seats was made by a consolidation of the G4 group: Brazil, Germany, India and Japan, a community of countries supporting each other's bids for a permanent seat. However, the G4 initiative found strong opposition in a broad group of more than a dozen states collectively calling themselves "Uniting for Consensus". In July 2005, Uniting for Consensus presented an alternative proposal that suggested that the P5 seats remain, and that an additional 10 rotating seats be added (Annan, 2005).

ORGANISATION OF ISLAMIC COOPERATION (OIC)

The OIC, which consists of 57 members, is the largest Muslim organisation in the world and the second largest inter-governmental organisation after the United Nations. The event of August 21, 1969 which led to the Al-Aqsa Mosque fire resulted in convening the Conference of Ministers of Foreign Affairs of the League of Arab States in August 25 to 26, 1969 in Cairo, where the Arab League Council stressed the importance of holding an Islamic summit. Saudi Arabia and Morocco took advantage of the Conference to hold a preparatory conference in Rabat from September 12 to 25, 1969. In March 1970, a conference was held in Jeddah for the Ministers of Foreign Affairs of Muslim countries to

study the initial proposals that evolved into a plan to establish an Islamic organisation. It was followed by another conference for the Ministers of Foreign Affairs of Islamic countries held in Jeddah in 1972, during which the Organisation of Islamic Cooperation (OIC) Charter was adopted. The name of the OIC was changed from the Organisation of the Islamic Conference to the Organisation of Islamic Cooperation in June 2011.

Under the OIC Charter, the Organisation aims to strengthen Islamic solidarity among member states and Islamic cooperation in the political, economic, social, cultural and scientific fields and to uphold the struggle of all Muslim people to safeguard their dignity, independence and national rights. The organisation was also to coordinate action to safeguard the Holy Places, support the struggle of the Palestinian people and assist them in recovering their rights and liberating their occupied territories (Newman, 2013). It also promised to strengthen the organisation by eliminating racial discrimination and all forms of colonialism, while creating a favourable atmosphere for the promotion of cooperation and understanding among member states and other countries. The Charter enumerated the principles governing OIC activities: equality among member states, observation of the right to self-determination and non-interference in internal affairs, observation of the sovereignty, independence and territorial integrity of each state and the settlement of any dispute that might arise among

member states by peaceful means such as negotiation, mediation, conciliation and arbitration among others (Newman, 2013).

THE NEED FOR OIC IN THE UNSC

The first meeting of the leaders of the Islamic world was held in the wake of the Zionist attempt to burn down the Al-Aqsa Holy Mosque on August 21, 1969 in the occupied city of Al-Quds. The Organisation decided to pool its resources and speak with one voice to safeguard the interests and well-being of Muslim communities throughout the world. It was clearly shown that the organisation would face numerous challenges within and without, which was later proven when several internal and external disputes arose. These challenges began with the fall of the Ottoman Empire and the Caliphate after World War I left a vacuum for a pan-Islamic institution. The division of the Muslim world before and after the emergence of independent states further ignited the search for an institution to revive unity among Muslims. Other major incidents include the Arab-Israel conflict, the Kashmir crisis, the former Soviet Union's invasion of Afghanistan, the Chechen issue and other incidents in Eastern Europe and the conditions of Muslim minorities elsewhere. The incident of September 11, 2001 and the subsequent invasion of Afghanistan and Iraq in 2001 and 2003 respectively, the Arab Awakening that began in Tunisia and eventually spread to several Arab Nations, Libya, Yemen, Sudan, Somalia and Mali and the on-going Syrian crisis and the UNSC deadlock are

also major events demanding a revised role of the OIC in global politics. Sanctions on Iran and differences of opinion among OIC members and a host of issues from setting gender policy to human rights and the stance on cartoons of the holy Prophet Muhammad (PBUH) have amplified a sense of alienation between Muslim communities and the West, and this has further warranted the urgency of UNSC reforms (Howden, 2006).

Muslim communities saw themselves subjected to a neo-colonial agenda of domination and conquest. As the ultimate multilateral organisation, the United Nations is charged with the task of managing this growing alienation and distrust that has generated such a tumultuous relationship. The UN has been partially responsible for the majority of cases that caused grievance to the Muslim world. However, even when the Organisation resisted US pressure to sanction the military invasion of Iraq, as far as many observers in the Muslim world were concerned, the UN sanctions policy against Iraq prepared the ground for this eventuality. This scenario forced several Islamic countries to rethink the role that OIC can play through the United Nations. Since then, several individuals and state actors of the OIC have advocated having an OIC representative in the UNSC. This was followed by the OIC secretary-general Prof. Ekmeleddin Ihsanoğlu's calls for OIC to have a permanent representative in the Security Council during the summit in Cairo in 2013. He said, "One of the important objectives for which I have been

exerting a lot of efforts was to have a seat for OIC in the Security Council to represent 1.5 billion Muslims in the world" (*"OIC demands seat on top UN body"*, 2013).

Ihsanoğlu cited several challenges facing Muslims and Islamic nations, which include poverty, lack of economic integration, Jewish settlement in occupied Arab territories and Judaisation of Jerusalem (Al-Quds), among others. Furthermore, the UN list of vetoed draft resolutions up until the end of 2012 shows that the Arab world has been the target of 36% of such vetoes. The United States alone is responsible for a whopping 58% of those vetoes, almost all in support of Israel. Russia comes a distant second at 26%. Overall, this means that only two countries have accounted for 84% of draft-resolution vetoes in the history of the Security Council in relation to Arab issues (*Hammar skjöld, 2015*). Recently, Saudi Arabia took an unprecedented step in turning down an offer of non-permanent seat on the UN Security Council until the body should be reformed. The Kingdom justified its action on the basis of the issue of Palestine and on-going crisis in Syria, stressing that the UN had failed to transform the Middle East into a zone free of weapons of mass destruction, a reference to Israel, which has never confirmed or denied possession of nuclear weapons, and Iran's Nuclear Programme (*"France suggests reforming veto power on Security Council"*, 2014).

In addition, the OIC secretary-general asserted in his speech at the University of Brunei Darussalam that it was time for

Muslim countries to be regarded as “global actors” in international politics. Ihsanoğlun argued that the UN secretary general Ban Ki Moon had personally confessed that OIC was a strategic partner of the United Nations. Ihsanoğlun made another request in the Russian Foreign Ministry’s international relations institute where he asserted that OIC already comprised the biggest voting bloc at the United Nations and it was the right time for it to have a seat on the Security Council. He stated, “During the first reconsideration of the reform in the UN, I think there should be a seat for OIC in the Security Council... If you look to the structure of the Security Council of today, you have the P5 and there are representatives of different civilisations, different cultures, and political powers. But you won’t find representative of more than 1.6 billion people of Muslim world” (Economy Watch, 2015).

EFFECT OF IHSANOĞLUN’S PROPOSAL

Ihsanoğlun’s desire for an OIC seat in the Security Council was not formed overnight; it was part of his comprehensive struggle to make OIC play a significant role within the organisation and in the rest of the world. Upon his appointment, he took several strategic initiatives to reform the OIC in various fields with the motto “Modernisation and Moderation”. He was the driving force behind the “Ten-Year Programme of Action to Face the Challenges of the Twenty-first Century”, which was adopted by OIC member states

at their Extraordinary Summit Conference in Mecca in December 2005. Through this programme and the new Charter of the OIC adopted by the Eleventh Summit Conference in March 2008, he introduced the application of certain concepts and principles for the first time in the OIC (Ihsanoğlun, 2010). The issue of human rights was introduced to the new Charter of the OIC and the Ten-Year Programme of Action (Convention of the Organisation of the Islamic Conference, July 1999). Objectives were adopted in the same Programme of Action, while emphasising on cultural dialogue (SIPA Lecture, September 2008).

The proposed seat in the Security Council was raised to cater for attendance to Muslim affairs in the SC. Particularly on issues concerning Muslims states, Ihsanoğlun’s proposal is vital because those countries most often viewed as contenders for new permanent seats i.e. India, Japan, Brazil, Germany and South Africa are not members of the OIC. A decade ago, Australia backed permanent membership of Indonesia to the UNSC due to its position as the world’s fourth most populous nation and country with the biggest Muslim population. The idea of Egypt getting a permanent seat was also circulated several years ago but this is undermined by its recent political instability. Pakistan’s chance is very unlikely due to its rivalry with India, while other larger Islamic countries either have a muted international profile, such as Bangladesh, or are too controversial, such as Iran and Nigeria (Organisation of

the Islamic Conference, 2014). Turkey's performance as a non-permanent member of the Security Council in 2009-10 set off warning bells in the West when it opposed an Iran-sanctions resolution that was so watered-down whenever Russia and China supported it ("*OIC demands seat on top UN body to represent Muslims*", 2015).

Although Ihsanoğlu called for the inclusion of the OIC in the UNSC, he cautioned that it may take time: "An OIC country needs a permanent seat on the security council, although I do not think this will happen during my tenure" (Ihsanoğlu, 2013). Ihsanoğlu is correct based on the fact that after the incident of September 11, 2001, several western countries' perception towards Islam, Muslims and Arab countries dramatically changed. Islam was misconstrued as a provocative, oppressive and tyrannous religion. This mistrust further led to provocative acts such as assaults on the prophet of Islam through cartoons and other means, an attempt to burn the Holy Quran, discrimination against Muslims and enactment of laws banning Islamic fundamental rights of Muslim women with regards to Islamic dressing, such as the state prohibition against wearing headscarves in schools in France or in Tunisia (Howden, 2006). Therefore, it makes sense to analyse the actions that led to such conclusions.

Ihsanoğlu's proposal for a permanent seat for the OIC is not a call for a particular member state to hold the position in perpetuity, but rather to allow countries within the bloc to rotate the seat.

Furthermore, it is also correct to state that it is ambiguous when Ihsanoğlu proposed that OIC should have the same status at the UN as that of the European Union (EU). It should be recalled that EU since 2011 has been enjoying an elevated status at the UN. Ihsanoğlu conceded that the EU has a different structure than that of the OIC (Goodenough, 2013). Ihsanoğlu might have confused or misled the organisation. First, if OIC is hoping for a permanent seat on the UNSC, it must be ready to name a single country that will represent OIC; hence, keeping the seat open for rotation among member states would be ambiguous for the UN to consider. Second, if OIC is expected to enjoy the same status as that of the EU, then it should forget lobbying for a UNSC permanent seat. In other words, Ihsanoğlu's vision of OIC's position in the Security Council is unclear, and any positive hope requires a clearly defined demand before such a proposal can be put forward to the Security Council (Marchesi, 2007).

ASSESSMENT OF THE PROPOSED CONTENDERS

The issues listed above attest to the enormity of the problems faced by Muslims in the world today. The seriousness of the crisis demands immediate action to avert the further descent of the Muslims into despair. The OIC must realise that it should not merely focus on political gain but also on alleviating feelings of alienation and insecurity among Muslims. Therefore, a very determined and firm stand must be

taken in seeking a permanent seat on the Security Council. Certain issues must be settled internally before the proposal is pushed forward, such as precise request and identification of suitable states, while consent and support of all states of the organisation are needed before a formal request is made.

Having looked at all members of the OIC, the researchers have identified several member states that can represent the organisation in its bid for a Security Council seat. Although the OIC comprises several countries that equally qualify for this proposed seat, the research chose to focus on Egypt, Saudi Arabia and Turkey.

Egypt

Egypt is a trans-continental country spanning the northeast corner of Africa and southwest corner of Asia, through the Sinai Peninsula. The world's only contiguous Eurafasian nation, Egypt has the sixth largest area estimated at 1,010,000 square kilometres (390,000 sq. miles), lies within the Nile Valley and shares a border with several countries. Egypt, for several centuries, has been performing an important cultural and political role between Islam and Christianity, the Arab world and other world civilisations (Boutros-Ghali, 1982). Egypt is the most populous country in North Africa and the Arab World, and the third-most populous in Africa, with a population of 86 million people. It maintains the largest and strongest military force in Africa and the Middle East estimated at 1,468,500 with

a combination of both active personnel and reservists (Egypt Military Strength, August 2010). In 2014, the Egyptian army was ranked the 13th most powerful in the world, consisting of the army, navy, air force and air defence. The permanent Arab League headquarters is located in Cairo and its secretary general has traditionally been Egyptian. Although the Arab League briefly moved from Egypt to Tunisia from 1978 to 1989, protesting the Egypt-Israel Treaty, Cairo has regained its prestige with the ability to convince member states of its normalcy with Israel. Egypt is seen as a vital actor for the progress and development of the region. Due to its current political situation, Saudi Arabia and the United Arab Emirate have promised to aid Egypt financially, to keep it at bay in its recent political turmoil and economic difficulties.

Saudi Arabia

Saudi Arabia occupies approximately 80% of the Arabian Peninsula. It covers 2,149,690 km (830,000 miles), the second largest in the Arab world after Algeria. Apart from sharing borders with eight countries, Saudi Arabia is the only country in the area with coasts on both the Red Sea and the Persian Gulf, and much of its terrain consists of inhospitable desert. Prior to 2014, Saudi Arabia was the world's second largest oil producer; it has moved to third place after the US overtook the Kingdom and Russia as the largest oil producer from July 10, 2014. The Kingdom remains the largest exporter of oil in the world and controls the world's

second largest hydrocarbon reserves. Saudi Arabia's Human Development Index (HDI) is very high and it is the only Arab country to be part of the G-20. The Kingdom has the highest percentage of military expenditure in the world, spending more than 10% of its GDP. The Kingdom's military spending in 2013 climbed to \$67 billion, overtaking the UK, France, and

Japan to fourth place globally, while the Kingdom rated as the 3rd largest military expenditure in the world with over \$80 billion in 2014, surpassing Russia from fourth place to third. It is also considered the world's second largest arms importer by the SIPRI (Trends in International Arms Transfer, 2014).

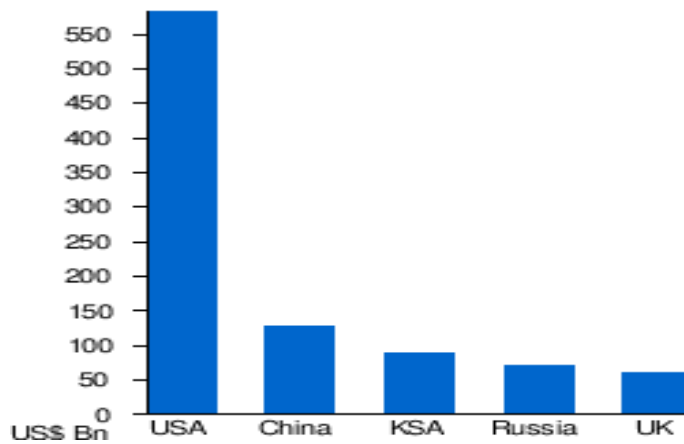


Fig.1: Top five countries with military expenditure, 2014. This figure illustrates the top five countries with military expenditure in 2014 in accordance with the International Institute for Strategic Studies, World Military Balance 2015. Saudi Arabia is in third position.

Saudi Arabia is a founding member of the UN as well as the Arab League (AL), Gulf Cooperation Council (GCC), Muslim World League, the Organisation of the Islamic Cooperation and the Organisation of Petroleum Cooperation (OPEC). It became a member of the World Trade Organisation in 2005. Saudi Arabia plays a prominent role in the International Monetary Fund

(IMF). It supports the proposed formation of the Arab Customs Union proposed for 2015 and the Arab Common Market proposed for 2020. Saudi oil pricing policy has generally been considered to have stabilised the world's oil market and it has tried to work for moderate sharp price movements.

TABLE 1
Saudi Arabian Foreign Aid to UN branches and Other Countries in 2014 – April 2015

Date	Foreign Aid
April 17, 2015	The Kingdom donated \$274 million to support humanitarian needs in Yemen
March 31, 2015	Saudi National Campaign sent 41 tons of relief materials to southern Syria
March 22, 2015	Saudi health centres provided medical assistance to over 2,600 patients a week in Zaatari camp
March 13, 2015	Saudi Arabia pledged \$4 billion in assistance to Egypt
December 11, 2014	King Abdullah donated \$35 million to West African countries to fight Ebola
December 10, 2014	King Abdullah donated \$104 million to the World Food Programme
December 10, 2014	The Kingdom donated \$1 million dollars to the UN High Commission for Refugees
November 4, 2014	The Kingdom handed over \$2 million in annual contribution to UNRWA
October 1, 2014	Saudi Arabia provided \$ 1 million to the UN High Commission for Refugees
August 13, 2014	Saudi Arabia donated \$100 million to the UN Counter-Terrorism Centre
August 6, 2014	Saudi Arabia Donated \$1 billion to the Lebanese Security Services to combat terrorism
July 1, 2014	King Abdullah ordered \$500 million in humanitarian assistance to the Iraqi people

Sources: Foreign Aid, Royal Embassy of Saudi Arabia, 2015

On its foreign aid to the UN and other organisations, Saudi Arabia contributed extensively to the financial pockets of the UN in several areas. The sum of \$104 million was given to the United Nations World Food Programme (WFP) in December 2014 (Table 1) for humanitarian operations in Syria, South Sudan and Somalia to purchase and supply essential food and nutrition assistance at a crucial time when food operations in those areas were under threat of suspension due to lack of financial support (“Generous Contribution by Saudi Arabia”, 2014). In August 2014, King Abdullah bin Abdulaziz Al Saud of Saudi Arabia announced a contribution of US\$500 million for food assistance to hundreds of thousands of Iraqis displaced

from their homes, followed by another \$100 million for the United Nations’ counter-terrorism efforts (see Table 1). The UN Counter-Terrorism Centre (UNCCT) based in the UN headquarters in New York was launched in 2011 with the help of a voluntary contribution from the Saudi government. The contribution to the WFP was part of a US\$500 million donation from Saudi Arabia to UN agencies in July 2015 to provide urgently needed humanitarian assistance in Iraq (“Saudi Arabia Contribution Saves Lives”, 2015). Apart from its regular voluntary aid, Saudi Arabia is also well known as a middle contributor to the purse of the United Nations and other countries, as shown in Table 1.

Turkey

Unlike Egypt, Turkey is a transcontinental Eurasian country. Asian Turkey comprises 97% of the country and is separated from European Turkey by the Bosphorus, the Sea of Marmara and the Dardanelles. The entire territory of Turkey is more than 1,600 km (1,000 m) long and 800 km (500 m) wide, with a roughly rectangular shape. Turkey is the world's 37th largest nation in terms of area (US Library of Congress, 2006).

Turkey is a founding member of the United Nations and has been a member of NATO since 1952, G-20. It is also a member of other major international organisations. Turkey has the second largest standing armed forces in NATO after the US with an estimated strength of 495,000 deployable forces according to a 2011 NATO estimate (NATO Public Diplomacy Division, 2014).

Turkey is one of the five NATO member states that possess the nuclear sharing policy of the alliance, together with Belgium, Germany, Italy and the Netherlands. A total of 90 B61 nuclear bombers are hosted at the Incirlik Air Base, 40 of which are allocated for use by the Turkey Air Force in case of a nuclear conflict (Der Spiegel, 2010). Turkey has the 17th largest and the largest nominal GDP in the world (Gross Domestic Product, 2013). Turkey's contribution to the OIC has increased tremendously. Apart from the tremendous contributions of its secretary general, who happens to be Turkish, Ankara is one of the leading countries to shed

light on the violence against the Muslim minorities in Myanmar, the Rohingya Muslims, the Arakanese and other Muslim minorities in the Arakan state, according to OIC chief Iyad Madani. Turkey has played an active role in the organisation's day-to-day activities and it has hosted several of its activities like the Islamic Conference of Foreign Ministers (ICFM) in Istanbul in 1976 and August 1991. These conferences led to the resolution on the establishment of two centres, namely "The Research Centre for Islamic History, Art and Culture" and "The Statistical, Economic, Social Research and Training Centre" in Istanbul and Ankara, respectively (OIC chief Iyad Madani, January 15, 2014).

ANALYSIS OF THE ASSESSMENT RESULT

The paper relies on eight criteria for evaluating the three contending states for the OIC seat in the Security Council. The criteria are defence budget, military, population, geographical area, *gross domestic product* (GDP), political stability, external influences and financial contribution to UN. Based on these criteria, positions are awarded in line with points accumulated by each country, and where there is no factual figure e.g. external influences, the historical fact analysis is calculated in terms of value and awarded in points. Table 2 indicates the position awarded to each state based on the figure or fact per criteria. For instance, in defence

budget, Saudi Arabia surpassed other countries with a budget of 80.8 billion and was placed first, followed by Turkey in second place with 18.1 billion, while Egypt was positioned third with 4.4 billion (Economy Watch, 2015). An example of the historical fact in Table 2 is the financial contribution to UN; this is difficult to estimate in terms of specific total amount. It was not merely in terms of cash donations but involved other valuable goods such as aid. The research adopted historical fact in

evaluating these values, and positions were awarded accordingly. As a result, position is associated with points, and the distribution of points is as follows: 1st position earned 30 points; 2nd position earned 20 points; and 3rd position earned 10 points.

Table 2 shows figures recorded for political stability, external influence and financial contribution to the UN calculated on positional bases. These positions were later converted into points in Table 3.

TABLE 2
Criteria, Positions and Points of the Proposed Contenders

Criteria	Egypt Position		Saudi Arabia Position		Turkey Position	
Defence Budget	4.4bn	3	80.8 bn.	1	18.1bn.	2
Military	1,268500	1	258500	3	596130	2
Population	88.4	1	27.7	3	82.5	2
Geographical Area	10001,450	2	2,149,690	1	783562	3
GDP	324	3	805	2	861	1
Political Stability	10	3	30	1	20	2
External Influences	10	3	30	1	20	2
Financial Contributions to UN	10	3	30	1	20	2
Position Marks		19		13		16

The total estimation of the positions in Table 2 above shows that Egypt had a total of 19 overall positions, followed by Turkey with 16 total positions and Saudi Arabia with 13 total positions. The logic behind

the position awards is that the higher the position obtained, the lower the value received. In other words, a higher position scores fewer points, while a lower position scores higher points.

TABLE 3
Results of the Estimated Points of the Three Contenders

Criteria	Egypt Position Points		Saudi Arabia Position Points		Turkey Position Points	
	Position	Points	Position	Points	Position	Points
Defence budget	3	10	1	30	2	20
Military	1	30	3	10	2	20
Population	1	30	3	10	2	20
Geographical Area	2	20	1	30	3	10
Economy by GDP per Income	3	10	2	20	1	30
Political Stability	3	10	1	30	2	20
External Influences	3	10	1	30	2	20
Financial Contributions to UN	3	10	1	30	2	20
Overall	3 rd	130	1 st	190	2 nd	160

Table 3 shows the performance of states based on the position and value points generated from each position. Saudi Arabia was placed in 1st position with a total of 190 points, followed by Turkey with 160 points in 2nd position, while Egypt secured 130 points and was placed in 3rd position.

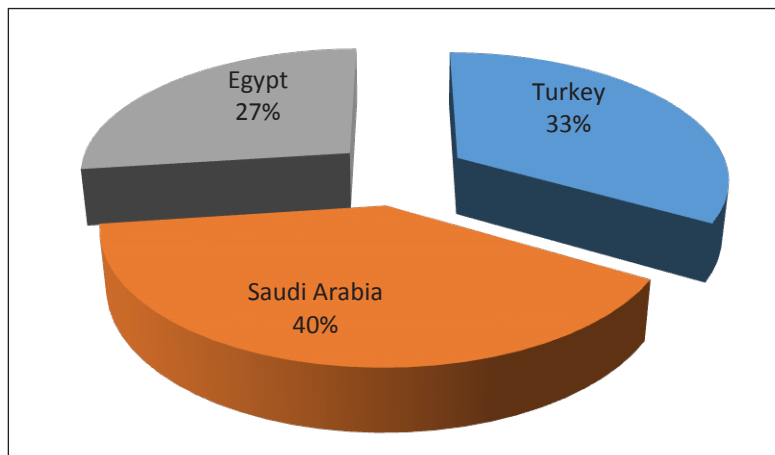


Fig.2: Percentage of each contender.

Fig.2 describes the percentage of each country per overall points. Saudi Arabia scored 190 points and won 40%; Turkey secured 160 points and earned 33%; and Egypt obtained 130 points and scored 27%. These findings show that Saudi Arabia was the best contender for the proposed OIC seat at the UNSC if such

a proposal receives the UNSC merit, while Turkey and Egypt occupied 2nd and 3rd positions, respectively.

CONCLUSION

The challenges faced by the OIC are complex and require comprehensive solutions. Almost every member of the organisation confronts one challenge or another, and there is no simplistic strategic method to resolve it. The ninth secretary general of the OIC, Ihsanoğlu's proposal for a Security Council seat is just one of the initiatives to raise the OIC's status. While this is considered a good suggestion, no actual initiative has been taken seriously to officially work out how such a goal can be achieved. It was through the discovery of this lapse that the researcher embarked on writing this paper in order to identify the best representative for the proposed seat (Charter of the Organisation of Islamic Cooperation, 2014).

Having taken a number of elements into consideration, and despite the fact that not fewer than 10 states can be presented to contest for the assessment, only three countries were selected for assessment. Eight criteria were formulated and the result of the assessment found Saudi Arabia to be the best contender for the position. Among others, financial capability elevates the Kingdom's chance of being the best contender. In fact, Saudi Arabia has channelled a tenth of humanitarian aid to neighbours and foreign countries that is not considered in this work. It can be argued that the Kingdom has provided

foreign assistance more than any other state in the Arab and Muslim world, either to other Muslim countries or directly to the purse of the UN, or its sub branches for various activities. This is imperative even for the UN to conclude on a capable representative. Furthermore, regardless of the absolute monarchical system of government adopted, the kingdom remains a peaceful and stable country in comparison with other contenders.

Notwithstanding, it has to be clear that the solution to the problems of the OIC requires a multidimensional approach. Securing a UNSC seat is not an automatic solution to dozens of challenges faced by the organisation, but merely a way forward. First of all, the OIC needs to call for the revival of unity of its members. That is, Muslim states should achieve unity among themselves. To compare the OIC with the European Union (EU), an economic and political union of 28 member states of Europe, more will need to be done. The OIC should convince its member states to unite for one common goal, that is, Islamic renaissance and a means to enjoy good relations with the rest of the world.

Although the OIC aims to defend the national sovereignty, independence and territorial integrity of its member states, this can only be realised through a common foreign and security policy. Therefore, coherence in the foreign policies of OIC states is required to safeguard the collective interests of Muslims. Although calls have been made for the OIC to establish a joint action force like NATO, it seems that

the Arab League, a key member of the OIC, is proposing the establishment of a peacekeeping force known as “Defence Force”, a force of 40,000 personnel to respond to any untoward circumstances. Such an initiative can only work effectively if there is unity and trust among the various states (Jones & El-Ghobashy, 2015). The issue of trust remains a big question among Arab nations and, of course, OIC members. Without speaking with one voice, Muslims will continue witnessing a spate of new crises in the future. As a result, this research proposes a candidate for OIC representation in the UNSC instead of candidate by rotation as suggested earlier. A country like Saudi Arabia can be complimented for her prompt and generous contributions and voluntary donations to humanitarian causes to Muslim nations and the UN in addition to other criteria discussed in this research. Clear evidence of these findings is Saudi Arabia’s current leading role in the Yemen crisis. Despite several reactions and differences of opinion on the question of the operation legality, the anticipated success of its leading role in Yemen presumably underlines a precedent for the Arab and Muslim world.

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The Emergence of Non-State Actors in Enhancing Malaysia's Relationship with the Gcc Countries

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ABSTRACT

For more than 40 years, there has been growing interest in the socio-political and economic interactions between Malaysia and individual Arab Gulf States. This is most likely because of the economic interaction between these nations and Malaysia as well as the religious affinity between Malaysia and the Arab Gulf states. This has invariably led to the proliferation and establishment of numerous non-state actors who are also playing momentous roles in enhancing bilateral relationships. The aim of this paper is not only to examine and investigate the influence and contributions of non-state actors in enhancing Malaysia's relationship with the Arab Gulf states but also to provide a significant attempt to assess the role of Malaysian non-state actors in shaping future direction with the Arab Gulf countries and the extent to which Malaysian foreign policy has intensified the role of non-state actors.

Keywords: Non-state actors, Arab Gulf States, Malaysia, foreign policy

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Malaysia's relations with the Arab Gulf states undoubtedly relies on the success of the spread of Islam. However, there has been a drastic shift in Malaysia's relations with the Arab Gulf states from kinship based on religion only to other facets of human capital development and economic activities. This shift has not been given adequate attention in academic discourse

on the engagement and involvement of non-state actors in strengthening Malaysia's relationship with the Arab Gulf States. This paper examines the roles of non-state actors in fostering commercial, trade and economic prosperity between Malaysia and the Arab Gulf states. It will, therefore, be pertinent at this stage to take a look at the emergence of non-state actors in international relations while acknowledging the continuous importance of state actors.

Non-State Actors: Emergence and Evolution

The rise of globalisation, liberalisation and privatisation in the 1980s and 1990s brought a swift transfer of roles from states as sole source of regulation, public policy and economy to non-state actors. This change slowly diminished the authority of the state and its activities at the international arena, and since then, the roles played by international institutions such as non-state actors, multinational corporations (MNC) and non-governmental organisations (NGOs) in a globalised world have become increasingly prominent (Milner & Moravcsik, 2009). The emergence and presence of these international institutions at the international circle gave rise to view points on how international relations could be determined and described. For instance, the world has been dominated by the realist point of view on how international relations can be explained. They have ignored the emergence of non-state actors in international relations, especially if

the definition of non-state actor includes terrorist organisations. The realists also believe in the state-centric approach that views all other actors in international relations as being of secondary importance (Willetts, 2001). Therefore, the realists have narrowed the role of non-state actors in international relations, especially in the aspect of policy making.

At a later stage, scholars began to notice the role of non-state actors in international relations because the states, somehow, had to give up some of their authority to meet the demands of non-state actors. In the case of humanitarian or social movements, for example, the states became more alert about the implementation of human rights, as otherwise, they would have had to face aggravated pressure from NGOs (Smith & Johnston, 2002). Therefore, the awakening of non-state actors as influential actors in international relations has become imperative. The neoliberal refers to this as the systemic-level theory of international politics, which plays an important role in reshaping the stance of the states to reconsider the influence of non-state actors in matters related to international relations (Milner & Moravcsik, 2009).

The important roles being played by non-state actors with respect to policy and decision making in the international affairs of states are, therefore, being fully recognised by the states itself. This recognition leads to the emergence of a number of influential non-state actors, NGOs and TNCs. States, directly or indirectly, are gradually depending on these non-state

actors for effective policies to build up the country. For example, attraction of foreign investment from multinational firms is now considered one of the major roles of non-state actors. Though their resources may be limited, they have the ability to mobilise millions of members and initiate global media campaigns to draw the attention of multinational and transnational investors (Fogarty, 2013).

The other area in which the role of non-state actors is well noted is international transactions, which a state may have difficulty regulating. This situation is known as the 'triangulation of trade and loss of sovereignty'. For example, a government may wish to impose sanctions upon another state, but may find it difficult to control information and people mobility, especially for business purposes (Willettts, 2001). In the international arena, sanctions can only be imposed if the states cooperated with one another. It is noted, however, that most often, there are clashes between powerful and weak states. Weak states anticipate that they will be exploited by powerful states for future hidden benefits, and therefore, they refuse to cooperate (Urpelainen, 2010). Sometimes, mediators like non-state actors facilitate an agreement and ease the conflicts between states in order to build strong cooperation in international relations because conflict may result in trade prohibitions, levying of tariffs and embargoes (Chang, 2005).

Indeed, it is acceptable to posit that non-state actors have been playing an active role in contemporary global politics

and the economy (Hettne & Söderbaum, 2000). This position is further emphasised by the fact that in the twenty first century, there has been agitation for more democratisation, as is being canvassed for in the Arab Gulf states (Kéchichian, 2004). Hence, with the new-paradigm of non-state actors, there is a kind of diplomacy and ideology in the overall activities of non-state actors (Langhorne, 2005).

Malaysian Non-State Actors in the Arab Gulf

Malaysia, in its vantage point in Asia has been doing well in education, socio-economic development, commerce and trade, and has long enjoyed political stability, among other positive features. The peaceful co-existence and security and the overall development of the country is not only restricted to the country but extends to other countries through its international relation policy and partnership with other international communities. There has been pragmatic effort by the government to partner with other countries through its foreign policies, for example, through activities related to human and capital development with such countries as those of the Arab Gulf states like Bahrain, Kuwait, Saudi Arabia, Qatar, Oman and the United Arab Emirates.

The country's relations with the Arab world, as noted earlier, is substantial in terms of socio-economic, trade and commercial activities, which have been conducted over many decades. However, the extent of the growing interest in the

roles of non-state actors between Malaysia and these Arab Gulf states has not been well researched despite the fact that the contributions of these non-state actors have been acknowledged at national, regional and international levels. There has been a drastic and growing demand to investigate and access the roles of non-state actors in the overall developments that have taken place between these countries in all facets of human endeavour. Yet, there is a lacuna regarding the extent to which the roles played by Malaysian non-state actors has assisted in shaping future direction with the Arab Gulf states. Therefore, the main aim of this paper is to investigate the contributions of non-state actors in fostering Malaysia's relationship with the Arab Gulf States.

Malaysian Foreign Policy: A Catalyst for Intensification of the Role of Non-State Actors

Undoubtedly, foreign policy is an important written document that indicates how a particular nation relates with other nations in socio-economic matters, politics, trade, commerce and other critical activities (Slaughter *et al.*, 1998). Malaysia, as it prepares to achieve its vision 2020, is working hard to ensure that its foreign policy is comprehensive and far-reaching (Sharifah, 2003). Malaysian foreign policy has recently affirmed its bilateral relationship with the Arab Gulf states and the West Asian region in general. Undoubtedly, Malaysian foreign policy has intensified the role of non-state actors in these relationships. Indeed, the political challenges faced by the Arab Gulf

has caused the USA to come up with a new policy on the Middle East generally with specific focus on the provision of peace, harmony and freedom. As a result of the multifarious challenges faced by the Arab Gulf States, the region's foreign policies have been shaped towards looking for working partners in alternative regions such as India and Turkey. Malaysia is also one of the countries whose enjoys favour with the Arab Gulf (Aras, 2005; Pradhan, 2010).

Indeed, economic prosperity has significant impact on the foreign policy of Southeast Asia in general and Malaysia in particular. In this regard, non-state actors have been actively collaborating and cooperating with other organisations that have similar objectives. Similarly, the motive was to have an economic orientation that is market-driven. At the end of 1997 Malaysian non-state actors reached a new high in economic sustainability since the economic meltdown (Sharifah, 2003). Subsequently, there has been agitation for change in socio-economic transformation policy and politics. This trend has in no measure positively affected the country's foreign policy. In this regard, it is asserted that the socio-economic model of Malaysia was focused on growth and development (Sharifah, 2003). Hence, political reformation is corroborated by national transformation in terms of economic and social change.

It is not unrealistic to posit that Malaysia has seen a lot of reform in the past five years. The changes or reforms cut across various realms such as the

economic, legal and political spheres of society. It can be asserted that just like Turkey in the Middle East, Malaysia enjoys a positive reputation among the Arab Gulf states and can be considered a role model for the Arab Gulf states as a result of its creative ideas in striving for reconciliation between democracy and Islam along with its technological advancement. However, there is an international sectarian difference in the country's seemingly reconciliatory approach towards democracy and Islam. Indeed, the role of Malaysia in the Organisation of Islamic Cooperation (OIC) and specifically, the role it plays through the International Islamic University has elevated its profile and prestige among Muslim countries in general and the Arab Gulf states in particular.

Further, a number of non-state actors in Malaysia have been proactively playing significant roles to ensure that the crisis in the Arab Gulf states is ended and more importantly, that humanitarian services are offered in conflict-prone areas in the Arab Gulf states and the wider region of the Middle East e.g. Palestine. Recently, government policies have been reformulated to address some fundamental problems facing the Arab Gulf States. Available resources further show that since the era of former Prime Minister, Dr. Mahathir, non-state actors especially those in the business community have been growing steadily and playing a greater role in both domestic and foreign affairs (Sharifah, 2003). In 1991, the Malaysia-Saudi Arabia Friendship Society (MBFS) was established, and this

has further contributed to Malaysia's goal of strengthening Malaysia-Saudi relations (Economic Planning Unit, 2006).

Socio-Economic Relationship Between Malaysia and the Arab Gulf States

Malaysia plays a significant role in the socioeconomic development of Asia in general and Southeast Asia in particular. The current socio-economic bilateral relationship between Malaysia and the Arab Gulf states can be traced back to 1979 with the establishment of the Arab-Malaysian Development Authority, which strengthened commercial and trade activities. The focus on economic development of the Arab Gulf states no doubt has helped Malaysia to promote its eco-democratic system more vitally. This system had also helped to improve the well-being and standard of living of her citizens (Habibi, 2010; Kamrava, 2012). Also, the social stability, peace and harmony enjoyed in Malaysia serve as an impetus in encouraging the Arab Gulf states to collaborate with the country in many areas of economic and capital endeavour, especially in trade and commerce. It is commonly known that peace, security and stability serve as determinant factors in the socio-economic development of any nation. The socio-economic vibrancy of Malaysia's bilateral relationship with the Arab Gulf states has lately been enhanced by the involvement of Malaysian businessmen in the oil industry through the establishment of the Gulf Cooperation Council (GCC) (Kéichichian, 2004; Habibi, 2010; Kamrava, 2012).

In 1981, the Gulf Cooperation Council (GCC) was formed aimed primarily at promoting the socioeconomic and political interests of the Arab Gulf states and more importantly, solving the multifarious problems of the Arab Gulf states (Habibi, 2010). There have been changes in the socio-economic relations between the Gulf and the West since the terrorist attack on the World Trade Centre (WTC) on 11 September, 2001. Now, there are several transnational business networks between Malaysia and the Arab Gulf states, and the economic ties between the two countries, on the basis of promoting socioeconomic development and cooperation, are very strong. The economic relationship between Malaysia and the Arab Gulf states is reflected in investment and business ventures between the countries (Sharifah, 2003; Abu-Hussin, 2010; Abu-Hussin & Salleh, 2013). Aras (2005) reported that:

The GCC countries have great potential for reconciling economic development and modernity in the Gulf, and this may serve as an example for other regions. The GCC is also active in providing funds to a number of infrastructural programmes outside the Gulf. It is necessary for regional countries to understand the conditions that created the constructive roles of Turkey and the GCC for regional peace, stability and development. In this regard, Turkey is a natural key to any plan or concept that aims to promote democracy and raise living standards, thanks to having both European and Middle

Eastern identities, political and social modernization, and rising democratic standards. (p. 94)

It is further asserted that Malaysia plays a significant role in attracting the Arab Gulf states through Transnational Commercial Organisations (TCOs) such as financial markets, business cooperation, stock exchanges etc. Similarly, in the Arab Gulf states, there are many Malaysian non-state actors that contribute significantly to socioeconomic development. These non-state actors play important socioeconomic roles mostly in the areas of multimedia and information technology (IT).

There are various aspects of IT revolution such as software development and IT services. For the enhancement of the socio-economic bilateral relationship between Malaysia and the Arab Gulf states, Malaysia, compared to many other countries like India, does not promote this relationship with semi-skilled and skilled workers. Nonetheless, professionals like medical doctors, engineers, accountants and businessmen etc. also form what is now known as non-state actors, and they have been contributing meaningfully to socioeconomic development in the Arab Gulf states (Gallarotti *et al.*, 2012). On the other hand, the Arab Gulf states in the recent past have sought exportation of hydrocarbon from the Southeast Asian market to replace trade with western countries.

As a result, recent socioeconomic activities between Malaysia and the Arab Gulf states have become strengthened, especially in the areas of trade and economic

cooperation. The establishment of an economic cooperation framework (ECF) would be especially important in fostering bilateral socio-economic and commercial relations between these nations.

The revival of religion is certainly part of the global search for identity and belonging for communities, social structure, institutions and new sets of orientations that provide meaning and purpose. In this regard, Muslim countries that are largely interconnected by religious belief, such as *Tauhid* (oneness of God), culture and history naturally develop a cohesive collective identity known as an “Ummah” (nation or community of Islam). The “Ummatic” identity, sentiments and agenda could provide ideational, normative and cultural factors relevant to officials involved in the decision-making process related to socioeconomic activities. Highlighting the importance of religious belief and values that could potentially shape future relations between Malaysia and the Arab Gulf, sectors such as *halal* products and food security that are a major concern to the Muslim community encourage cooperation between Malaysia and the GCC to boost economic opportunities in these sectors. Malaysia has been promoting this area by implementing *halal* standards and developing *halal* industrial parks. In fact, Saudi Arabia has expressed willingness to share expertise with Malaysia in building a *halal* park in the Middle East (Bernama, 2010). UAE, on the other hand, requires the *halal* certification logo for all imported products, and the Malaysian *halal* logo is

the one most recognised (personal interview with Consul Agriculture of Malaysia in Dubai, September, 2014). This is due to the fact that the Malaysian *halal* certification system, through its Department of Islamic Religious Department (JAKIM), applies stringent tests to all products before issuing the *halal* certificate. There are also about 80 Malaysian-based companies that have established businesses in UAE that are actively promoting *halal* food (MATRADE, 2010).

Cooperation and Collaboration Between the Gulf Cooperation Council (GCC) and Malaysia

Malaysia is considered a ‘second home’ for tourists from Southeast Asia, and Bukit Bintang, located in central Kuala Lumpur, is a prominent entertainment and leisure spot for them. Four major languages are spoken in Malaysia, namely, Malay, Mandarin, Tamil and English. However, according to Foley (2012), in the last few years, the prominence of the Arabic language in entertainment hubs in Kuala Lumpur such as cafes, restaurant, clubs etc. is an indication that the Arab presence in tourist spots is growing. This phenomenon reflects the Malaysian tourism slogan, “Malaysia – Truly Asia”.

This undeniable fact has necessitated the employment of Arabic-speaking employees as well as the serving of Arab food in different restaurants. The number of Arabs from the Arab Gulf states especially from *Khaliji*, specifically Saudi Arabia, is so high that Malaysians refer to

the peak period in Arab travel to Malaysia as the “Arab Season” (Foley, 2012). A huge number of Arabs live in harmony and work without fear in Southeast Asia. Malaysia is also an ideal country in terms of intellectual exchange for the Arab Gulf states as it offers attractive educational opportunities. In addition, medical care in Malaysia is considerably cheaper for patients from the Arab Gulf states compared to treatment obtained in Western and European countries. Foley (2012) noted:

While Gulf Arabs contributed generously to religious institutions in Southeast Asia in the twentieth century, they made few investments in the region’s economy, apparently preferring safer opportunities in the West. The director of the Arab-Malaysian Development Bank observed in 1979 that religion factored little into the economic decisions of Gulf Arabs: ‘When it comes to paying out money, they take out their Japanese calculators and do their sums.’ But this dynamic changed at the start of the twenty-first century, when Gulf states ‘re-oriented’ their focus eastward — towards not only China, but also the Muslim nations of Southeast Asia. For many in the Gulf, Malaysia was an attractive alternative destination to the West for education, healthcare, investment and leisure — especially after the 9/11 terrorist attacks, the Dubai Ports World affair, and the 2008 global financial crisis. Malaysia also offered two additional benefits: an entity way to Indonesia

and the other growing economies in Southeast Asia and a way to check the growing influence of Iran in the region. There are 70,000 Iranians living in Malaysia alone. (p. 78)

This indicates that apart from the influence of religion, Gulf investment in the economy of Southeast Asia is a significant factor in Malaysia’s relations with the Arab Gulf states. Taking note of this, Southeast Asian leaders strongly uphold the stand point that the presence of Gulf countries in the region will considerably boost the economy of the region in the immediate future, allowing the region to compete with the growing economy of China. The presence of the Arab Gulf states in the region can also influence the growing interest of Western markets in Southeast Asia. It is notably presumed that negative events in the Gulf have served as positive reinforcement to the growing interest of Southeast Asia in the Gulf in order to maximise economic benefits. Further still, the economic success or prosperity stories recorded between Malaysia and the Gulf states suggest that non-state actors have contributed immensely to socioeconomic relations between them.

The Emergence of Islamic Banking

The emergence of Islamic banking and finance has further strengthened Malaysia’s engagement with Arab countries. The establishment of these institutions has benefitted from the surplus of oil money in the Arab Gulf. The Islamic banking and

finance sector in Malaysia has recently been a platform for funds from the Arab Gulf states, and this continues with the participation of Arab Gulf banking institutions in the Malaysian market. For example, BIMB, the first Islamic bank in Malaysia, received a substantial investment from Dubai Islamic Investment Bank, a subsidiary of the Dubai Group, in 2007. Dubai Islamic Bank purchased a forty-percent share in BIMB, valued at RM828 million (US\$224) (Bernama, 2007). Few other funds in the Islamic banking and financial sectors have received such a significant injection of Arab petrodollars. Furthermore, the Kuwait-based Gulf Investment Cooperation (GIC) recently launched a RM500 million (US\$164 million) issuance of *sukuk*.¹

The Malaysian government via the Malaysian Islamic Finance Council and Central Bank of Malaysia (BNM) are encouraging Islamic banks from the Arab Gulf states to establish businesses in Malaysia. BNM has given licences to several bank operators from the Middle East, such as Al Rajhi Banking & Investment Banking, KFH and ACR ReTakaful Holdings (a joint venture between Khazanah Nasional Berhad² and the Dubai Group). Moreover, the Malaysia International Islamic Financial Centre

¹ *Sukuk* is an asset-based Islamic bond that is structured according to *Syariah* (Islamic law) principles.

² Khazanah Nasional is a government-owned investment organisation that manages the sovereign wealth fund.

(MIFC) is actively promoting Malaysia as a major hub for international Islamic finance in the Arab region and encouraging substantial discourse between the market players in Malaysia and the Arab region. With the appointment of the Crown Prince of the State of Perak, Malaysia, HRH Raja Dr Nazrin Shah Ibni Sultan Azlan Shah, as the financial ambassador of MIFC, Malaysia is now widely accepted as a leading example of the industry and is recognised as the most advanced player in the Islamic banking and finance industry. One such example of cooperation between Malaysia and the Arab Gulf states is the gas exploration project in Sarawak between Mubadala Company of Abu Dhabi and the Malaysian National Petroleum Company (PETRONAS) and Sarawak Shell Berhad (Mubadala, 2014). Mubadala was also given two concession blocks in offshore Sarawak, in the eastern part of Malaysia (2013) and has a strategic joint venture investment with 1MDB in Sarawak for developing a US\$4 billion aluminium complex in Malaysia (Fitch, 2011). The success of Mubadala Company in Malaysia is believed to be due to the strong contribution of Malaysian entrepreneur Jho Low. Jho Low is linked with Mubadala through its subsidiary hospitality unit, the Viceroy Group of Hotels, of which he is a director, and was believed to have connected Malaysia with the UAE (AR, 2013).

Foley indicated the extent of the involvement of the Arab Gulf states in Malaysia in terms of education, investment, health and leisure services. In addition, he pointed out (Foley, 2012):

At the same time, the Gulf's bilateral trade with Southeast Asian nations is still smaller than its bilateral trade with China, Europe, Japan and the United States. Although the number of Gulf tourists have grown rapidly in recent years, even the number of Saudi tourists (87,000) were dwarfed by those from Singapore, Indonesia, Brunei and China in 2011. One sees similar numbers in Indonesia, where

only a fraction of the 7 million tourists annually come from the Gulf. Although the number of GCC students in Southeast Asian colleges and universities has risen, and the fees at Malaysian universities are a fraction of those at Western institutions, there are now 50,000 Saudis studying in the United States — many more than in Malaysia. (p. 84)

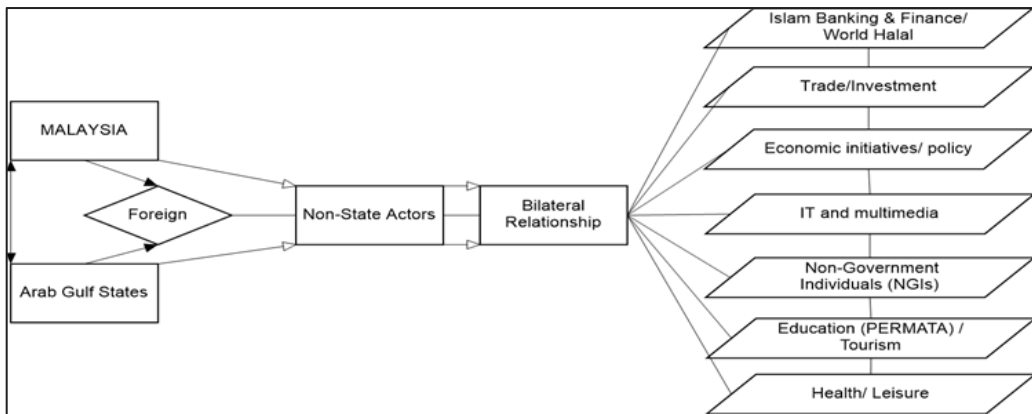


Fig.1: A framework illustrating non-state actors in enhancing Malaysia's relationship with the Arab Gulf states (Büthe, 2004; Aras, 2005; Langhorne, 2005; Pradhan, 2010; Foley, 2012).

Fig.1 provides a detailed explanation of the role of non-state actors in enhancing Malaysia's relationship with the Arab Gulf.

CONCLUSION

The paper has meticulously explored the socioeconomic bilateral relationship between Malaysia and Arab Gulf states through the lens of non-state actors. Non-state actors are otherwise referred to as transnational organisations or non-governmental organisations. This paper

has investigated the interesting factors that have contributed to the bilateral relationship between Malaysia and the Arab Gulf states. It explicitly elaborated that the roles of non-state actors in strengthening the bilateral relationship between Malaysia and the Arab Gulf states cannot be over-emphasised. Lack of governmental support in providing essential facilities for humanitarian services is one of the fundamental factors that enables or paves the way for the emergence of non-state actors. Studies have shown that socioeconomic and political expansion

between the Arab Gulf states and countries like Turkey and India is being transformed by non-state actors.

In the Malaysian context, non-state actors have contributed immensely to the enhancement of the dialogue between Malaysia and the Arab Gulf states especially in the desired change and required transformation. Various areas to which there have been meaningful contributions by non-state actors to the enhancement and development of Malaysia's economic relationship with the Arab Gulf states were also thoroughly examined. In conclusion, it is suggested that the Malaysian government, policy makers and stakeholders should encourage and motivate Malaysian non-state actors to contribute towards shaping future direction with the Arab Gulf states. In other words, Malaysian foreign policy must inculcate the idea of intensifying the role of non-state actors towards the enhancement of existing relationships for future growth and development.

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The Application of Contract Law Principles in Domestic Contracts

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ABSTRACT

A domestic contract refers to an agreement between persons having a family relationship. Despite the general rule of contract, parties in social, domestic and family agreements may not have the intention to create legal relations, but domestic contracts are legally binding. In the context of family law, domestic contracts normally involve marriage contracts and separation agreements that include, among others, the pre-nuptial agreement, settlement agreement, division of matrimonial property agreement and custody of children agreement. Despite the common nature and structure of the domestic contract as a typical agreement, there are concerns from family law practitioners that domestic contracts should be interpreted differently from the commercial or other types of contract and judges should have special or additional factors of consideration in giving effect to these contracts. In Malaysia, there is a proposal for the formation of a Family Court to improve procedures and provide better service to families. The main objective of the Family Court would be to empower the parties to resolve their disputes by mutual consent and in a manner that best serves the needs of the children involved. With the proposal for the establishment of a family court, it is very important for the court to determine the approaches that shall be applied by the said family court in domestic contracts in comparison to judicial approaches in commercial contracts. This paper examines approaches of the courts in dealing with

family law contracts and compares them with the judicial approaches in domestic agreements between family members under general contract law. The research methodology adopted in this paper is the statutory and doctrinal analysis.

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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Keywords: Domestic contract, family law, contract law

INTRODUCTION

In Malaysia, contract law is based on English law, which focusses on the principles decided by the courts. Although the *laissez-faire* principle is applied, where parties are free to agree on terms of the contract, when disputes arise, the court retains power in interpreting and giving effect to terms of the contract. Other than the rules of interpretation, common law contract also applies the principle of intention to create legal relations whereby parties of an agreement which falls under family, social and domestic agreement are deemed not to have the intention to create legal relations (*Balfour v. Balfour* [1919] 2 KB 571; *Jones v. Padavatton* [1969] 1 WLR 328 Court of Appeal). This means that although Section 4 of the Married Women's Act 1957 provides that the married woman is capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation as if she were *femme sole*, a general contractual agreement entered between husband and wife or between parent and child is arguably legally binding.

However, despite the general presumption that an agreement between family members does not have any intention to create legal relations, it is common under family law for spouses to enter into agreement before the marriage, during the marriage, upon divorce and after divorce. Section 56 of the Law Reform (Marriage

and Divorce) Act 1976 clearly provides for a domestic agreement or arrangement to be referred to the court to express an opinion as to the reasonableness of the agreement or arrangement. It is interesting to see that there are different approaches applied by the courts in interpreting domestic contracts compared to general or commercial contracts.

ADMINISTRATION OF FAMILY LAW IN MALAYSIA

Malaysia exercises a dual system of family law, with Muslims and non-Muslims coming under different family law systems. The basis of this dual system originated from the diversity of Malaysian citizens, who come from various races, religions, customs and practices pertaining to family matters. Family law is the only area of the law which divides citizens based on religion. Due to the existence of the dual system of family law, different courts have been established to administer family law for Muslims and non-Muslims.

The Non-Muslim

In Malaysia, the family constitutes the subject matter of a number of legislative enactments for the establishment of husband-wife and child relationships. For non-Muslims, these are essentially found in the Law Reform (Marriage and Divorce) Act 1976. However, there are various other enactments which deal specifically in nature with certain areas, for instance the Domestic Violence Act 1994, which

regulates domestic violence cases. The Penal Code also contains provisions on family matters, particularly domestic violence. For child-related cases various statutes are applicable such as the Adoption Act 1952, Guardianship of Infant Act 1961, Legitimacy Act 1961 and Child Act 2001. Other than that, the Distribution Act 1958 and Inheritance (Family Provision) Act 1971, Married Women and Children (Maintenance) Act 1950 and Courts of Judicature Act 1964 are also applicable.

When it comes to process and proceedings, it is more complicated. In domestic violence cases, the proceedings commenced by a wife are heard in the Magistrates Court but at the same time, the High Court may also hear her petition for divorce as well. Protection orders, punishments and redress are dealt with by both the criminal and civil courts (Sections 2 and 4 of Domestic Violence Act 1984). Petition for divorce, nullity, custody, judicial separation, declaration of legitimacy (Legitimacy Act 1961, section 5), division and disputes over matrimonial property are heard in the High Court (Law Reform (Marriage and Divorce) Act 1976, section 2(1)). Applications for maintenance are normally handled by the Magistrates and Sessions courts but the High Court has jurisdiction as well (Section 2 of Married Women and Children (Maintenance) Act 1950, Section 2(1) & (2) of Law Reform (Marriage and Divorce) Act 1976). Adoption cases are heard in either the High Court or the Sessions Courts (Section 10 of Adoption Act 1952). Applications

and succession cases are heard either before the Subordinate Courts or the High Court depending on the value of the estate (Section 2 of Inheritance (Family Provision) Act 1971).

Other than that, the current practice of conciliation regulated under Section 106 of the Law Reform (Marriage and Divorce) Act 1976 has been claimed to cause more problems than solutions. The parties feel that it is forced mediation as it is mandatory for a couple to refer their case to the conciliatory body before the presentation of the divorce petition. There is no specific guideline or procedures and the members of the conciliatory body are always changing. Therefore the parties have to repeat their matrimonial pain every time new members are appointed (Zaleha Kamarudin, 2005).

The Muslim

For Muslims, the Administration of Family Law Enactments in various states and also the Administration of Syariah Enactments in each state deals with procedure. The jurisdiction of the Syariah Subordinate Courts and Syariah High Courts as well as the Syariah Appeal Courts for each state in Malaysia is also contained in different statutes based on the states. For instance, for the state of Selangor, it is contained under the Selangor Administration of Islamic Enactment 1989 while for the Federal Territories, the relevant law is the Administration of Islamic Law (Federal Territories) Act 1993.

The Syariah Courts generally adjudicate cases on marriage, divorce and distribution of property. The application for divorce, judicial separation, maintenance upon divorce, guardianship of children, legitimacy, matrimonial property and distribution of property should be made to the Syariah High Court. However, the Syariah Subordinate Courts also have the same jurisdiction as the Syariah High Court and the only difference concerns the amount or value of the subject matter in dispute. Domestic violence cases involve criminal action on which the Syariah Court has limited jurisdiction. This has caused confusion and frustration to victims of domestic violence because it requires the victim to go to two different courts, which consequently results in more pain, harm and hardship for the victim (Abu Bakar Munir & Nor Aini Abdullah, 1995). These situations can create misperception on the integrity of the Syariah Court.

Family Court

The idea of a Family Court is based on the ground that family disputes involve different approaches compared to resolution of other civil matters. In other words, the less adversarial system is not suitable to tackle family conflicts. This is because family has its distinct features that include, firstly, future arrangement of family life after divorce; secondly, the involvement of interest of the third party, primarily the children, who will be mostly affected by the family breakdown; thirdly, the involvement of the family in court

proceedings and lawyers, and fourthly, the legal process. All this is regarded as an undesirable forum for the resolution of family disputes as the disputes also concern a few non-legal issues related to life (Hale *et al.*, 2002). The family institution is different from other social units because it possesses special characteristics: firstly, families have a shared history; secondly, families have a shared future; and finally, families have a shared biology (Copeland & White, 1991).

Family disputes also involve the parties' proximity, emotional strains and perhaps bitter hatred against each other, which need to be resolved in a comprehensive way in order to maintain the peace and happiness of the family involved (Cheang, 1985). Therefore, not only legal issues arise, but also emotions and psychological effects that might become serious enough to affect the whole family institution. It is not proper to resolve legal issues only while other aspects are ignored. This is because the family institution is a fundamental part of society. Family is defined as a special social structure in which the principals are related to one another through blood ties or marital relationships, and whose relatedness is of such a nature as to entail mutual expectations that are prescribed by religion, reinforced by law and internalised by the individual (ÑAbd al-Óti, 1995).

Generally, Family Court is defined as an integrated and unified jurisdiction in a single court with competence over all aspects of family matters (Ain Husna

& Roslina Che Soh, 2012). It includes juvenile delinquency, divorce, nullity and separation, guardianship and custody disputes, maintenance, matrimonial property disputes, domestic violence, children issues and adoption. Instead of jurisdiction over such matters being fragmented between several courts, it is consolidated in a single court, even though specialised divisions or sections may need to be established within that one court (Brown, 1966). Besides jurisdiction being integrated in a single court, this court also collaborates with other social service units that provide their services in court. This emphasizes the holistic approach of family dispute settlements that integrate all aspects of human beings and observe the case as a whole. Most importantly, it promotes the less adversarial system of litigation by encouraging settlement through mediation, conciliation and arbitration.

Issues of Contract

A contract is defined as a promise or set of promises to which the law attaches a legal duty and also provides a remedy for breach of that duty. One of the elements that the law requires in establishing a contract is the intention of the parties to create legal relations. The creation of legal relations is a doctrine in English contract law that states that an agreement is legally enforceable only if the contracting parties may be deemed by the court to have intended it. The requirement of intention to create legal relations in contract law is aimed at sifting out cases that are not really

appropriate for court action. Not every agreement leads to a binding contract that can be enforced through the courts. In order to determine which agreements are legally binding and have an intention to create legal relations, the law draws a distinction between social and domestic agreements and agreements made in a commercial context.

Social and Domestic Agreements

For agreements under this category, the general presumption that the court applies is that the parties do not intend to have or create legal relations. In *Balfour v. Balfour* [1919] 2 KB 571, the defendant (husband) and his wife emigrated to England from Ceylon. When the defendant returned to Ceylon his wife remained in England on doctor's advice. The defendant promised to pay his wife £30 a week during his absence until she could return to Ceylon. However, the defendant later divorced the plaintiff. She sued the defendant for the £30 per month. The Court of Appeal held that there was no contract between the parties as there was no intention to create legal relations. Atkin LJ took the view that that arrangement between the husband and wife was not contractual because the parties did not intend that it should have legal consequences.

Domestic agreements between parent and child are equally scrutinised when considering intent to create legal relations. For example in *Jones v. Padaraton* [1969] 1 WLR 328 Court of Appeal, the plaintiff worked in the USA. Her mother, the

defendant, offered to provide for expenses if the plaintiff would return to England and study for her Bar examination. The plaintiff agreed and the defendant offered to provide her a house, in which several rooms would be let out to tenants. Later, the plaintiff became uncooperative and the defendant claimed possession of the house. The plaintiff resisted on the grounds that her mother was contractually bound to the arrangement. The Court held that there was no contract between the two parties as they had no intention to enter into a contract.

In *Phiong Khon v. Chonh Chai Fah* [1970] 2 MLJ 114, after the death of her husband, the respondent's mother lived together with a man i.e. the appellant. After she died, the appellant claimed that the respondent had executed a document (alleged as a transfer of land) to him. The respondent denied this. The Federal Court held that the burden of proof was upon the appellant to show that the respondent intended to execute the document of transfer of land to the appellant. As he failed to do so, the court came to the decision that there was no serious intention to create a legal relationship.

In *Choo Tiong Hin & Ors v. Choo Hock Swee* [1959] MLJ 67, the respondent and his wife started a farm. In due course, they adopted five sons (appellants). Everyone helped with work related to the farm, which grew into a successful family business. After the wife died, the respondent remarried, as a result of which he left the family home. The respondent brought an action claiming possession

of the farm from his adopted sons and a declaration that he was the owner of the property. The appellants claimed that they were entitled to an equal share as they had helped in the creation of the family wealth. The court held that there was no intention to create legal relations. Whyatt CJ clearly stated that:

the agreements, thus pleaded, possess all the characteristics of a private family arrangement depending for its efficacy upon a sense of filial duty and paternal responsibility on the part of the adopted sons and their father... Agreements of this character between adopted sons and their adoptive father may well work satisfactorily so long as a spirit of trust and mutual confidence prevail within the family but if this ceases to exist, then in my opinion, the sanctions of the courts are no substitute.

Despite the general presumption that domestic agreements are not legally binding, to discover the true intention of the parties the court will look at the words and conduct of the parties in making the contract and a secret intention not so expressed is of no avail. For example in *Merrit v. Merrit* [1970] 1 WLR 1211 CA, the defendant (husband) left his wife (plaintiff) for another woman. When they met to make settlement arrangements, the husband signed a letter, which stated that the plaintiff would pay all charges on the house that they had bought until the mortgage payments were completed and the defendant would, after that, transfer

the property to her. After the plaintiff settled the mortgage in full, the defendant refused to transfer the house to her. The Court held that the declaration made by the husband was binding and thus after having paid all the charges the wife was now the sole beneficiary of the house. The court also held that in this case, the principle in *Balfour v. Balfour* was not applicable because the husband and the wife in that case were not living in amity (friendly relationship). Thus, it can be concluded that an agreement made by a husband and wife who are separated or about to separate will be held binding by the court.

Similarly, in *Simpkins v. Pays* [1955] 1 ELR 975, the court was of the view that the existence of the third party in the contract showed that they had intention to create legal relations. In this case, the defendant, her granddaughter and a lodger (plaintiff) entered into a weekly competition run by the Sunday Empire News. The entries were sent in the defendant's name. Each week, all three submitted entries and took turns to pay the postage fees. They agreed that if any of the entries won, they would share the winnings among them. The defendant received £250 in prize money from one of the entries but refused to share the winnings with the other two. The plaintiff brought the action to claim one third of the prize money. It was held that there was a binding contract despite the social connection as the plaintiff was also a party to the contract.

It is clear that under common law, before the court gives effect or decides on the disputed issues of the agreement, it

first discusses the validity of the agreement as a binding contract. Only when the court applies the rebuttable presumption of intention to create legal relations in domestic agreements is there legal effect, while if the court applies general presumption, the agreement has no legal effect and is not binding on the parties.

Domestic Contracts in Family Law

An agreement or domestic contract between spouses is now very common. Section 56 of the LRA clearly provides for such an agreement or arrangement to be referred to the courts to express an opinion as to the reasonableness of the agreement or arrangement. In addition, the Rules of Court 2012, which govern all proceedings brought in the High Court, render sufficient jurisdiction to enable the parties in a matrimonial dispute to refer to the court any agreement or arrangement they have entered into for consideration. The agreement between spouses may assist the court to decide on relevant issues including ancillary matters such as division of matrimonial property.

The effectiveness of such agreements has been discussed in a number of cases. The court will only uphold the spouse's agreement if it is found that the terms of the concluded agreement do not transgress the provision stated in Section 76 of the LRA. For example, in the Singapore case of *Wee Ah Lian v. Teo Siak Weng* [1992] 1 SLR 688, the parties had, in the course of divorce proceedings, entered into an agreement dealing with *inter alia*, the

disposition of their matrimonial property. The question then arose as to whether the settlement should be upheld. The Court of Appeal held that precautions needed to be observed in considering the agreement for the purpose of preventing a violation of the relevant provisions. However, since the concluded settlement in this case did not transgress the directions in section 106 of the Women's Charter, the matrimonial property was ordered to be divided according to the terms of the settlement.

Another interesting point to note is that the power of the court to consider the agreement is discretionary. The court may ignore the agreement completely and exercise its power under Section 76 of the LRA. The test that the court should apply is to see whether the agreement provides for a reasonable division. The viability of the spouses' agreement is well supported by the court's decision in the case of *Wong Kim Fong Anne v. Ang Ann Liang* [1993] 2 SLR 192. After their separation, the parties entered into an agreement that stated that the wife was the legal and beneficial owner of the matrimonial home and that the husband had no interest in it. However, the husband claimed for an order under Section 106 of the Women's Charter, and the wife alleged that the agreement was binding and thus, should be complied with. The court in deciding the case said that the onus was on the husband who was seeking to disclaim the effectiveness of the deed. Since the husband failed to do so, his claim was dismissed.

The effectiveness of the agreement was also discussed in *Lim Beng Choo v. Tan Pau Soon* [1996] 3 SLR 177. The wife's application to divide the proceeds of sale of the matrimonial flat was allowed by the court despite the fact that there was an agreement concluded seven years before to give up her share. In allowing the application, the High Court emphasised that the agreement between the parties as to how the matrimonial property should be divided did not oust the jurisdiction of the court to divide the property. Thus, the decision suggests that if an agreement fails to provide justice to either party, the court can ignore it despite the fact that it was validly entered into by both parties.

One important question that is usually asked is whether the validity of the agreement is challengeable. The High Court had a chance to deal with this matter in the case of *Wong Kam Fong Anne v. Ang Ann Liang* [1993] 2 SLR 192. The court explained that there were probably few reasons to challenge the agreement. Apart from being unfair to any of the parties, it would also be considered weak if proven that they had not understood the provisions when the agreement was signed, or it was concluded by persuasion or influence by the solicitor in charge at the time.

The validity of the spousal agreement was also challenged in the case of *Lim Thian Kiat v. Teresa Haesook Lim* [1988] 2 MLJ 103. The court held that the agreement entered into was perfectly valid as the terms were arrived at voluntarily, with the advantage of the respondent possessing adequate legal advice.

The above discussion suggests that jurisdiction of the court cannot be ousted by a private agreement between the parties. The fact that there might be an agreement entered into by both parties does not preclude the court from exercising its power under the existing provisions if an injustice will be caused by holding the parties to its terms. Furthermore, an agreement drafted previously may not be relevant with the passing of time and the changing needs of the parties.

In *Aishah Bee v. Mohd Noor bin Aman Shah* (1979) 1 JH (2) 71, the existence of an agreement deterred the court from dividing matrimonial property. Before the divorce, the husband and wife signed an agreement as to the distribution of their household property. However, after the divorce, the wife brought an action claiming her share of matrimonial property in the house, a radiogram and a television. The learned chief judge dismissed the wife's claim by quoting the saying of the Prophet (pbuh) that Muslims are bound by their own agreement. Therefore, since an agreement is entered into voluntarily by the parties, they are bound by the agreement.

CONCLUSION

It is clear that despite the general presumption under Contract Law that family and social agreements have no legal effect, the judges in the cases discussed in this paper generally did not question the validity of the agreements. Although the court retained discretionary

power in interpreting the agreements, in most cases, the courts seemed to acknowledge the agreement rather than question whether the agreement was an enforceable contract in the first place, with exception to cases where a party to the contract raised the issue of validity of the contract.

It is perceived that if Family Court is established in Malaysia, the doctrine of intention to create legal relations would be less invoked by the courts as that seemed to be the approach adopted by the courts in dealing with domestic contracts in family law. Nonetheless, it is worth highlighting that issues in the above discussion are mainly about settlement on common/personal matrimonial property such as houses, vehicles and savings. It would be interesting to see what the approach of the court would be if the parties disputed something of commercial value such as shares, business assets, rights in management or directorships in company. A more thorough study should be carried out to analyse whether the courts' decisions on domestic contracts related to family issues are the right approach or if the courts should first invoke the doctrine of intention to create legal relations prior to acknowledging the validity of the terms of the agreements. It would be interesting to see what would happen if the court in the first place put the burden of proof on the parties claiming the contract and challenged the validity of such agreements as they are made between husband and wife or between family members.

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Mosque Tourism Certification in *Waqf* Management: A Model by Ukhwah Samara

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ABSTRACT

This study proposes a model of a mosque tour guides certification programme to promote religious tourism and *waqf* management as developed by Ukhwah Samara, a non-profit organisation. The certification programme would begin with training to up-grade the knowledge of existing registered tour guides and include basic understanding of Islamic history and civilisation. A practical training and assessments for the certification would be conducted in participating mosques following the completion of the initial training. Ukhwah Samara together with four other bodies, namely, the respective mosques, State Islamic Religious Council, Sabah Tourist Guides Association (STGA) and World Federation of Tourist Guide Association (WFTGA), would be involved in this international certification process. In addition to generating *waqf* revenues for the mosques, the outcome of the proposed training model is to educate tourists in the unique social and cultural diversity of local ethnic communities. The study contributes to current literature, which is limited, on religious tourism and *waqf* management in Malaysia, and provides recommendations to improve the financial sustainability of mosques through religious tourism certification.

Keywords: Mosque certification, religious tourism, Ukhwah Samara, *waqf* management, World Federation of Tourist Guide Association

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Waqf represents voluntarily donated assets by Muslims that are intended to be consumed or developed for the benefit

of the community. *Waqf* institutions operate similar to trustee institutions, and in Malaysia they are governed by state regulations and enactments under the auspices of the Head of State or Sultans. To a great extent, sustainability of *waqf* institutions such as mosques relies on continuous public confidence and financial support. As mosque activities expand and their demand for financial resources rise, these *waqf* institutions ought to plan for economic activities in line with the current business trend to generate continuous income.

One of the growing industries with the potential to be managed by mosques as an income-generating activity is tourism. Without reference to any particular faith, the origin of tourism as it is called today is rooted in the spiritual practice of pilgrimage. The current estimate of the annual religious travel market worldwide is reported to be US\$18 billion (Religious Travel, 2015). While this may probably be a conservative figure, it reflects the significance of religious tourism internationally. Thus, many countries today perceive tourism to be an increasingly important source of income, employment and foreign exchange receipts.

Prior research including by Ihsan and Adnan (2009), Said, Mohamed, Mohd Sanusi and Syed Yusuf (2013) and Masruki and Shafii (2013) on *waqf* mainly focussed on management aspects (e.g. governance, financial management and accountability). However, the rise in *waqf* activities and the establishment of new

waqf institutions in recent years require a close examination of issues related to *waqf* revenues. Currently, in Malaysia, Sabah is one of the states with the highest number of *waqf* properties. However, most of them are left unproductive and suffer from lack of public exposure and in some cases, total neglect. One of the main reasons is that the *waqf* institutions mostly operate as non-governmental organisations (NGOs). As with most NGOs, the main challenge is to generate sustainable revenue to cover operating and project costs. To achieve this, an NGO named Ukhwah Samara was established in Kota Kinabalu, Sabah with the vision of promoting mosque tourism. Its mission was based on the philosophy that humankind, regardless of their religious background, is entitled to happiness and equitable living to pursue a life of dignity and fulfilment.

The purpose of this paper is to introduce an international mosque tourism certification process as a potential source of income for *waqf* institutions. A model developed by Ukhwah Samara in Sabah is presented and discussed. Currently, there are 24 mosques in Sabah listed under the State Religious Affairs Department. The certification is intended to improve the professionalism of tour guides within the local communities and produce income for the mosques for their *waqf* management. The study suggests a systematic approach to managing *waqf* institutions such as mosques and contributes to the limited literature on religious tourism in Malaysia.

Ukhwah Samara

Ukhwah Samara (US) is a non-profit organisation (NGO) that was established in February 2014. In line with public interest and the recent growth of *waqf* activities in Sabah, three enthusiastic founders of US donated their own assets, including cash, to start charitable activities. The US office is currently located in a rent-free premise in Kampung Likas, Kota Kinabalu and managed by volunteers. The office space was rented and paid for by a local teacher who in turn invited US to operate at the location at no charge. The teacher also serves as a volunteer together with her students, friends and family members. These volunteers can be categorised into two main groups. The first are Muslim working adults whose roles are to plan and monitor the activities of US. Most are in their early forties and fifties. The second group is represented by Muslim and non-Muslim students enrolled in tourism studies at local universities in Kota Kinabalu. These students usually work voluntarily at US during weekends and term breaks.

The underlying philosophy of US is to enhance the livelihood of mankind, locally and across the globe. It is guided by compassion and seeks to aid all to prosper culturally, financially and intellectually. The stated vision of US is, “To become the best training, consultancy and certification centre for mosque tourism and culture in Asia Pacific.” Its unique agenda is to promote mosque tourism and is dedicated to providing “a flexible training and

certification model for mosque tourism, which may be localised to accommodate all unique cultures and practices.”

The idea to form the NGO was mooted on 28 March 2013 in Kota Kinabalu by three very close friends. They were surprised to observe the low level of and variations in the practice of Islam especially among the various ethnic groups in Sabah. This pioneering group was also disturbed to see the poor living conditions of the people particularly in a place called Sook. The observation is common in most areas in the interior of Sabah; the difficulty of finding mosques in most of the locations was a further concern to them. These factors were among the elements that energised them to establish the NGO in Kota Kinabalu. The name ‘Ukhwah Samara’ is a combination of two Arabic words: *ukhwah* means ‘united’ and *samara* is derived from *sa* (from the word *sakinah* or ‘peace’), *ma* (from the word *mawaddah*, which means ‘love’) and *ra* (from the word *rahmah*, which carries the meaning ‘compassion’). The name reflects the vision of the founders, who truly believe in promoting harmonious and borderless living in unity through love and caring.

Fig.1 presents the current organisational structure of Ukhwah Samara. The president is assisted by an advisory body that comprises experts from the industry, government agencies and local community. The selected industries that are represented on the board are tourism, hotel, media and culture while the appointed advisors from the government

and community are prominent religious experts and leaders. Its top management is made up of the president, vice-president, treasurer and corporate secretary. At this introductory stage, Ukhwah Samara's activities are focussed on three main areas. Each area is strategically positioned under one of the organisation's three divisions.

Headed by a director, the divisions are: (i) Tourism, Education and Community; (ii) Media, Cultural and Heritage; and (iii) Lodging and Recreation. At present, the Media, Cultural and Heritage (MCH) division receives the most resources and is very active in promoting mosque tourism.

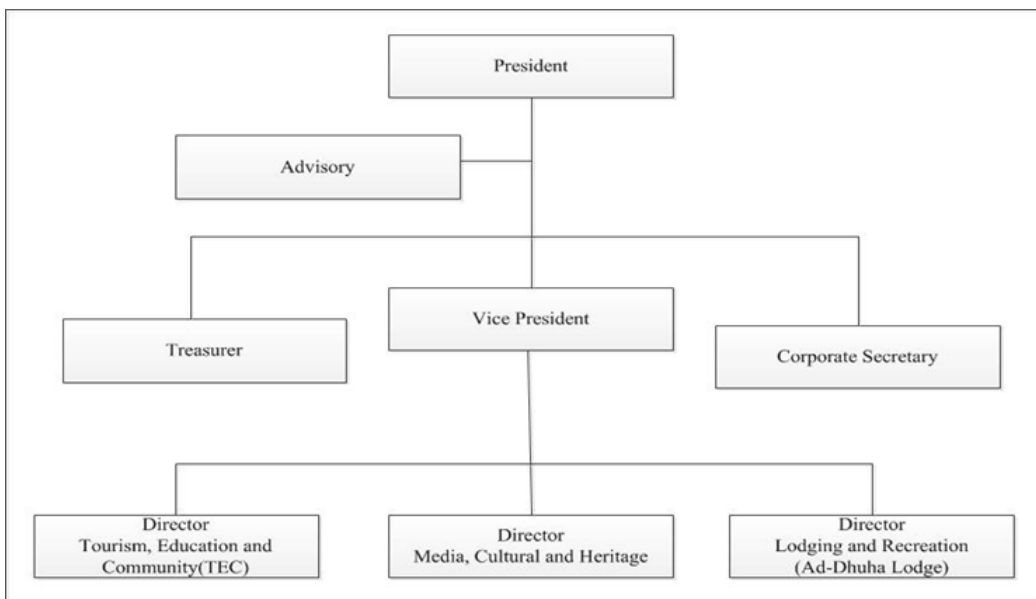


Fig.1: Organisational structure of Ukhwah Samara.

In order to generate awareness and significance of mosque tourism the TEC division is currently preparing a handbook on guidelines, which includes a comprehensive explanation of mosque tourism. Through TEC activities, volunteers have the opportunity not only to assist in the building of civil society but more importantly, in promoting the mosque as a major tourist destination and attraction. In promoting mosque tourism

this NGO has prioritised its main activities into four major roles: (i) to identify and invite local travel agents to participate in mosque tourism in Sabah; (ii) to certify participating travel agents as being fully compliant with the standards for mosque tourism; (iii) to identify and invite selected mosques to participate in mosque tourism; and (iv) to endorse qualified mosques for international certification.

LITERATURE REVIEW

Waqf is an Islamic term that refers to a religious endowment. It is a permanent dedication through the transfer of one's wealth to receive the blessing of Allah. The ownership of the asset is thus returned from the person making the *waqf* to Allah, the supreme creator. This implies that the ownership of the property or asset declared and transferred as *waqf* is withdrawn from the donor and used for public interest. In Islam the practice of *waqf* first started in the early years of Islamic civilisation when Prophet Muhammad (pbuh) offered a well of Bahruya' in Medina for purchase and opened it for public use. As cited in Kahf (2003), following that, Saiyidina Umar Al-Khattab also donated his property in a place named Khaibir as *waqf*. Today, the most prominent example of a *waqf* institution is the University of al-Azhar in Cairo, which started as a *waqf* and has been operating using endowment funds contributed by Muslims around the globe.

Waqf in Malaysia is governed by state legislature. Every state has its own religious council, which sets the *waqf* procedural matters and monitors *waqf* affairs. According to existing *waqf* procedures, every *waqf* property started as a private possession and must have a legal owner(s). After the act of *waqf*, the asset is placed under injunction from any form of further transaction and the property is transferred to a *waqf* institution, which acts as a permanent trustee to the asset. As such, it cannot be sold, inherited, granted (*hibah*) or preserved in a will (*wasiyyah*).

The property is then used for the purpose of community services that are *syariah*-compliant (complying with Islamic law) (Sabit & Hamid, 2007). Generally, agricultural or vacant land represents the main type of *waqf* asset. Such land is usually intended for education, health or religious teaching purposes.

Waqf Land for Mosque

Generally, *waqf* development results in the building of mosques, educational institutions, libraries and lodging. At present, according to the statistics provided by the Sabah Islamic Religion Board (SIRB) a total of 2743 *waqf* properties are registered with the agency and 945 (34%) of them are specifically dedicated for construction of and use as mosques. The highest number of *waqf* sites for mosques is in the district of Semporna (170 or 18%) followed by Tawau (154 or 16%). On the other hand, Keningau, Pensiangan, Kudat, Tambunan and Sandakan have among the lowest number of *waqf* land intended for the building of mosques. Kota Kinabalu, the state capital city, has only 55 (5%) of *waqf* land for this purpose. Other major categories of the uses of *waqf* land in Sabah include for the building of *musalla* (37%) and burial sites (16%). Similarly, Tawau and Semporna districts register the highest number of *waqf* sites for the building of *surau*. The number of *waqf* sites may reflect the dominance of Muslims in the areas, their religious commitment, the level of *waqf* knowledge, the awareness of the community and their social and economic status.

Once developed, the benefits of *waqf* properties are not restricted to the Muslim community alone. Rather, they extend beyond religious, cultural, racial and sectarian boundaries (Sabit & Hamid, 2007). Any revenue or income derived from activities using *waqf* properties is a *sadaqa jariya* (recurring, continuous or on-going charity) for the donor. The role of the mosque to Muslims is not limited to a place of gathering for daily prayer. Equally important is its role as a symbol of unity and a centre for peaceful activities where everyone is welcome and loved.

Mosque Tourism and Waqf Revenue

Mosque tourism represents a form of religious tourism. Religious travel or faith-based travel is evident in studies by Mazumdar and Mazumdar (2004), Al-Munajjid (2009), Bhuiyan, Siwar, Ismail and Rabiul Islam (2011), Timothy (2011), Betsy and Teri (2012) and Jafari and Scott (2014). The development and growth of tourism in Islamic countries has witnessed the recent innovation in promoting the mosque as a centre for tourism. The mosque has become one of the popular destinations among local and international tourists as part of attractive tour packages (Shafaei & Mohamed, 2015). The growth in the number of Muslim tourists suggests the need to evaluate the current branding and marketing strategies of Malaysia as a preferred Islamic destination. This country, with its multi-ethnic and multi-cultural setting, traditional cuisine and unique Asian heritage is already established as a top tourist destination in

Asia. As Malaysia has these advantages, the effort to promote mosque tourism should be taken seriously by Muslims as a means to generate *waqf* revenues and to sustain mosque activities. According to Mohd Hussin *et al.*, (2014), mosque activities are healthy for the economy and accommodate the needs of society.

All over the world, the al-Haram Mosque, the holiest mosque for Muslims and prominent mosques such as the cathedral-mosque of Córdoba in Spain, which symbolises the grandeur and spirituality of the Christian and Muslim periods (Suárez, Navarro & León, 2005) are visited daily by tourists. In Malaysia, the Zahir Mosque of Kedah is well known for its profound Indo-Saracenic architectural style. Other mosques of great attraction in Malaysia include the Putrajaya Mosque, the Kuala Kangsar Mosque in Perak and the Kristal Mosque in Kuala Terengganu. The Sultan Mosque in Singapore, which is among the top ten most beautiful mosques in the world, is another example of must-see mosques in this region. Religious tourists may not be motivated by spiritual motivation alone but might be interested to study the religious heritage of a culture. According to Smith (1992, p.386) “cultural tourists, or ‘secular tourists’ visit sacred sites as part of a broader itinerary. These people tend to visit sites that are holy to others, out of curiosity or an interest in culture.”

In Malaysia, mosques are under the trusteeship of the state religious council. The expenditure incurred in operating

mosques include the salaries of *imams* (mosque leaders), teachers and preachers while the basic utility costs of water and electricity are subsidised by the state. Without sufficient and consistent cash flow, the operations of mosques may be limited to only the basic religious activities. On the other hand, if each mosque were able to conduct activities that can attract visitors and generate revenues, it could reduce its reliance on state funding and public donations. From the economic point of view, *waqf* is a powerful mechanism to develop the nation (Pitchay, Meera, & Saleem, 2014). The large accumulation of *waqf* properties signifies the generosity and concern of wealthy individuals in up-lifting the economic and social life of Muslims. *Waqf* can be in cash, land and other properties. One of the most common development projects on *waqf* land is to build mosques, usually using cash *waqf*.

METHODOLOGY

This research uses a case-study approach. Masjid Bandaraya, one of the largest mosques in Kota Kinabalu, Sabah was selected as a subject of the study. It is located in an area named Likas and is well known as a tourist attraction for religious tourism in the state. The methods used in data gathering include reviews of the literature, open-ended interviews, observations, electronic data search and document reviews. Additional information was obtained from a briefing organised by the World Federation of Tourist Guide Association (WFTGA) and the Sabah

Tourist Guides Association (STGA) on 17 April, 2014. The session was organised in conjunction with an official visit of the WFTGA to Sabah and attended by one of the researchers. The main agenda of the briefing was to highlight the current concerns of WFTGA on tourism potentials and challenges in Sabah. The session was held at the main campus of Universiti Malaysia Sabah in Kota Kinabalu.

Following the briefing, a dialogue session among the researchers was organised to deliberate on the implications of and the action plan for US based on the WFTGA's resolutions on tourism development in Sabah. As a result of the dialogue, a special interview session was held with the State Mufti on 12 May, 2014 from 2.30 to 5.30pm. The session took place in Kota Kinabalu at the office of the State Mufti and was attended by three of the researchers. The main objective of the session was to gather the views of the Mufti regarding mosque tourism and request state support in the promotion activities.

A semi-structured approach was used to allow for informal discussion and flexibility in the dialogue. The interview started with a 30-minute presentation by one of the research team members on a proposed certification model for mosque tourism. Prior to the presentation, the proposal was discussed and amended three times in a monthly meeting with Ukhwah Samara. The main purpose of the presentation to the State Mufti was to provide the overall procedure, responsibilities and possible

challenges to be addressed at the state level relating to Islamic and cultural matters in mosque tourism certification.

Following that, the Mufti was invited to comment and provide feedback on the proposal. Specific questions were also addressed to the Mufti regarding the role of the State Islamic Religious Board on the development of commercial businesses on *waqf* property. The Mufti was very supportive of the initiative and gave assurance of his commitment to the project. His main concern was the fee that would be charged for the mosque certification and how it would be distributed among the parties involved. He suggested that a special meeting to discuss the financial implications should be held. The interview ended with an invitation to the Mufti to visit the office of US.

A Proposed Model for Mosque Tourism

The mosque as the epicentre for Muslims to pray and practise Islam is widely documented. However, there are growing numbers of non-Muslims who are becoming fascinated by mosques and are interested in visiting and seeing mosques. These are religious tourists or culture-and-heritage tourists. The historical and distinctive uniqueness of mosque structures and their architecture form the fundamental attractions for these tourists. In Sabah, for example, the State Mosque with its majestic dome and stunning gold inlay motif and the Bandaraya Mosque with its contemporary Islamic architecture represent two

outstanding styles of architecture. These well-known mosques have registered growth in the number of international tourists and the number is growing annually in tandem with Borneo numbers as Borneo becomes the new religious tourism hub. In general, these mosques receive a fair share of Muslim and non-Muslim tourists every year.

Prophet Muhammad (pbuh) said, "The most beloved places on Earth to Allah are its mosques, and the most despised places on Earth to Allah are its markets" (Sahih Muslim). Thus, it is not surprising to observe increased interest in mosque tourism including from international tourists, and the trend is expected to continue based on the current travel pattern. In Malaysia, even though allowing non-Muslims and international tourists to visit mosques is gaining public acceptance, to our knowledge, there is no specialised training or certification programme for mosque tour guides. The lack of training programmes affects the competency of tour guides, especially non-Muslims tour guides. This probably explains the observation that most tourists spend time taking photos inside and outside the mosque while some tourists remain in their tour busses, probably due to having no interest in mosque tour activities.

There are many issues faced by mosques in Sabah especially in Kota Kinabalu due to the recent influx of tourists to the sites. For example, almost all of the tour guides connected with both the

State Mosque and the Bandaraya Mosque are not professionally trained in specific knowledge of mosque tours. They are either volunteers or mosque personnel whose job description includes handling tourists who visit the mosque. At times no one is available to receive tourists and the simple solution is to assign security personnel to the job of guiding tourists. Therefore, Ukhwah Samara initiated a training programme for mosque tour guides catering for undergraduate students registered in the Bachelor of Business (Tourism Management) programme at Universiti Malaysia Sabah. As part of the course assignments, tourism students in their final year could choose to volunteer as tour guides for the Bandaraya Mosque in Kota Kinabalu. The students could gain practical experience and obtain credits as part of the industrial training requirement under this special arrangement between Ukhwah Samara and the mosque. The programme involves student presentations on the history, culture, heritage and varieties of interesting elements of Islam and mosques. The students have to equip themselves with the knowledge and understanding of Islam as preparation for the training. They also need to improve their confidence level and communication skills in order to efficiently perform tour guide activities.

This proactive project has revealed a number of weaknesses, and this has led to a model for the improvement of mosque tourism. In promoting mosque tourism, Ukhwah Samara prioritises

its main activities into four major roles: (i) to identify and invite the participation of local travel agents in meeting the criteria for handling mosque tours; (ii) to certify participating travel agents for compliance with the requirements for mosque tourism; (iii) to identify and invite the participation of selected mosques in specific districts; and (iv) to prepare for and certify the participating mosque as being compliant with mosque tourism activities and thus, authorized to engage in mosque tourism.

All of the training and certification programmes are planned to be offered in collaboration with MUIS as the major stakeholder, a local university as the training provider, the Sabah Tourist Guides Association (STGA) at the state level and the World Federation of Tourist Guide Association (WFTGA) at the international level. Fig.2 presents the proposed framework for certifying the tour guides for mosques. The programme begins with up-grading the knowledge of existing tour guides to include basic understanding of Islamic history and civilisation, mosque architecture, its traditional and contemporary functions and its roles in attracting tourism. This stage is followed by a second phase dedicated to practical training, which is to be conducted at the participating mosque. After the practical training period the trainees would be assessed and subsequently certified after complying with all the necessary criteria.

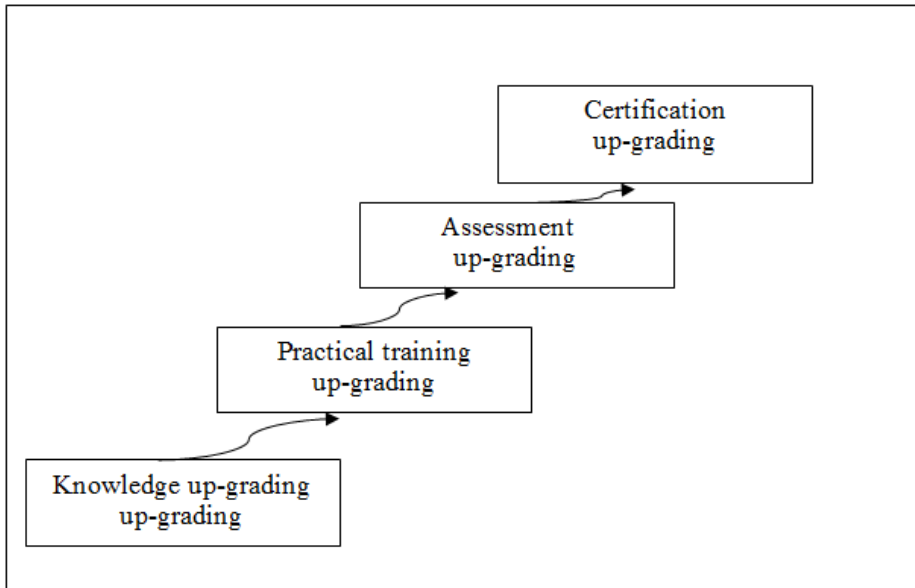


Fig.2: Certification model for mosque tour guides.

The certification is important to ensure acceptable standards of practice among tour guides and to meet the expectations of tourists. US would play an equally important role as the four other bodies, namely, MUIS, the mosques, STGA and

WFTGA, in the certification process as presented in Fig.3. This model for mosque tourism may be modified and localised to accommodate local cultures and their various unique practices.

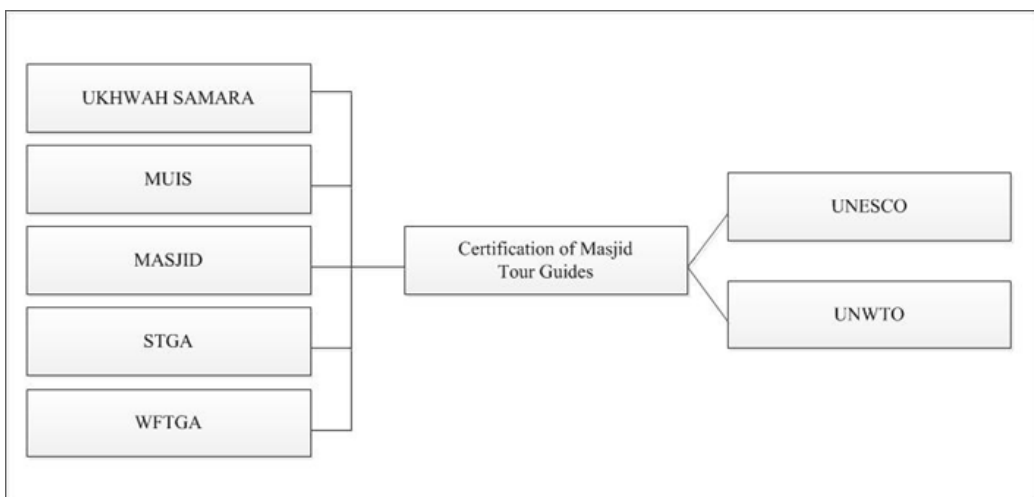


Fig.3: Agencies involved in mosque tour guide certification.

Achieving the recognition of and inclusion in the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and acceptance into the United Nations World Tourism Organisation (UNWTO) is the ultimate aim of this certification programme. This international standard certification provides added value to and enhances the Code of Ethic and Ethos of Malaysian tour guides. Countries with a Muslim-majority population, like Indonesia and Turkey, as well as those of a Muslim-minority population, like Japan or France, may be invited to participate in formulating the international criteria for the certification of mosque tour guides.

Tour guides are the human face of tourism. They interact directly with tourists and provide information about places that are visited, the local, the food and the culture. Every day, tourists travel to seek different adventures, attractions, destinations and experience. The entire experience is shaped by the personality, communication skills, knowledge and competency of the tour guide assigned to the group. The tour guide becomes the anchor or resource person and the key determinant for the tourists' satisfaction. Since the tourists may come from different countries where English may not necessarily be the *lingua franca*, the ability of tour guides to master other languages becomes an added advantage. Thus, the programme can be enriched by adding foreign language study. Currently, there exists a gap between demand and supply for German-, English-, Korean- or Japanese-speaking tour guides

in Sabah based on tourist arrivals from these countries. Training mosque tour guides in multiple languages would further enhance the value and quality of mosque and Islamic tourism.

CONCLUSION

Today, the main challenge of *waqf* management is to plan for revenue-generating activities in order to sustain their operations. Without a practical strategy and innovative planning, *waqf* institutions may not be successful in delivering their intended services and benefits to the public. To a great extent, sustainability of *waqf* institutions relies on continuous public confidence and financial support. As *waqf* activities expand and demand for financial resources also rise, *waqf* institutions ought to look for business ventures to generate continuous income for growth and sustainability. Ukhwah Samara has initiated and is currently promoting mosque tourism as a professionally certified and internationally recognised *waqf*-related activity. This is motivated by the global growth in religious tourism and the large number of land donations as *waqf* for the building of mosques in Sabah.

As a place of worship, the mosque provides a unique opportunity for non-Muslims to observe directly how Muslims perform their daily prayers. In addition, they would also be able to understand the history, culture and civilisation of Islam. Tourists normally expect unique and different experiences as part of their travelling. Travelling can be very pricy but

people are willing to pay in return for a rewarding journey. Most important of all, specific criteria must be developed before a mosque is authorised to conduct mosque tourism. This is necessary in order to ensure that basic facilities such as cleanliness and washroom standards meet tourist expectations and at the same time protect the image of the mosque. In addition, the local community must be aware of and actively participate in the mosque tourism programme to avoid unnecessary conflict due to lack of understanding.

Mosque tourists are not expected to have prior knowledge of Islamic values or religious requirements including the sensitive issue of attire. The local community, on the other hand, may get upset with what is considered improper dressing of tourists. Thus, mosques that are certified for religious tourism should provide proper information on attire as well as the necessary attire for those wishing to visit them. Furthermore, in promoting mosque tourism it is proposed that the state regulatory body adopt a model of tour certification for guides and the participating mosque. The certification process would provide training for both Muslim and non-Muslim tour guides and certify them as specialists in mosque tourism. The local experience of raising public donations and activities for the building of a specific mosque being toured on *waqf* property can be documented and presented to tourists. This documentary can help the tourists to further understand

the concept of *waqf* as a unique economic system in Islamic communities and as an Islamic practice.

The proposed model is still at its early stage and may not be immediately implemented. Designing training and certification is time consuming, while getting international recognition may take years of hard work and sacrifice. However, its long-term benefits make it a worthwhile effort for all stakeholders to ensure its success. As with any business venture, there are risks and returns involved in mosque tourism. In order to be successful and sustainable, mosque tourism also requires a proper plan and strategy, promotion and operational competencies. Through mosque tourism the local community can be motivated to learn other languages and cultures. They can directly benefit by participating in small-scale businesses including souvenir shops, handicraft outlets and cafeterias offering items of local pride to Muslims and Malaysians. The economic effects of this could be the subject of future empirical studies.

ACKNOWLEDGEMENTS

The authors would like to express our gratitude to Ms. Afirah Azudin of Universiti Sultan Zainal Abidin for her assistance in this study.

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Marriage in the Absence of *Wali Nasab*: Procedural Difficulties in Obtaining Consent from a *Wali Raja*

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ABSTRACT

Marriage in Islam is a sacred institution. It is a form of ritual submission to Almighty God. For a marriage to be valid, one of the pre-requisites is that it must be entered into in the presence of the female party's guardian (*wali nasab*), who must be a blood relative or she must at least have obtained his consent. In the absence of this guardian or without his consent e.g. through deputed power, the marriage is rendered invalid unless it is solemnised by the head of state or his deputy (*wali raja*) i.e. the *wali* who generally has authority over Muslims in the territory. Nevertheless, there is contention that marriages in need of solemnisation by a *wali raja* are prolonged most probably due to procedural difficulties that arise in the process of application for *wali raja* or other factors. This paper seeks to examine whether this contention is true and what are the procedural difficulties in obtaining such consent of the *wali raja* and what are the ways to overcome those difficulties if any. The research conducted for this paper was basically qualitative, where analysis was based on written procedures and practices outlined by the law. It is hoped that this research will be beneficial to all researchers, academicians, the legal fraternity and the public as a whole.

Keywords: Marriage, guardian/wali, procedural difficulties, wali nasab, wali raja

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

A marriage contract requires either the presence or the consent of a guardian (*wali*). The absence of a guardian renders the marriage void and invalid (Al-Ramli, 1993; Al-Zuhaily, 2001; Al-Khin *et al.*, 2009). Therefore, under Islamic law, the

guardian is a very important person for the bride. As a marriage is to guarantee enjoyment, happiness, comfort and success for the husband, the wife and the families, Islamic law assigns a guardian to safeguard the interest and welfare of his ward. Being a male, a guardian knows the character of a man better than a woman. Being a guardian, he should understand and know what is best for his daughter or ward. In view of this role, the bride requires supervision even though her father or guardian may be absent or declines to solemnise her marriage. The father or guardian might be absent due to the distance between his and the bride's residence or between his residence and the marriage venue or due to other reasons such as that he may be performing the *hajj* or *umrah* or is missing or is of a different religion (Re Kyra Mitchell, [2009] 2 ShLR 199). The consanguine guardian might also decline to solemnise the marriage of his ward due to certain reasons such as non-equality of status, enmity, young age, black magic (Marlia Akmar binti Ramli lwn Ramli bin Abdul Rahman (2010) JH 30(2)) etc. In these circumstances, the guardianship shall be replaced by a *wali 'am* (the head of state) or *wali raja* whose power is deputed by the head of state. In Malaysia, there are many marriages of this nature. A bride who has no *wali* from *nasab* and wishes to have her marriage solemnised must proceed with an application for the marriage to be solemnised by the *wali raja* (Islamic Family Law (Federal Territories) Act 1984, s. 13b). She must comply with certain

procedural aspects before her application can be successful and her marriage is solemnised. This procedure of application for a *wali 'am* can result in the delay of the marriage solemnisation. This defeats the purpose of marriage as a ritual to legalise a relationship. In addition, the parties involved might resort to other solutions such as indulging in cross-border marriage or solemnising the marriage without a *wali*.

AN OVERVIEW OF THE CONCEPT OF GUARDIANSHIP (*AL-WILAYAH*) OF MARRIAGE UNDER ISLAMIC LAW

Guardianship in Arabic language is *al-wilayah*. *Al-wilayah* literally means power or authority and help or assistance (Ibn Manzur, n.d.). Terminologically, only one definition has been given by the Hanafi jurists, who defined *wilayah* as the exercise of power by words over another person whether the latter wishes it or not (al-Haskafi, 1966; Badruddin Hj Ibrahim, 2006). Nevertheless, no definition has been given by prominent Sunni jurists from the Malikis, the Shafi'is and the Hanbalis. On the other hand, contemporary Muslim scholars have expounded various definitions of guardianship (*al-wilayah*) (al-Namr, 1409h). For example, Mustafa al-Zarqa', a contemporary Muslim scholar, defines *al-wilayah* as the management of a minor's affairs by a mature person knowledgeable of personal and financial matters (Al-Zarqa, 1968). Shalabī, another contemporary Muslim scholar, defined *al-wilayah* as legal authority enabling

a person to create and carry out various dispositions and contracts. (Muhammad Mustafa Shalabi, 1403/1983). The above definition encompasses all kinds of *al-wilayah*, including guardianship over persons and guardianship over property. Guardianship of marriage is a kind of guardianship over persons. According to Muhammad Abu Zahrah, guardianship (*al-wilayah*) of marriage refers to authority or power that gives rise to a marriage contract (Muhammad Abu Zahrah, n.d.). Guardianship of marriage is further divided into two: limited guardianship (*al-wilayah al-qasirah*) and extended guardianship (*al-wilayah al-muta'addiyah*). Limited guardianship refers to legal authority that a person has to solemnise his own marriage, while extended guardianship refers to legal authority of a person to solemnise the marriage of another person (Sha'aban, 1993). The person who has this legal authority is known as the guardian.

It follows that the word "guardian" in the Arabic language is *wali*. According to the Hans Wehr dictionary, apart from "guardian", *wali* can be literally defined among others as "helper" or "protector" or "sponsor" or "patron" (Wehr, H. n.d.). Based on the definition of guardianship, guardian (*wali*) in marriage refers to the person who is authorised to give rise to a marriage contract. According to al-Zuhaily, *wali* is a person who leads a marriage contract (Al-Zuhaily, 2001). Guardianship over marriage of a woman falls under extended guardianship, where a guardian has authority to solemnise the marriage of a woman. There are four

causes of extended guardianship: (1) blood relationship (*qarabah*) such as legal authority of a father over his daughter (2) ownership (*milk*) such as legal authority of a person over his slave; (3) *wala'* or the right of successor by contract; (4) Muslim rulership (*imamah*) i.e. legal authority of the ruler over the ruled (al-Haskafi, 1966). However, blood relationship and rulership are the most common and relevant nowadays. Therefore, it is common that guardianship of marriage of a woman can be either guardianship due to blood relationship or guardianship due to rulership. (Al-Zuhaily, 2001). Guardians from blood relationships are those relatives of the woman from the groom's side based on priority. They include the groom's father, germane brothers, consanguine brothers, germane nephews, consanguine nephews, paternal uncles and so forth. The *wali* is duty bound to safeguard the welfare and interests of his ward and to make sure that she is married to a man who is equal to her in status. Furthermore, marriage is not only confined to the relationship between husband and wife but also between their families. (Zaydan, 352-353). This also reflects that the decision to marry is not an individual decision but a collective one. Where there is no *wali* who has blood relationship with the bride due to reasons such as that the *wali nasab* may have died or refuses to consent or he is missing, the *wali* shall transfer to the head of state (rulership) or his deputy. This is based on the *hadith* of the Prophet (pbuh): "The Sultan is the *wali* for those who have no *wali*" (al-Shawkani, 1998).

WALI AS ONE OF THE ESSENTIAL REQUIREMENTS (RUKN) OF MARRIAGE IN THE SHAFI'I SCHOOL

It is a well-accepted fact that most Malaysian Muslims follow the Shafi'i school of law. Under the Shafi'i school of law, the *wali* is an essential requirement (*rukun*) of marriage apart from the two parties intending to marry, the two male witnesses and the *sighah* (offer and acceptance) (Al-Ramli, 1993; Al-Khin *et al.*, 2009). Such requirements must be fulfilled to determine the validity of the marriage. Validity of marriage is important as it guarantees further rights to the couple such as the husband's right to obedience, the wife's right to *mahr*, the wife and children's rights to *nafaqah* and the children's rights to lineage (*nasab*) and custody. On the other hand, the absence of a *wali* will invalidate the marriage, and an invalid or void marriage provides no rights and obligations. (Al-Khin *et al.*, 2009).

There are two types of *wali*, and first priority in solemnising a marriage goes to the *wali nasab*, who is closer in degree of blood relationship to the woman (*wali aqrab*). To be a qualified *wali*, he must fulfil all conditions, which include being a Muslim, being sane, being an adult man, being *'adil* (has never committed a major sin and does not continue to commit minor sins), is not *fasiq*, is a free person and is not absent due to *ihram* (performing the *hajj* or *umrah*). Where the *wali nasab* is not qualified, for example if he is dead, insane, senile or a minor, the guardianship transfers to a distant *wali* in blood (*wali ab'ad*).

Where the *ab'ad wali* is not qualified, or something prevents the *wali aqrab* from solemnising the marriage, guardianship shall transfer to the head of state (*sultan*) based on the *hadith* of the Prophet i.e. "The sultan is the guardian for those who have no guardian" (Al-Shawkani, 1998). Al-Shawkani explained that this *wali*, according to the majority of *fuqaha*, refers to kinship (*qarabah*) from the male agnatic group (*'asabah*) of the same parenthood (*nasab*). Thus, if the *wali* is absent or does not exist at all, the matter is transferred to the *sultan* because he is the guardian for those who have no guardian (Al-Shawkani, 1998).

Shafi'i jurists have discussed several situations that result in the transfer of guardianship from the *wali aqrab* (*wali nasab*) to the head of state (*sultan*) or his deputy (*wali raja*). These circumstances have been identified as firstly, when the woman has no *wali* from *nasab* at all; secondly, when the *wali aqrab* cannot be found (*ghaib*); thirdly, when the *wali aqrab* is away beyond a distance of 96 kilometres or two *marhalah* away; fourthly, when the *wali aqrab* is missing; fifthly, when the *wali aqrab* declines (*'udhul*) to solemnise the marriage of his ward; and finally, when the *wali nasab* is marrying his ward and there is no *wali ab'ad* who is at the same rank as he (Al-Ramli, 1993; Al-Shirazi, 1994).

Where the *aqrab wali* is qualified and capable of solemnising the marriage of his ward, he may execute this right and power to solemnise the marriage in several ways,

namely, either by being present on the day of the marriage and acting as the *wali* or by giving his consent for the marriage to be solemnised by a *wali raja*. He might also delegate his power to a qualified person, for instance from among his relatives or friends, or *juru nikah* as practised today in Malaysia. The absence of a *wali* or his deputy or *wali 'am* will render the marriage invalid or void (Al-Shirazi, 1994; Islamic Family Law (Federal Territories) Act 1984 s. 7, 13).

Muslim jurists do not seem to have discussed in detail the procedure to be adopted when the *wali* declines to solemnise his ward's marriage. Nevertheless, the *sultan* or his deputy (*wali raja*) is allowed to take the place of the *wali aqrab* upon fulfilment of several conditions, namely, if the *wali* declines to solemnise the marriage and the man who is marrying his daughter or ward is equal in status (*kufu*) with her. (Al-Shirazi, 1994).

The Law in Malaysia

Islamic law relating to the personal law of Muslims in Malaysia is governed by the Islamic Law Act and Enactments of every state. This paper will mainly refer to the Islamic Family Law (Federal Territories) Act 1984 (Act 303) (herein after referred to as IFLA) as this Act is considered the pioneer Act relating to Islamic rules governing marriage, divorce and related matters. The laws in the IFLA are quite similar to the provisions of the other 12 states in Malaysia i.e. Selangor (e.g. the Islamic Family Law (Selangor) Enactment

2003), Negeri Sembilan, Malacca, Johor, Perak, Pulau Pinang, Kedah, Perlis, Pahang, Kelantan, Terengganu, Sabah and Sarawak.

The IFLA does not define a *wali*. However it defines the *wali Mujbir* as being the father or paternal grandfather (Islamic Family Law (Federal Territories) Act 1984, s. 2). The IFLA also defines a *wali Raja* as the *wali* authorised by the Yang di-Pertuan Agong in the case of the Federal Territories, Malacca, Penang, Sabah and Sarawak or by the Ruler, in the case of other States as the person who gives away in marriage a woman who has no *wali* from *nasab* (the Islamic Family Law (Federal Territories) Act 1984, s. 2).

With regards to the requirement of a *wali* in marriage, the IFLA provides for both the *wali* and the woman's consent in marriage. The IFLA states that:

- a) A marriage shall not be recognised and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either-
- b) the *wali* of the woman has consented thereto in accordance with Hukum Syarak; or the Syariah Judge having jurisdiction in the place where the woman resides or any person generally or specially authorised in that behalf by the Syariah Judge has, after due inquiry in the presence of all parties concerned, granted his consent to the *wali raja* to solemnise the marriage in accordance with Hukum Syarak; such consent may be given wherever there is no *wali* by *nasab* in accordance with

Hukum Syarak available to act or if the *wali* cannot be found or where the *wali* refuses his consent without sufficient reason (Islamic Family Law (Federal Territories) Act 1984, s. 2).

The above provisions indicate that when a woman has no *wali* from *nasab* or because the *wali nasab* cannot be found or refuses to solemnise the marriage, the woman may apply for the marriage to be solemnised by a *wali Raja*.

Apart from consent, the IFLA also provides for procedure of marriage solemnisation in relation to both *wali nasab* and *wali raja*. The IFLA states, among other things, that a marriage in the Federal Territories shall be solemnised by either the *wali* in the presence of the Registrar or by the representative of the *wali* in the presence of and with permission from the Registrar or by the Registrar as the representative of the *wali* (Islamic Family Law (Federal Territories) Act 1984, s. 7 (1(a-c))). Where the marriage involves a woman who has no *wali* from *nasab*, the marriage will be solemnised by the *wali raja* (Islamic Family Law (Federal Territories) Act 1984, s. 7(2)).

There are several cases related to application for *wali raja* in the Syariah Court based on several grounds. In the case of Azizah binti Mat v Mat bin Salleh (1976 2 JH 251), the father declined to solemnise the marriage of his daughter as he wanted his daughter to get a job first before she got married. He had previously allowed her to become engaged to the man she wished to marry but after two years, he changed

his mind. The court held that in this case the father had declined to solemnise the marriage of his daughter without sufficient reason, and therefore, the court allowed the application for a *wali raja*. In the case of Sharifah Hanim v Syed Hussein bin Syed Salim (Civil Case no. 10005-052-1065-2004), the daughter made an application to solemnise her marriage through the *wali hakim* as her father declined to be her *wali* because, among other reasons, he believed the prospective groom to be of bad character. The court allowed the application as the court found that the father had refused without sufficient reason. In the quite recent case of Marlia Akmar binti Ramli lwn Ramli bin Abdul Rahman (2010 JH 30(2)), the daughter applied for a *wali hakim* as her father declined to solemnise her marriage. The court allowed her application as the reason for declining to solemnise the marriage as given by the father was insufficient and the man was equal in status with the daughter. An appeal that was filed by the father later was also dismissed by the court (Ramli bin Abdul Rahman lwn Marlia Akmar binti Ramli (2010) JH 30(2) 199).

There was also an application for a *wali hakim* by a new convert. In the case of Re Kyra Mitchell [2009] 2 ShLR 199, the applicant applied for a *wali raja* as she had no *wali* from *nasab*. The court allowed her application. In this case, the court also held that a son could not be the *wali* for his mother because of his relationship to her as son.

The provisions of the IFLA and the above four cases do not seem to reflect any

difficulty in procedure of application for a marriage to be solemnised by a *wali hakim* or *wali raja* even though in practice there may be a contention by one or both of the parties involved that they faced difficulties and tension while awaiting the court's decision in granting the marriage to be solemnised by a *wali hakim* or *wali raja*. (Interview with applicant, 18 March 2011). One case involved the marriage of a woman whose father was missing and whose whereabouts were unknown. However, so far, there has been no reported cases related to the application for a *wali raja* where the *wali nasab* was missing. As this paper studies only recorded cases dealing with procedural difficulties, we will examine further procedure for application for a *wali hakim/raja*.

Procedure for Application for a Wali Raja

Generally, under Islamic family law enforceable in all states in Malaysia, permission to marry is applied from the Office of the Registrar for Marriage, Divorce and *Ruju'* where the wife-to-be resides (section 16 of the Islamic Family Law (Federal Territories) Act 1998). However, there are cases that the Registrar must refer to the Syariah Subordinate Court before approval to marry can be given. The cases concern:

- a) application to marry by a man below 18;
- b) application to marry by a woman divorced before consummation
- c) application for a *wali hakim* for these reasons:
 1. no *wali* from *nasab*

2. missing *wali*
 3. convert *Muslim*
 4. illegitimate daughter
 5. *wali* refuses to be a *wali*
 6. *wali* is away performing the *haji* or *umrah*
 7. *wali* cannot be contacted because of a situation of emergency
- d) application for polygamous marriage

The procedure for application of a *wali hakim* depends on whether the application is made on the grounds of conversion, the bride being an illegitimate daughter, there being no *wali* from *nasab*, the *wali* is missing or the *wali* refuses to give permission. For an application on the grounds of either conversion, there being no *wali nasab* or the *wali* is missing, the applicant should submit the relevant documents to the Registrar of Marriage, Divorce and *Ruju'*, after which an interview with the Registrar will be scheduled. The Registrar will further investigate the matter, and if satisfied with the reasons given, will submit a report to the Syariah Court. The applicant will then make an application to the Syariah Subordinate Court that is supported by an affidavit (Syariah Court Civil Procedure (Federal Territories) Act 1998 s. 7(2), Second Schedule of SCCP (FT) Act 1998, Form MS 3, MS 26). It is to be noted that according to the Practice Direction issued by JKSM, priority will be given to an application for *wali hakim* in case of conversion whereby the application will be heard and determined on the same date of application if all the documents and particulars are complete. For an

application for *wali hakim* on the grounds of the case involving an adopted daughter, a missing *wali* or an illegitimate daughter, the application will be heard on the date that will be fixed (Practice Direction No 8 2012). After the Syariah Subordinate Court grants permission to marry in the presence of a *wali hakim*, the applicant will submit the order to the Registrar of Marriage, Divorce and *Ruju'* and proceed to make the stipulated payment. The Registrar will then issue a letter of permission for marriage.

When a *wali* refuses to be the *wali*, the applicant must get permission to proceed with the marriage from the Syariah Subordinate Court by filing an application that is supported with an affidavit. At this stage, the court may order the party to try to settle the case by way of *sulh* first. The date will be fixed by the Court and in the hearing, the Court will call the father to explain his reasons for refusing to be the *wali*. If the Court finds the reason to be unreasonable, it will instruct the father to be the *wali* in the marriage. However, if the *wali* refuses after being instructed by the court twice, the right of being the *wali* will be transferred to the *wali ab'ad*, not the *wali raja* (Practice Direction No 5 2008). The court may also grant permission to solemnise the marriage by a *wali raja* (Azizah binti Mat lwn Mat bin Salleh (1976) 2 JH 25; Marlia Akmar binti Ramli lwn Ramli bin Abdul Rahman (2010 JH 30(2)).

Procedural Difficulties

It can be seen that the law does describe the procedure for application to marry in the presence of a *wali raja*. If the *wali* refuses

to give his consent and the daughter files an application for *wali raja*, the *wali* will be summoned by the Syariah Subordinate Court to explain why he refused to give consent. The summons needs to be served in person as provided for in Section 41 of the Syariah Court Civil Procedure (Federal Territories) Act 1998. The person summoned is given a copy of the summons bearing the seal of the Court. A problem may occur if the *wali* refuses to receive the summons, in which case, the summons server may leave the summons near the person being served and direct his attention to it (SCCP 1998 s 42). In the affidavit of service, the summon server must state the manner in which the summons was served. Another problem may occur if the *wali* refuses to attend the court proceedings after the summons has been served. In this case, the Syariah Court may issue a warrant of arrest to compel the appearance of the *wali* (SCCP 1998 s. 51). If the court is satisfied that summons has been duly served, the bride-to-be must produce witnesses to testify that the *wali* is missing and then take the *yamin istizhar*. A problem may occur if the bride-to-be fails to produce witnesses who can testify to the status of the father and support her application. This may delay the proceedings. However, if the plaintiff can prove her case, the court will then grant her application (SCCP 1998 s. 121(1)(b)).

Delay in obtaining permission from the *wali* or permission to marry in the presence of a *wali raja* can compel the couple to elope to a jurisdiction that is more than 2

marhalah away in order to justify marriage with no *wali*. Popular places for this are Narathiwat, Yala, Pattani, Songkla, Sattun and Betong, where the marriage may be solemnised in the presence of a *wali raja/hakim* appointed and recognised by the government.

CONCLUSION

It is undeniable that a successful marriage begins with a good husband and wife. Due to the understanding that a woman lacks knowledge and experience of man's behaviour, Islamic law provides for assistance in choosing a man for marriage. Islam considers the *wali* as being an important person in monitoring the marriage of a woman. The *wali* must ensure that the woman has made the right choice. Due to the significance of the *wali* in the marriage of a woman, Islam rules that where the *wali* from blood relationship is absent, he should be replaced by the sultan or his deputy to ensure the protection of the woman's welfare. The procedural aspect of application for a *wali raja* under Islamic law in Malaysia seeks to achieve the same purpose i.e. to safeguard the welfare of the woman. Such procedure is not to cause difficulties but to make sure that the marriage of a woman is based on approval, knowledge or consent of a *wali* who performs this important function in the marriage of a woman. The above discussion also reflects that the procedure that is outlined by the law will not cause any difficulty to the applicant if she can prove her claim during the trial. Problems or

difficulties may arise only in remote cases where the application is made for a *wali raja* due to a missing *wali aqrab* (interview with the applicant, 2011). Such problems and difficulties are mainly due to the delay in serving the summons as the *wali* might not be able to be reached. To overcome these difficulties, perhaps the law should provide a clear rule for a minimum period for the *wali* to turn up. For example, where a *wali* does not turn up after advertisement in the newspapers for one month, then the ward may testify and take the prescribed oath and her application be duly considered and granted. The procedure needs to be eased in order to prevent the couple from eloping and opting for a runaway marriage that may lead to another set of problems.

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The Role of *Fatwa* and *Mufti* in Contemporary Muslim Society

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ABSTRACT

Fatwa in general refers to the legal opinion issued by any Muslim jurist (*mufti*) relating to certain rulings of Islamic law. In principle, *fatwa* serves as a means of clarifying any issue that arises in Muslim society. This reflects that *fatwa* and *mufti* are two crucial significant tools of providing legal guidance within the ambit of the Shari'ah governing Muslims in their day-to-day affairs. This is because even though *fatwa* is not legally binding when it is issued, it carries a significant effect in contemporary society as it provides guidelines and rules to follow. This paper seeks to examine the significant role of *fatwa* and *mufti*, respectively in contemporary Muslim society. Discussion will include definition of *fatwa*, conditions of *fatwa*, qualification of persons eligible to issue *fatwa*, scope and purview of *fatwa*, legal effect of *fatwa* on the Muslim community and the role of *fatwa* and *mufti*, respectively in attending to issues and problems arising in contemporary Muslim society. The research will mainly adopt library research in providing a sound legal theory of *fatwa* under Islamic law. It is believed that the findings of the research will provide a clear guideline relating to the role of *fatwa* and *mufti* in contemporary Muslim society that will benefit the *fatwa* institution in Malaysia in particular and the public at large.

Keywords: Fatwa, mufti, Islamic law, role of mufti

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Fatwa and *mufti* are two common words in the field of Islamic jurisprudence. These subjects are very significant especially in the context of Malaysia today. This is because the public in general might not be aware of all detailed rules of Islamic law especially those that are probable (*zanniyyah*) in nature. Furthermore, there

might be new issues or cases that arise in society where there are no clear Islamic rulings. Therefore, references to learned people are necessary as the Quran states to the effect 'Ask the learned person if you have no knowledge' (The Quran; al-Anbiyaa' 21; 7). *Fatwa* and *mufti* can answer and clarify questions that are raised by the community.

Definition of Fatwa

According to the Arabic lexicon, *al-ifta'*, *al-futya*, *al-futwa* and *al-fatwa* refer to 'giving answer, or a reply, stating the decision of the law, respecting a question, or a commonly used, a notification or an explanation of the decision of the law, or, in respect to a particular case, given by a *faqih*'. In other words, it is an answer or a reply to a question relating to a dubious judicial decision (Ibn Manzur, 1414H; Lane, 1968). According to Ibn Hamdan, *al-ifta'* is notification of the Islamic ruling on events and circumstances with legal proof (*al-dalil shar'ie*) (Ibn Hamdan, 1380H). Meanwhile, according to al-Zaybari, *fatwa* technically refers to the text or statement answered by a *mufti* or legal ruling of the Shari'ah where the *mufti* provides clarification on certain issues (al-Zaybari, 1995). In short, *fatwa* can be generally understood as the legal ruling that is given by the *mufti* as an answer to enquiries by someone on a certain legal issue.

The person who holds the position of giving a *fatwa* is called *al-mufti*. He is a jurist consult (Lane, 1968) who notifies the decision of the law, in or respecting

cases submitted to him for the guidance of the *Qadi* and others in matters relating to Islamic law (al-Mallah, 2009).

The word *fatwa* and its derivatives have been mentioned in the Holy Qur'an to convey the meaning of asking questions around uncertain matters, either religious or worldly. For example, The Qur'an; al-Nisa 4: 127 states to the effect, "And they ask you a decision about women. Say: Allah makes known to you," and in al-Nisa 4: 176: "They ask you for a decision of the law. Say: Allah gives you a decision concerning the person who has neither parents nor offspring", conveying the meaning of asking clarification in religious matters.

The derivation of the word *fatwa* has been also used in *surah* Yusuf asking for the interpretation of dreams: "the matter is decreed concerning which you inquired (The Qur'an; Yusuf 12: 41)"; "O chiefs! Explain to me my dream, if you can interpret the dream" (The Qur'an; Yusuf 12: 43); and "Yusuf! O truthful one! Explain to us seven fat kine which seven lean ones devoured" (The Qur'an; Yusuf 12: 46).

In the story of Bilqis, the queen of Saba, *fatwa* conveys the meaning of seeking advice and consultation, where the Quran states to the effect: "She said: O chiefs! Give me advice respecting my affair" (The Qur'an; al-Naml 27: 32). Finally, two verses from al-Saffat carry the meaning of firm questioning that intends to expose persons who are fraudulent; these verses are related to the challenge of the

Prophet (pbuh) to non-believers. The Quran states to the effect: “then ask them whether they are stronger in creation or those (others) whom We have created” (The Qur’an; al-Saffat 37: 11); “Surely We created them of firm clay,” and “Then ask them whether your Lord has daughters and they have sons” (The Qur’an; al-Saffat 37: 149).

The importance of giving *fatwa* with basis had been stressed in the *hadith* to the effect: “Whoever is given a *fatwa* (verdict) that has no basis, then his sin will be upon the one who issued that *fatwa*”. This *hadith* conveys the meaning of permission and authorisation, where if a person gives permission to another to conduct a certain practice that has no basis and foundation in the permissibility of the practice, and if the questioner (*al-mustafti*) then commits a sin based on this *fatwa*, the sin (of the questioner) will be upon the *mufti*, not the questioner (Ibn Majah, 2007).

In another *hadith*, Abdullah ibn ‘Amr reported that the Prophet (pbuh) said:

Allah does not take away the knowledge by taking it away from (the hearts of) the people, but takes it away by the death of the religious learned men till when none of the religious learned men remains, people will take as their leaders ignorant persons who when consulted will give their verdict without knowledge. So they will go astray and will lead the people astray. (al-Bukhari, 1422H)

Conditions for the Issuing of a Fatwa

There are several conditions to be fulfilled before issuing a *fatwa*. Firstly, the *fatwa* must be issued by a qualified *mufti* who is considered as being learned or knowledgeable (*ahl al-dhikr*) as the Quran states to the effect: “And We did not send before you any but men to whom We sent revelation-- so ask the followers of the Reminder if you do not know” (al-Nahl: 43). Therefore, a person who has no knowledge in Islamic law and is not knowledgeable in the principle of derivation of the rule, is forbidden from delivering a *fatwa* as the Quran states to the effect,

Say: My Lord has only prohibited indecencies, those of them that are apparent as well as those that are concealed, and sin and rebellion without justice, and that you associate with Allah that for which He has not sent down any authority, and that you say against Allah what you do not know. (The Qur’an; al-A’raf 7: 33)

In another verse, it is given, “And, for what your tongues describe, do not utter the lie, (saying) This is lawful and this is unlawful, in order to forge a lie against Allah; surely those who forge the lie against Allah shall not prosper” (The Qur’an; al-Nahl 16: 116). According to al-Duski, it is not permitted for a Muslim to say that something is permitted or prohibited unless he knows that the permissibility and prohibition originated from the Lawgiver (al-Duski, 2007). This has been ascertained by the Prophet (pbuh) when he said to the effect:

whoever (intentionally) ascribes to me what I have not said, then (surely) let him occupy his house in Hell-fire; whoever is given fatwa without (having) knowledge, then his sin will be upon the one who issued that fatwa. If anyone advises his brother knowing that guidance lies in another direction, he has deceived him. (al-Hakim, 1990)

This hadith clearly indicates that one is prohibited from delivering a *fatwa* if one is not knowledgeable in the related matters and in the principle of deriving the rules.

Secondly, the *fatwa* must be in compatible and in agreement with definitive texts from the Quran and the *Sunnah* of the Prophet. In other words, the *fatwa* must not contradict with any definitive evidence as this contradiction will render the *fatwa* unfeasible. According to al-Dhahabi, Imam al-Shafii was reported to affirm his stand in the case of contradicting evidence by stating, “if you find in my book what is in contrast with the tradition of the Prophet (pbuh), take what the traditions of the Prophet said, and ignore my opinion (al-Dhahabi, 1985).

Thirdly, the *fatwa* must be originated from the renowned and authentic books. This is because the basis of the *fatwa* implies fair and rightful transmission on the transmission of *fatwa*. Therefore, information on *fatwa* from unknown books is forbidden, until the authenticity of the information has been verified. However, the content of the unknown work may be attributed as being authentic if it is known that the author adopted this method of

verification, and he is a credible source who is known for his fairness and integrity. It is forbidden to issue a *fatwa* based on marginal annotation on the basis of lack of authenticity and verification (al-Duski, 2007).

Finally, *fatwa* must be compatible with the customs (*urf*) of the person who seeks the explanation (*mustafti*). If the *mufti* has no background knowledge of the person who seeks explanation, he must perform an informal investigation to gain knowledge regarding the background of the *mustafti*; this information includes the person’s origin, his homeland, his mother tongue, his customs etc. (Al-Duski, 2007). According to al-Qarafi, there is no disagreement among the jurists that this is compulsory since the difference in customs and language etc, necessitates differences in *fatwa* and ruling. (Al-Qarafi, n.d.).

Qualification of Person who Is Eligible to Issue Fatwa (Mufti)

Muslim jurists have held the view that the qualification of persons who are eligible to issue *fatwa* equals the qualification of *mujtahid* since the practice of giving *fatwa* is similar to *ijtihad* as both require effort from the *mufti* and *mujtahid*. The difference is only in terms of the scope of their roles. In other words, the *mujtahid* provides explanation from a vast and larger scope, and sometimes deliver the ruling before the actual occurrence. The *fatwa*, on the other hand, addresses a specific subject, and is issued only if there is a request for clarification.

According to al-Nawawi, there are two types of *mufti*. The first is the independent *mufti*. They are the *mufti* who are knowledgeable in sources of the rulings from the Quran, the *Sunnah*, the consensus and the analogy. They must be knowledgeable in the principles of derivation of the rules. The *mufti* must possess knowledge in the sciences of the Quran, *hadith*, the principle of abrogation (*al-naskh wa al-mansukh*), the rules of Arabic grammar, language, morphology and the debates among scholars as well as their outcome. The *mufti* must also possess vast experience in derivation of the rules. They should also be knowledgeable in *fiqh* and its various issues. The *mufti* are called independent *mufti/mujtahid* as they act independently with respect to the evidence (*dalil*) without imitating or being restricted (*muqallid*) to any *madhhab*. Other knowledge such as arithmetic or mathematics can be a requirement as well if the issue concern inheritance or finances (Al-Nawawi, 1999).

The second type of *mufti* is the dependent *mufti*. There are four categories of dependent *mufti*. The first is the *mufti* who follows the methodology of his teacher (imam) in deriving Islamic rulings. He, however, does not imitate the opinion of his teacher. (al-Nawawi, 1999; Ibn Husayn al-Makki, n.d.) The second is the *mujtahid/mufti* who is dependent on the methodology of his teacher but at the same time, also agrees with the view of the teacher. He does not pursue a view or principles of derivation of rules beyond

what has been established by his teacher (al-Qasimi, 1986; al-Nawawi, 1999). The third category is the *mufti* who studies the view of his teacher together with the view of jurists from other schools or that of a disciple of his teacher's or that of jurists from his own school of law (*madhhab*) and then makes a preference accordingly (al-Qasimi, 1986; al-Nawawi, 1999). The fourth category is the *mufti* who engages in memorising different views relating to legal rulings in his school (*madhhab*). However, this category of *mufti* has no ability to derive rulings. Therefore, if he is asked about certain legal positions, he is able to issue *fatwa* only on the basis of the views from scholars of his own *madhhab* (al-Qasimi, 1986; al-Nawawi, 1999).

Scope and Purview of Fatwa

There are two main types of Shariah rulings under Islamic law. The first relates to belief. This ruling consists of knowledge of Allah the Almighty's existence, His oneness (*wahdaniyyah*), His attributes (*sifah*) and the six pillars of faith. These rulings are considered critical and complex and are a delicate subject. Any questions regarding this topic is considered an unbearable responsibility. Therefore, the jurists are in agreement that no *ijtihad* or *fatwa* on this topic can be exercised (Al-Ashqar, 1976; al-Dusuki, 2007). The opinion of these *mufti* is based on the Qur'anic verse, "So know that there is no god but Allah, and ask protection for your fault and for the believing men and the believing women; and Allah knows

the place of your returning and the place of your abiding” (Muhammad 19). The purpose of ‘knowledge’ in the verse is merely to contemplate and to meditate, not to seek in-depth explanation. In another verse, “Most surely in the creation of the heavens and the earth and the alternation of the night and the day there are signs for men who understand” (Ali ‘Imran 190).

The companions of the Prophet (pbuh) had contented themselves with total submission where this topic was concerned as the Prophet had not assigned them to delve further, even if they knew the subject. They had also not been discharged from being a believer due to lack of knowledge of this subject, which prevents them from issuing *fatwa* on the subject. According to Amir Badshah, *fatwa* may be issued only on subjects that tend to be speculative, but not on belief. All that is required is mere knowledge of the subject (Amir Badshah, n.d.).

Total submission was adopted by jurists in the golden age of Islam spanning the first year of the Hijri calendar and the two centuries that followed, but even they were forbidden from thinking too deeply on the subject; this action was considered aberrant and ignorant (Al-Shawkani, 1999). The method of issuing *fatwa* adopted by Imam Malik ibn Anas in the case of *al-istiwa*’ in al-Baqarah 2:29 is clearly demonstrates how the subject was handled in that period: “al-Istiwa’ is known, and the manner of ‘*istiwa*’ is unknown, while believing in *istiwa*’ is obligatory, and asking about it is an innovation” (al-Shatibi, 1992).

It is also prohibited to raise questions on matters that have been transmitted by a large group of people such as the matters relating to the pillars of Islam, prohibitions regarding mothers and daughters related to marriage etc. when, in practice, there is no suspicion that the group had gathered together to fabricate a falsehood as this is difficult to prove. In such matters it is considered that evidence has been transmitted and the method has been shared between the people and the jurists (al-Duski, 2007).

The second Shari’ah ruling is on matters related to the Muslim’s daily affairs such as contract of sales, marriage, divorce, manumission, administration, penance etc. These are matters related to which it is permitted to issue *fatwa* but based on the premise that if such a *fatwa* is forbidden, it is impossible for the person who seeks information to wait until he himself reaches the expertise of the *mujtahid*.

Furthermore, although it is the communal obligation of every Muslim to study, preventing or prohibiting the person who seeks explanation to ask questions may lead to forfeiture of a ruling and this may discourage any progress in improvement, thereby causing hardship for the people in the carrying out of their daily activities (al-Duski, 2007). Therefore, there is no other option except to seek answers from the person in charge i.e. the *mufti* as stated in the Quranic verse, al-Nahl: 43 as well as in the verse, “Abiding therein forever; surely Allah has a Mighty reward with Him” (Al-Tawbah: 22).

The Prophet (pbuh) also encouraged his companions to seek explanation if they encountered new cases such as that of the man who injured his head and had wet dreams (*ihtilam*), and who was then ordered by his friend to perform ritual ablution (*ightisal*), causing him to become rigid and stiff, and then to die. When the Prophet was informed of the incident, he said, "They have killed him, may Allah kill them. Is not a cure for a lack of knowledge to ask a question?" (Ibn Majah, 2007).

New Scope of Fatwa

As human life evolves with time and development, the emergence of new circumstances cannot be prevented. Although Muslims inherit a vast amount of works and knowledge written by the jurists, these works are not sufficient to provide answers and solutions to all new circumstances. This is where the *fatwa* institution plays a vital role; as long as human life continues to evolve and transform, and as long as Shariah is appropriate and compatible with every place and time, the request for *fatwa* will never cease (Al-Duski, 2009).

There are two main areas of great change that need attention, namely, the area of medical science and technology and the area of finance. The former includes matters related to information and communication technology, organ transplant and regeneration, chemical warfare etc. while the latter includes

current practice and the products of finance and banking such as Islamic bond (*sukuk*) and modes of financing, among others (Al-Ashqar, 1976; al-Duski, 2007).

For example, one of the conditions to imposing the cutting of the hand of thieves is that the property stolen must be valuable and must have been put under the security of the owner, that is to say, it enjoyed physical security. The burden of proof regarding the security of the property is upon the owner as the said property was in his custody. However, recent developments in cloud storage do not imply physical security as the property stored is in the form of virtual property. The question may not arise as the law regarding intellectual property is regulated and implemented, but the question regarding the burden of proof upon the owner of the said property as well as the issue of ownership does arise. Most of the items in cloud storage are shared files, and the owner may not know for certain that his property has been taken or stolen. The said property may also have been used by the 'unauthorised' owner in another server or country. The activity of sharing or taking this same property can be repeated, and the owner may not know that his files have been used. The issue arises that the original owner may not even know that his property has been taken or stolen, and may have no mechanism for ascertaining proof in order to bring the perpetrator to justice. The only way of tracing the culprit is through certain organisations, and this requires a large amount of money (Netskope Report, 2015).

Legal Effect of Fatwa on the Muslim Community

Fatwa is an instrument under Islamic law that facilitates clarification on Shariah rulings regarding new circumstances based on detailed evidence related to the rulings. However, although the explanation comes after someone asks for explanation (*mustafti*), necessitating the effect of such *fatwa* only on the *mustafti*, technically the effect of *fatwa* is seen on other than *mustafti* provided that the same matter is being considered. This is because *fatwa* is related to general rulings of Shariah, which can be related to the *mustafti* and others as *fatwa* provide explanation on general matters as a whole (al-Mallah, 2009).

As the scope of *fatwa* is related to the act of worship, and the explanation found in the act of worship is in the form of clarification, it cannot be imposed legally by the Qadi (al-Qarafi, n.d.). For example, the Qadi is not permitted to deliver judgement that someone's prayer is valid (*sahih*) or void (*batil*) as the explanation can only be delivered via *fatwa*. The *mustafti* may accept the *fatwa* if it is correct or he may disregard it and ask for a new *fatwa* from another *mufti*. However, the *fatwa* may become binding towards the *mustafti* if he is restricted to follow (*muqallid*) the *madhhab* of the *mufti* (al-Qarafi, n.d.). According to Al-Sheikh Muhammad Ali, since *fatwa* is merely an explanation of the Lawgiver's rulings that is related to *maslahah* in this world and the hereafter, the obligation is specific to those restricted by the *madhhab* of the *mufti*.

Therefore, *fatwa* is more general in ruling but more specific in obligatory requirement (Al-Sheikh Muhammad Ali, 2009).

In a nutshell, *fatwa* will become binding only if the *mustafti* seeks clarification that requires immediate attention, and no other solution available. Otherwise, if there is time to seek explanation from another *mufti*, the solution given may be ignored to facilitate convenience in Muslim daily activity (al-Nawawi, 1999).

Role of Fatwa and Mufti in Attending to Issues and Problems Arising in Contemporary Muslim Society

The institution of *fatwa* as a mechanism in providing explanations enjoys a significant position, which is gravely important and enormously advantageous. *Fatwa* provides an explanation and clarification on obscure matters related to religious affairs. It provides guidance on what is considered the correct pathway to success.

The importance of *fatwa* raises the position of the *mufti* to that of the Prophet, in providing and giving explanation as well as with regards to their *khalifah*. This point of view is based on the premise that the early Muslim scholars (the *ulama*) were the successors to the Prophet in terms of providing explanations and solutions, as well as having been his companions. With regards to this, the Quran states, "O you who believe! Obey Allah and obey the Messenger and those in authority from among you; then if you quarrel about anything, refer it to Allah and the Messenger, if you believe in Allah and

the last day; this is better and very good in the end” (The Qur’an; al-Nisa’ 4: 59). Since their duty is to deliver and spread the Lawgiver’s ruling to the people, as well as since their *fatwa* is correct, obeying their *fatwa* is similar to obeying the command of Allah (al-Duski, 2007).

According to ibn al-Qayyim, the position of the *mufti* is similar to that of a minister (*wazir*). The privilege of the position of a minister appointed by the king is verified, and his standing is not unknown, as his position is one of the highest ranks. The position appointed by Allah the Almighty enjoys the same privilege as the one appointed by the Lawgiver i.e. the messenger of Allah (Ibn al-Qayyim, 1991).

The life of Muslims and their personality is clear and plain in terms of their beliefs, worship, social life, economic activity, legislation, litigation and the law. The institution of *fatwa* will continually guide and support the development of Muslim lives. The *fatwa* that follows the correct method that is based on the Quran and the *Sunnah*, as well as the correct rules of derivation will give the positive effect of preserving the identity of Muslims. This process will continue to prevent any corruption and depravation in the heart of Muslim society (al-Mallah, 2009).

Muslim jurists were warned of the consequences of taking for granted the leniency of the *Syara’* in *fatwa* where the *fatwa* is not based on authentic sources. They were also warned not to give *fatwa* based on their own wishes and desires as

the effect of those actions would affect Muslim society (al-Ashqar, 1976). The evidence of this is vast, such as the *fatwa* on the status of Muslims regarded as non-believers because of disagreement in denominational issues and the *fatwa* on the permissibility of sexual intercourse with a newly deceased wife (Abu Daka, 2011; Khan, 2014).

In Malaysia, the institution of *fatwa* plays a vital role in providing explanations for new developments that cater specifically for new issues arising in Malaysian society. Examples can be seen in the *fatwa* regarding child marriage (child under the age of puberty), womb donation, various types of vaccine, gold sales and investment and indelible ink, among others (e-Fatwa, 2015) *Fatwa* is an effort by Islamic authorities to provide explanation and clarification in order to prevent hardship from afflicting Muslim society. Nevertheless, whether the *mufti* follow the *fatwa* issued is another matter.

Fatwa and *mufti* play a very significant role in Muslim society. If no one is entrusted with the role of issuing *fatwa*, society would descend into chaos to the extent that people are not able to differentiate between what is permissible and what is prohibited. Perhaps, in such a scenario, what is permissible might become prohibited while what is prohibited might become permissible. Therefore, *fatwa* and *mufti* are necessary in order to meet with the religious needs of society.

CONCLUSION

The role of *fatwa* in giving clarification and explanation with regard to new developments is crucially needed today where speedy solutions are expected. The notion that the Shariah is applicable at any time and in any place will always be practical if one of the mechanisms in providing solutions, which is the institution of *fatwa*, is utilised to its full capacity. It is hoped that this role will not be tarnished by some secluded and remote cases as *fatwa* is based on personal judgement in cases that are purely speculative, making it non-binding on *mustafti* in general and the Muslim society as a whole. It is also worth mentioning that derivation of *fatwa* and rulings prove that Shariah represents the flexibility and evolution of Islamic law in every age and place.

ACKNOWLEDGEMENTS

This research was funded by the Fundamental Research Grant Scheme (FRGS) under the Ministry of Higher Education of Malaysia (MOHE).

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A Baseline Study of the Enforcement of *Nafkah* Orders in the Selangor Syariah Court

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ABSTRACT

This study examines problems in the enforcement of *nafkah* orders of the Syariah Court. Despite the fact that the Syariah Court is guided by comprehensive statutory laws, complaints on matters related to the enforcement of *nafkah* orders remain unresolved. Previous studies on this issue showed that women and children were the most affected group due to the weak enforcement of the Syariah Court's *nafkah* orders. Therefore, this study was undertaken to examine and identify problems that have resulted in failure to enforce *nafkah* orders. This research uses the qualitative approach based on legal doctrine and data collection from field study. Data were obtained through examination of files from court and from informants, namely, officers from the Syariah Court as well as clients of the court. The study discloses an obvious co-relation between complex and lengthy processes, unnecessary time consumption and cost inefficiency with the enforcement order of *nafkah*. This article is the preamble to an envisaged study on the enforcement of the *nafkah* order in the Syariah Court. The results will be useful for further improvement of existing legal provisions in Malaysia.

Keywords: Syariah Court, *nafkah* order, enforcement, procedure

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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INTRODUCTION

Surveys on the enforcement of *nafkah* claims at the Syariah Court have indicated gaps and loopholes in the laws, especially in the procedures concerning the enforcement of the *nafkah* court orders. Therefore, it was the purpose of this study to reassess the effectiveness of the enforcement laws and

procedures involved with the objective of providing solutions to problems associated with *nafkah* enforcement. This is to ensure that families entitled to *nafkah* are duly paid and the legal system is sustainable with cogent laws and procedures, competent staff and sufficient funds.

BACKGROUND

The laws and procedures on enforcement of *nafkah* court orders in the Syariah Court are incorporated in the various states' Enactments and Acts. Although each state has its own jurisdiction, and administration of Islamic Law is a state jurisdictional matter, nonetheless there are similarities in the provisions of the various state enactments on the enforcement of the *nafkah* court orders (Ibrahim, 1997). However, its actual enforcement in all the 14 states has been poorly carried out, proven by the ground survey from the 1980s henceforth until the early 2000, which found that *nafkah* court orders have been neglected in all the states (Maznah, 2011). Substantiated by YADIM (an agency under the government) during the period of 1984-1999, this problem has gained prominence because of the repeated questions and pleas by estranged wives in all the states as well as the admission of the administrators of *nafkah* court orders themselves. This is further supported by a compilation of reported complaints from the year 2000 to 2013 as recorded by the Wanita UMNO Complaints Bureau (personal communication with the complainants, 2000-2013). The number one complaint received was on enforcement of *nafkah*

court orders. In addition, other enforcement proceedings indicate considerable delay in their implementation (Zaleha Kamaruddin, 1999). A study on enforcement of *nafkah* court orders in the Syariah Court from 2000 to 2005 by a research team from University Kebangsaan Malaysia reported that out of 94% of *nafkah* orders issued by the Syariah Court, 80% were not enforced (Nor Aziah Awal *et al.*, 2009).

Presently, all states are governed by the Islamic Family Laws and State Syariah Civil Procedures Laws. As such, the procedural aspect of enforcement of *nafkah* is set in a pattern of practice as interpreted by court officials. Further, the practical aspect of its implementation lacks efficiency due to weakness of the procedures themselves, shortage of trained and experienced staff and an inadequate support system within the Syariah judiciary as well as externally. As generally observed, although a *nafkah* order is granted by the Syariah Court, the claimant is unable to execute the order immediately. The plaintiff has to initiate other proceedings to execute the order, which entails more delays and incurs higher cost. Worse still, even after getting the execution order, the defendant may not still comply with the order, rendering more hardship for the frustrated claimant as well as the court because the order had not been enforced. The problem is further aggravated when there is lack of an appropriate support system to alleviate the problems faced by the claimant (Interview with Syariah Court officials in Selangor and Federal Territory on July 6 and 8, 2015, respectively).

Another aspect of the law that impedes not only the execution of the court order but the actual implementation of the law is the interpretation of the state constitution with regards to the jurisdiction of the Syariah Court in exercising its powers to enforce the court orders. This is seen in the State of Perak, where the enforcement unit for *nafkah* orders has been displaced from within the Syariah Court system. It affects the smooth running of the enforcement process in enforcing *nafkah* orders (Interview Session with the Perak Syariah Court Officer on August 6, 2015).

LITERATURE REVIEW

The literature on this subject matter is limited as not much has been written from the enforcement perspective, with a focus especially on the procedural aspect. Although much has been written on *nafkah* as an issue made popular by NGOs due to complaints of non-compliance by errant husbands, little focus has been given to how errant husbands who do not pay *nafkah* ought to be dealt with by the law. Many seminars and workshops have called for steps to be taken to resolve this serious problem but the matter has not been adequately addressed by the law and the relevant agency.

The general principles of the law on *nafkah* and its enforcement are found in the books written by Ahmad Ibrahim touching on both the administration of Islamic law and Islamic Family Law in

Malaysia and the comparison between civil and syariah procedural aspects (Ahmad Ibrahim, 1997). Zaleha Kamaruddin (1999) in her research paper discussed the delays in the enforcement of the payment of *nafkah* from 1990 to 1997. However, the study does not discuss the procedural aspect of enforcement of *nafkah* orders. Najibah Mohd Zin in a study entitled 'The Impact of International Instrument on Women's Rights and Family Well-Being in Malaysia: Challenges and Prospects for Reform' commented on the failure of the husband to provide *nafkah* and suggested the strengthening of the relevant laws and procedures. Maznah Mohamad (2000) in an article entitled '*Di Mana Berlaku Diskriminasi Dalam Islam*' made several observations with regard to discrimination of women due to the inability of the courts to enforce *nafkah* orders. According to her, the lack of enforcement was due to the lackadaisical attitude of the courts in providing enforcement. She criticised the procedural aspect of the law that was not made enforceable. She was of the opinion that the provisions of the law relating to maintenance were not fully understood and applied by the plaintiff as well as the Syariah court. Being a social scientist, her observations were based purely on her surveys and interviews. Nonetheless, the article identified the legal issues that gave rise to the critical need for improvement to enforcement of the law, which due to its weakness had caused women to be perceived as being legally discriminated against in the Syariah system.

Sheikh Ghazali bin Sheikh Abdul Rahman (2007) in an article '*Masa Depan Mahkamah Syariah di Malaysia: Cabaran dan Strategi Dalam Masyarakat Majmuk*' proposed the setting up of an insurance-based Family Protection Fund as a mechanism to enforce *nafkah* orders. However, this article did not provide a mechanism by which such enforcement can be viable to resolve enforcement of *nafkah*.

Since enforcement of maintenance is a global issue, it makes sense to look at cases from other countries. In the context of Singapore, for example, Leong Wai Kum (2011) propounded the rights to *nafkah* in Singapore where a system was created to increase the efficiency of the enforcement of court orders by having an enforcement section in the Family Court setting.

Internationally, the Australian government provided in detail the system and law for child support to overcome the problems of errant parents not providing *nafkah* to rightful dependants and, at the same time, to alleviate the financial status of sole-parent families (Jacobs & Douglas, 1998).

In Muslim countries, the traditional family support system is retained, with the father/husband as financial provider. Where the family system no longer worked in accordance with the Islamic system, for instance in countries like Tunisia, Morocco and Egypt, workings of the support system were changed. Tunisia started a family fund system in 2007 that helps the court with the enforcing of the maintenance order. Egypt

established the Bank al Nasr to facilitate payments. The operation of these funds is governed by their respective national legislation in order to provide authority for the purpose of enforcement.

Historically, the issue of *nafkah* received greater emphasis during the Islamic period. Tucker (1998) traced the historical aspect of the *nafkah* law back to the days of the Ottoman Empire, and justified the significance of the enforcement of *nafkah* responsibility in Islam.

The Legal Framework

The Syariah legal system derives its power from the Ninth Schedule List II, which is the State list of the Federal Constitution. Thus, the Syariah Court has the authority to make decisions within its jurisdiction in statutory form (Muhammad Habibullah v. Faridah Dato' Talib [1992] 2 MLJ 793) or by inference (Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Malaysia (PERKIM) Kedah & seorang lagi [1994] 1 MLJ 690).

In the context of *nafkah*, the legal framework encompasses both the substantive and the procedural law expounding on *nafkah* payment and enforcement procedures. In terms of statutory provisions, the substantive law provides, for example, for the payment of *nafkah* by the husband in the event of divorce (Part VI of Sections 59-80, Islamic Family Law in Selangor). The various sections specifically make it an offence for defaulting parties and clearly spell out the rights to claim.

Complementing the substantive law, the Selangor Enactment for civil procedures in the Syariah Court outlines the procedure for claiming of *nafkah* and its enforcement. Twenty main steps are provided in procedural law involving the payment of money, with *nafkah* being one of them. These include seizure and sale, garnishee proceeding, committal order and judgment debtor summons (See Sections 148,151,175 and 181 of the Syariah Procedural Law 2003). The court may impose deduction of salary if the defendant is employed as provided for under Maintenance of Women and Children 1968 through attachment of earnings order. The claimant is expected to comply with the procedures if the case is not settled through mediation (*sulh*) proceedings or other forms of settlement. Under the Practice Direction issued by the Syariah Judiciary of Malaysia, the Syariah Court must make efforts to settle any claims involving *nafkah* through *sulh* proceedings. The plaintiff may invoke any of the enforcement methods if the defendant fails to comply with the order depending on the facts and circumstances of the case and options available for the claimant.

RESEARCH METHODOLOGY

The study focussed on the implementation and the enforcement of *nafkah* orders based on Selangor Syariah Civil Procedure Law 2003. It commenced with a preliminary pilot study in Selangor for the baseline report with the objective to identify the cause of delay in procedure and the reason for failure to enforce payment of *nafkah*.

For the baseline study, the research method comprised both doctrinal and non-doctrinal approaches. Court Regulations and Practice Directions were analysed in identifying the ramifications of the current law governing *nafkah* orders. Content analysis of four files of four different claimants in the Syariah court of Gombak Timur were studied to examine the legal issues surrounding *nafkah* proceedings and efficacy of procedure. The files were measured according to the World Bank research method, which examines the variables of process of enforcement procedure, time and cost.

The Gombak District was chosen as it is a Muslim area with a demography of urban and semi-urban communities of diverse income and educational background that reflect the capacity and capability of the clients to pursue enforcement of Syariah *nafkah* orders up to completion. A pilot study was conducted at the Lower East Gombak Syariah Court at Jalan AU 2A/17, Taman Seri Keramat, 54200, Kuala Lumpur. The said court is situated in Keramat, within a housing area, and therefore is accessible to the public, especially those who rely on public transport.

In addition, face-to-face interviews were conducted with selected respondents, whose cases were at enforcement stage, using semi-structured questions. Data on the indicators were used to measure the efficiency of the judicial system following step-by-step evolution of *nafkah* disputes before the Syariah Court. The files were categorised according to the coding system

prescribed in Practice Direction i.e. 023 (arrears), 024 (*nafkah* of children), 025 (variation order), 037 (enforcement order) and 099 (committal order).

FINDINGS

Law and Proceedings

The study disclosed an obvious co-relation between lengthy processes, unnecessary time consumption and exorbitant cost in the procedure enforcing *nafkah* orders. Problems associated with substantive and procedural law were found upon examination of the relevant files and as the result of the interviews on enforcement of *nafkah*. Initially, the study showed that the current legal provisions on substantive law of the Selangor Family Law Enactment 2003 requires the applicant to apply for *nafkah* after divorce as provided for under Section 59 of the said enactment. The study showed that many opted not to apply for *nafkah* while the number of those who claimed *nafkah* was very much lower than the number of divorce cases. Although the reason for not claiming *nafkah* is not known at the time of the study, one of the contributing factors as explained by the court officer was related to the complexities of the procedure (Interview in February 2015).

The examination of files further indicated that the current procedural law (Syariah Civil Procedural Law) causes delays in enforcing *nafkah* orders. The technicalities and complexities of procedure have forced the plaintiff to go

through lengthy processes. The study also revealed that enforcement is further impeded when a defendant dies during the process or his whereabouts cannot be traced. Although garnishee proceedings can be used by ordering the third party to pay the debt, in reality, the fund is no longer available to meet payments. In spite of the procedure and enforcement options provided by the law, it is a futile attempt when the money is not there.

Time and Cost

The study showed that the court awards the amount to the plaintiff either through a normal claim or by way of consent order (*sulh*). However, the process of enforcing *nafkah* follows the same track of enforcement procedures should the defendant fail to pay the amount as ordered. Part of the problem is associated with the ignorance of the plaintiffs on the proceedings. Such a situation is quite understandable due to the complexities and technicalities of the proceedings that often baffle the layman.

Representation by lawyers is important to assist the claimant. However, the study showed that the presence of lawyers contributes considerably to the delays as well as the cost. The length of the proceedings greatly affects cost incurred as a result of making the applications, travelling to court and related personal expenses.

The examination of the Syariah Court's files in the Syariah Lower Court of Gombak Timur Selangor also showed

that the process of enforcing *nafkah* can take between 10 and 20 years to enforce the *nafkah* orders. This delay is mainly contributed by defendants who refuse to cooperate. It creates a setback for many women who end up not claiming *nafkah*, and their number is higher compared to the number of divorces in a year.

DISCUSSION

The study testifies that enforcement of *nafkah* court orders is weak and its procedures are inefficient. There is general weakness in the substantive law. The most significant weakness is that there is no automatic granting of order for *nafkah* upon pronouncement of divorce before the court or dissolution of marriages. The law provides (Part VI sections 59-71) for the court to issue an out-of-court order for payment of *nafkah* and there is a need for a summons to be filed by the plaintiff, entailing court process. This was found to be difficult for claimants, especially those without money or who do not qualify for legal aid and cannot afford a lawyer. If a lawyer is required to represent the party, this would mean that the claimant would have to bear the costs. If the claimant is not represented, she will be burdened with paper work, and this hassle discourages many claimants. When the ex-husband cannot be located, no action is further pursued. Most of the time, legal action stops there and no further action is taken. This research established that the burden to provide information is on the claimant, who in most instances is helpless in tracing

the ex-husband. Although the courts may sometimes make some attempt to assist, inter-agency cooperation is weak and the claimant is usually left without being able to trace the ex-husband.

Further, there is often repetition and redundancy of procedure that cause delay especially in cases where the claims require separate registration and files for each claim like *nafkah*, custody of children and *muta'ah*. As such, this requirement has caused redundancy of procedure and unnecessary repetition of work, cost and time.

The process of application for *nafkah* order can also be initiated by summons and statement of claim and by application and affidavit. If the proceeding is wrongly commenced, the case is struck off as illustrated in the case of Abdul Hamid bin Kamaruddin v. Rohaya binti Mohamed (2007) JH 24/1,27 where the appeal by the claimant was delayed as the application was by application and affidavit when it should have been by summons and statement of claim. In the case of Moriasi bin Mohammad v. Ajmawati binti Atan (2005) JHXX/1,105, other intricacies in the process proved to be too technical for the claimant to institute proceedings in his own capacity without any legal assistance. Therefore, it cannot be expected that the layman should have legal knowledge about court proceedings.

Even after the order is obtained for a claimant there is no guarantee that the ex-husband will pay. The claimant or plaintiff needs to apply for the enforcement of the

nafkah order through judgement debtor summons. The problem that may arise very often is to serve summons on the husband, especially if he is self-employed. The duration of the issuance of the court order is not regulated and may jeopardise the applicant's interest. Further, the judgement order must be effectively served.

Delays may be caused when the defendant may want to vary the amount to be paid, usually to reduce the amount of *nafkah* as stipulated in the court order. There are also instances when the ex-husband further delays payments by making appeals to the High Court and applying for a stay of execution pending the appeal. This is because there is no standard formula to determine the amount of *nafkah* as the court decides on a case-by-case basis.

Delays are deliberately prolonged by defendants through various means. For example, making an application for notice of judgement obliges the defendant to show cause and state why he should not be sent to prison. It is observed that legal procedures delays as provided for under various sections of procedural law. Moreover, there is no specific timeframe for the execution of a judgement order where the court is supposed to be in a position to ensure that the claimant receives payment of *nafkah*. Furthermore, court personnel may aggravate the situation if they lack in efficiency, professionalism and innovativeness in recording and filing cases and giving instructions to clients.

A lackadaisical attitude also contributes to delays. Most claimants come to court with high expectations that the process is to be so easy and simple that they expect the court to grant them *nafkah* without any procedures to be complied with. Many claimants complain of having to go to court several times and being burdened with paper work. The delay may also be due to the engagement of lawyers, who can prolong the litigation process.

The above discussion emphasises that the complexities of procedural law and attitudinal issues can contribute to delay in enforcement of *nafkah* orders. This issue of delay requires further exploration for a suitable resolution.

CONCLUSION

The baseline study of the process of the enforcement of *nafkah* orders in the Syariah Lower Court of Gombak Timur, Selangor provides proof that delay often occurs in the process of the enforcement of *nafkah* orders, and this requires in-depth study. This study examined the process of the enforcement of *nafkah* orders as a national issue, encompassing study of enforcement in all states in Malaysia, which confirms the validity of the findings. It is clear that an effective mechanism for the enforcement of *nafkah* orders is urgently needed for implementation in all states in Malaysia.

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Socio Legal Studies on Legal Awareness among Family Members in Rural Areas in Malaysia: Empirical Evidence

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ABSTRACT

Having a good relationship with family members is the utmost consideration in family life. This socio-legal study focusses on the family institution, in which all family members play pivotal roles in determining the wellbeing of the family. The main objective of this study is to understand family relationships in terms of legal awareness among family members. The survey was the main method used in this study and it will be analysed using statistical techniques. The semi-structured interview was also employed in this research. The study shows that most rural folks prefer mediation in settling disputes. The findings of this research are expected to fill the gap in socio-legal literature on Muslim marriage matters and to provide valid reasons for designing a new policy and regulatory framework to deal with the implementation and enforcement of Islamic Family Law in Malaysia.

Keywords: Family relationship, mediation, legal awareness, rights and duties

INTRODUCTION

Family relationships are one of the fundamentals in determining peace and tranquility in the institution of family.

However, the process of urbanisation and development has resulted in great impact on family wellbeing, especially in rural areas. Family relationships, especially the relationship between parents and children, is discussed in three aspects in this study. First, this study considers the family institution itself, in which all family members play a pivotal role in determining the wellbeing of the family. Second, the obligation of each member

ARTICLE INFO

Article history:

Received: 15 June 2015

Accepted: 13 October 2015

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towards the family, including the rights of children and wives to receive maintenance from the head of household, is discussed. Lastly, this research studies the spreading of legal awareness among all family members so that they understand their rights and obligations towards the family. Family relationships must be strengthened because the family is the basic social unit that prepares and supplies human capital resources for national development (Noor, Gandhi, Ishak, & Wok, 2014). Therefore, dissemination of legal awareness about their rights and obligations must be instilled among family members.

Objectives of the Research

This study was conducted to see, with regards to legal awareness among family members, whether parents fulfilled their obligations towards family members and also to see if the adult children fulfilled their obligations towards elderly parents. This study also was conducted to examine the level of understanding among rural folks of their legal rights in Islamic Family Law.

RESEARCH METHODOLOGY

This paper used the quantitative and qualitative approaches. A survey was conducted in selected states in Malaysia that represented four regions, namely northern, central, east and southern Malaysia. A structured questionnaire was used to collect the data of 800 respondents.

A face-to-face in-depth interview was conducted with informants to collect information on the development of the villages concerned and to get clearer information about the problems regarding the family institution that are generally faced by people living in rural areas.

LITERATURE REVIEW

Islamic Legal Perspective

A husband or father has a duty of maintaining his wife and children. There are several commandments in Islamic Law with regards to this maintenance. First is, "But he shall bear the cost of their food and clothing on equitable terms" (Al-Baqarah:233). In another verse it is stated, "Let the man of means spend according to his means; and the man whose resources are restricted; Let him spend according to what Allah has given" (At-Talaq:7). In addition, there is a saying of the prophet in relation to the obligation to provide maintenance. It is narrated by Aisyah that Hindun binti 'Utbah said; "O Rasulullah, my husband (Abu Sufyan) is stingy and does not give me what is sufficient for me and my children, can I take of his property without his knowledge?"; Rasulullah responded, "Take what is sufficient for you and your children, and the amount should be just and reasonable" (Bukhari (Trans.) Muhammad Muhsin Khan, 1983). Thus, a husband or father who realises on his obligation towards his wife and children will perform those duties without hesitation as his legal awareness is good.

Malaysian Legal Perspective

According to Section 71(1) of the Islamic Family Law (Federal Territories) Act 1984, a divorced woman is entitled to stay in the house she used to live in when she was married for so long as her husband is not able to get other suitable accommodation for her. In subsection 2 of this section, the right to accommodation provided in subsection (1) is said to cease if the period of *'iddah* has expired; or if the period of guardianship of the children has expired; or if the woman has remarried; or if the woman has been guilty of open lewdness (*fahisyah*) and thereupon, the husband may apply to the Court for the return of the house to him. Apart from that, Section 72 of the Islamic Family Law (Federal Territories) Act 1984 also emphasises the rights of children to receive maintenance. According to Section 72 of the same act, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention and education as are reasonable according to his means and station in life or by paying the cost thereof. In the subsection 2 of the same provision, it is stated that it shall be the duty of a person liable under Islamic Law to maintain or contribute to the maintenance of children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them. Thus, as can be seen, there are no provisions regarding the duty of adult children to maintain their elderly parents.

With regards to legal awareness among people in Malaysia especially those who live in rural areas, the literature discusses, firstly, the obligations of the head of the household, for instance, by Jazilah *et al.*, (2013). They listed several reasons why enforcement and execution of maintenance are carried out. Among the reasons are failure to pay the maintenance order; the payment does not obey the order; payment is irregular; the judgement debtor remains undetected; and payment was made once only (Mohd, Mat, & Abbas, 2013). In this research, descriptive analysis was used; court documents such as case files related to implementation of enforcement of maintenance orders were studied. The method was applied as it was appropriate to identify the mechanism used by the selected Shariah Courts in settling enforcement and execution cases.

According to Emrich (1985), poor, rural areas throughout Asia have no access to adequate legal services; fundamental guidelines for legal services were based on human rights (Emrich, 1985). He identified the factors that gave an impact on providing legal aid to villagers. Among others were technological change, the development of national and international markets for rural produce and increasingly centralised bureaucratic administration (Emrich, 1985). His work was based on legal doctrine, and no empirical research was done. In addition, the literature notes that mediation is one of the alternative dispute resolutions that is popular among Malay communities (Raihanah, 2010).

According to her, mediation is aimed at amicable settlement especially in matters arising from divorce.

FINDINGS

Maintenance after Divorce

Consistency in receiving maintenance. Table 1 reveals that more than onethird (35.5%) of divorced female respondents answered that they received the maintenance consistently. The rest (65.5%) did not receive maintenance consistently.

Reasons for non-consistency of receiving maintenance. For this question, the respondents were allowed more than one answer. The results showed that more than two thirds of the ex-husbands (69.2%) intentionally did not provide maintenance regularly. Not being able to afford maintenance was the main reason given by husbands at 30.8%.

TABLE 1
Consistency of Providing Maintenance

Consistency of Providing Maintenance	Frequency	Percentage
Yes	7	35.5
No	16	65.5
Total	23	100.0
The ex-husband intentionally refused to provide maintenance	9	69.2
The ex-husband could not afford to provide maintenance	4	30.8
Total	13	100

*Multiple responses

Children's Obligation

Reasons for children working in the family village. Respondents were allowed to respond more than once to this question. The results in Table 2 show that more than half of the children (52.6%) already had a job followed by slightly more than two fifths of the respondents (43.6%) who claimed they would take care of their parents. Less than one tenth (3.8%) feared relocation. The findings reflect that the children of the respondents preferred to stay in their village as it was their comfort zone and they felt more secure in being near their parents and family.

TABLE 2
Reasons for Children Working in the Family Village*

Reasons	Frequency	Percentage
Already had a job of their own	165	52.6
Able to take care of their parents	137	43.6
Fear of relocation	12	3.8
Total	314	100.0

*Multiple responses

Children Staying in Village – Maintenance for Parents

Table 3 shows that more than one third of the respondents (39.2%) provided maintenance for their parents while the rest (60.8%) did not. The results indicate that the children's income was meagre, only sufficient to maintain their own family and therefore, it was difficult to extend financial aid to their parents.

Children Staying in Town – Maintenance for Parents

The results for children living in town were about the same as those for children living in the village in terms of providing maintenance for parents, whereby more than one third (38.5%) provided maintenance for their parents while almost two thirds (61.5%) did not. This indicates that although their income was much higher, the cost of living in town was much higher than living in the village. Therefore, there was little money left over for their parents.

TABLE 3
Child Residential Area by Locality

Staying in Village	Frequency	Percentage
No	435	60.8
Yes	281	39.2
Total	716	100.0
Staying in Town		
No	445	61.5
Yes	278	38.5
Total	723	100.0

Number of Children Visiting Their Parents

Table 4 illustrates that nearly half (46.3%) the number of children visited their parents whereas the balance (53.7%) did not. The data indicate that the cost of travelling, the relationship between the children and parents, the nature of their profession and other relevant reasons determine their decision to visit their parents. The need to do so is not pressing as there are other ways of communicating with their parents.

Frequency of Children Visiting their Parents

Nearly half the number of children (42.7%) visited their parents once a week while about 26.6% visited their parents once a month. The findings indicated that the respondents earning a higher income could travel more frequently to visit parents and family to whom they were attached. On the other hand, slightly more than one tenth of the respondents or 13.4% of the respondents visited their parents once a year while 11.3% visited their parents once every six months. This implies that the respondents had financial constraints or were not attached to their parents or family. The data also shows that the mean of visitation is 2.833 and standard deviation is 1.651 on a 5-point Likert scale.

TABLE 4
Child Visiting Family when Working Elsewhere

Visitation	Frequency	Percentage
No	388	53.7
Yes	335	46.3
Total	723	100.0
Frequency of Visitation		
Once a week	143	42.7
Once a month	89	26.6
Once in 6 months	38	11.3
Once a year	45	13.4
Others	20	6.0
Total	335	100.0
M=2.833, SD=1.651		

Knowledge of Rights During Marriage and After Divorce

The results showed that the majority of the respondents (92.5%) knew their rights during marriage and after divorce (Table 5).

TABLE 5
Knowledge of Respondents on Rights During Marriage and After Divorce

Legal Awareness	Frequency	Percentage
Yes	738	92.5
No	60	7.5
Total	798	100.0

Sources of Information on Rights during Marriage and After Divorce

The respondents were allowed to give more than one answer to this question. Table 6 shows that nearly three quarters of the respondents (74.0%) gained knowledge of rights related to family maintenance from religious classes at the mosque, while almost half obtained the information from family members and friends (48.2%). This indicates that they obtained the information directly from individuals who were close to them. On the other hand, more than one third (33.7%) obtained the information from the mass media such as the radio and television, while more than a quarter (29.3%) did so from the newspaper and more than one tenth from the Internet (15.5%).

TABLE 6
Source of Information on Rights During Marriage and After Divorce*

Sources of Legal Awareness(N=738)	Frequency	Percentage
Religious class at the mosque	546	74.0
Family members and friends	356	48.2
Newspaper (Print media)	216	29.3
Internet	114	15.5
Electronic media such as radio and television	249	33.7
Total	*	*

*Multiple responses

General Knowledge of Rights during Marriage

The respondents were allowed to respond more than once to this question. Table 7 shows that the majority of the respondents (96.7%) knew their rights on maintenance. It is presumed that maintenance rights may be known not only from *hukum syarak* (Islamic Law) but as common knowledge. About 74.9% knew their rights to *faraid* (inheritance), while 58.0% knew their rights to *hibah* (gifts).

TABLE 7
Rights During Marriage*

Rights during Marriage (N=800)	Frequency	Percentage
Maintenance during marriage	714	96.7
Rights related to inheritance/Islamic law of succession	553	74.9
Gifts	428	58.0
Total	*	*

*Multiple responses

Legal Knowledge of the Rights of a Wife

The respondents were allowed to respond more than once to this question (Table 8). The results show that more than half of the respondents (61.8%) had knowledge of the custody of children and while 54.7% were aware of rights to jointly acquired property. The results imply that guardianship and custody of a child are accepted as the natural right of the mother. More than half of the respondents were aware of the rights related to *iddah* maintenance (52.7%), while less than one fifth (35.2%) were aware of the rights related to *mutaah* and 33.2% were aware of the rights related to deferred *mahar/pemberian*. However, very few of the respondents (27.7%) knew about rights pertaining to debt during marriage. The data imply that debt can also be claimed after divorce.

TABLE 8
Legal Knowledge of the Rights of a Wife*

Rights(N=364)	Frequency	Percentage
Custody of the child	225	61.8
Claims for jointly acquired property	199	54.7
Claims for <i>iddah</i> maintenance	192	52.7
Claims for <i>mutaah</i>	128	35.2
Claims for debt during marriage	101	27.7
Claims for the deferred <i>mahar</i> or/and gifts	121	33.2
Total	*	*

*Multiple responses

Legal Knowledge of the Rights of a Husband

The respondents were allowed to respond more than once to this question. About 58.5% had legal knowledge of the rights of a husband with regards to custody of children, while 56.7% had legal knowledge of claims related to jointly acquired property and 53.9% had legal knowledge related to debt during marriage. The data shown in Table 9 indicate that ex-wives were more aware of legal rights related to custody of children compared to ex-husbands but ex-husbands were more aware of rights related to claims for jointly acquired property and debt during marriage.

TABLE 9
Legal Knowledge of the Rights of a Husband*

Rights (N=436)	Frequency	Percentage
Custody of children	255	58.5
Claims for jointly acquired property	247	56.7
Claims for debt during marriage	235	53.9
Total	*	*

*Multiple responses

Response on Shari'ah Court's Involvement in Matters Relating to Claims

Table 10 reveals that nearly half of the respondents (64.6%) agreed to the Shari'ah Court's involvement in matters relating to claims, whereas more than one quarter (26.3%) somewhat agreed and only about one fifth (16.5%) strongly agreed. The data

indicate that there was trust and belief on the part of the respondents that the Shari'ah Court could assist them in claiming their rights upon divorce. Less than one tenth disagreed (8.0%), while only about 1.0% strongly disagreed.

TABLE 10
Response on Court's Involvement for Claims

Level of Agreement in Court Settlement	Frequency	Percentage
Strongly disagree	8	1.0
Disagree	63	8.0
Somewhat agree	206	26.3
Agree	377	48.1
Strongly agree	129	16.5
Total	784	100.0
M=3.771, SD=0.880		

Involvement of Sulh Process in Problem Solving

The findings show that the majority (81.0%) agreed with the involvement of the *sulh* process in solving their problems whereas the rest, at 19.0%, disagreed (Table 11). The findings implied that the involvement of *sulh* in problem solving is still needed in addition to having cases referred to the Shari'ah Court.

TABLE 11
Involvement of Third Party for Problem Solving

Settlement of the case using <i>Sulh</i>	Frequency	Percentage
No	149	19.0
Yes	636	81.0
Total	785	100.0

DISCUSSION

The research also found that despite locality, most adult children decided that they would not consider maintenance for their elderly parents as one of their main responsibilities. It can be assumed that their income may be sufficient only for their own family with little left over to extend to their parents. Rahimah *et al.*, suggested that more quality time should be given to elderly parents by their adult children (2012) to ensure that their parents lived well.

It has also been established that failure of the father to provide child maintenance will lead to child maintenance problems including welfare of the child or children. This also suggests a negative attitude of the father towards their children. Jazilah *et al.*, (2013) confirmed that if the father failed to fulfil his duty, the mother of the children had the right to enforce the maintenance order in court. Muslihah and Najibah (2012) suggested that strict enforcement was needed to ensure the father of the children did his duty. Thus, it can be argued that maintenance of children is very important because it relates directly to the welfare of the children.

The findings also showed that most of the respondents gained knowledge of their legal rights in Islamic Family Law from attending religious classes at the mosque. This is supported by the multiple responses of the respondents.

...The problem in my village has to do with religious education, where the head of the household needs to be trained first in the religious knowledge. Looking at the current situation, people very rarely go to the mosque. I am not satisfied with this situation. Previously, every problem faced by the villagers was referred to the mosque. But nowadays this is no longer the trend... (Encik Suhardi bin Haji Yusof)

...Indeed, faith and religious upbringing will definitely ensure our happiness. Here, our mosque provides general religious education to the villagers. As the village chief and the head of my family, I am very concerned with religious upbringing. Many religious activities have been organised by the mosque and they have been well received by the villagers... (Encik Zainudin bin Hj Mohd Yatim)

This shows that the majority of the rural folks were well equipped in religious teaching by their mosque.

Most of the respondents were obliged to settle their cases or problems in court. Where the case could not be settled, the best solution was referring it to the mediation or *sulh* process. According to Raihanah (2010), mediation is the best mode to settle disputes among these communities.

RECOMMENDATIONS AND CONCLUSION

Several recommendations are suggested to instil legal awareness among family members of families living in rural

areas to ensure family wellbeing. The recommendations are as follows:

1. Government agencies such as the Legal Aid Department must have a legal clinic or branch in every district or province so that rural folks may refer to them without having to go to the city
2. Promotion of religious and legal education through mosques or seminar should be intensified;
3. The government should enact laws pertaining to the maintenance of elders.

Studies conducted previously showed that urbanisation has impacted the family institution in rural areas. However, in this study, we discovered that family relationships were still largely preserved. Therefore, it is submitted that more research must be done in order to encourage rural folks to gain legal awareness pertaining to family relationships.

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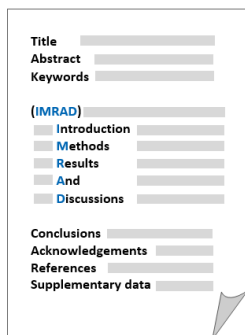
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1st Floor, IDEA Tower II
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43400 UPM Serdang
Selangor Darul Ehsan
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